

NOTICE
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2013 IL App (4th) 120080-U
NO. 4-12-0080
IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

FILED
August 27, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Livingston County
CAREY PETTIGREW,)	No. 10CF85
Defendant-Appellant.)	
)	Honorable
)	Stephen R. Pacey,
)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Knecht and Holder White concurred in the judgment.

ORDER

- ¶ 1 *Held:* (1) Defendant was not denied a fair trial where the trial court was not required to believe defendant's testimony he suffered from an "impulse disorder."

(2) Defendant's sentence does not violate the proportionate penalties clause of the Illinois Constitution.

(3) The trial court did not abuse its discretion in sentencing defendant to seven years' imprisonment.

¶ 2 Following a June 2011 bench trial, defendant, Carey Pettigrew, was convicted of threatening a public official (720 ILCS 5/12-9(a)(1)(i), (a)(2) (West 2010)). In August 2011, the trial court sentenced defendant to seven years' imprisonment.

¶ 3 Defendant appeals, arguing (1) he was denied a fair trial because the trial court refused to consider the defense the threat in question was involuntarily made because he was incapable of consciously controlling himself due to his post-traumatic stress disorder (PTSD), (2)

his sentence violates the proportionate penalties clause of the Illinois Constitution, and (3) he received an excessive sentence. We affirm.

¶ 4

I. BACKGROUND

¶ 5 On April 1, 2010, the State charged defendant with threatening a public official (720 ILCS 5/12(9)(a)(1)(i), (a)(2) (West 2010)) where he stated in open court to Judge Jennifer H. Bauknecht, "I'm gonna kill you when I get out."

¶ 6 During defendant's June 24, 2011, bench trial, Judge Bauknecht testified defendant was representing himself in front of her during an April 2010 hearing on an unrelated matter. Judge Bauknecht denied defendant leave to file several of his motions. She stated she would entertain certain motions but found others frivolous and repetitive. Defendant "was not very happy about that and became agitated." Defendant repeatedly interrupted Judge Bauknecht and eventually asked the Department of Corrections (DOC) officers in charge of his transport to take him out of the courtroom. The officers did not take defendant out. Judge Bauknecht testified, "I kind of shook my head like, no don't take him out, and then he said, 'Bitch, fuck you.'" At that point, Judge Bauknecht instructed the officers to remove defendant. Judge Bauknecht testified while defendant was being escorted out of the courtroom, he stated " 'Bitch, I am going to kill you when I get out.' " Judge Bauknecht testified she took the threat seriously.

¶ 7 The State then called Carey Luckman, the assistant State's Attorney representing the State during defendant's April 1, 2010, hearing. Luckman testified Judge Bauknecht was trying to explain to defendant he cannot keep filing the same motions after they have already been denied. At that point, defendant "started to become agitated." According to Luckman's testimony, defendant stated something to the effect of, "I am going to go off *** get me out of

here." Luckman testified defendant then stated to Judge Bauknecht, "Bitch, I am going to kill you when I get out."

¶ 8 Barbara Wahls, the court reporter working during defendant's April 1, 2010, hearing, testified for the defense. Wahls testified her shorthand machine automatically recorded audio from defendant's hearing. A portion of the audio file, beginning at 1:23:00, was played during trial and admitted into evidence. The trial court heard the events leading up to and including defendant's initial outburst and subsequent threat to Judge Bauknecht.

¶ 9 According to defendant's testimony, prior to his outbursts he felt himself becoming "extremely agitated to the point [he] felt [his] composure falling apart." Defendant testified he had been diagnosed with an "impulse disorder" and his medication had been stopped. Defendant "basically felt as though [he] wasn't going to be able to control [himself,]" which is why he initially asked the correctional officers to take him out of the courtroom. Defendant testified it was not his intention to threaten Judge Bauknecht with his statements. No other defense witnesses were called.

¶ 10 In closing, defendant's trial counsel argued defendant threatened Judge Bauknecht because of his lack of "impulse control." Counsel maintained, as a result, defendant could not have threatened her willfully or because of the performance of her duty. Counsel argued defendant was aware he was about "to get into trouble" and wanted to get out of the courtroom, but "unfortunately, it did not happen as quickly as everyone could have hoped."

¶ 11 The State argued evidence of defendant's mental condition was not supported by anything other than defendant's own testimony. As a result, the State contended the case was really about defendant's credibility. The State added the fact defendant warns people "before he

goes off" does not excuse his behavior.

¶ 12 At the conclusion of the trial, the trial court found defendant guilty of threatening a public official. Specifically, the court found the following:

"Well, there is no dispute that Judge Bauknecht is a public official. There is no[] dispute she was in the performance of those duties at the time this occurred, and there isn't any dispute that she sincerely was ruling against the Defendant and the Defendant became agitated and was unhappy with that. There isn't any dispute he made the threats. The defense is, is that I felt this coming on and because I was agitated and I asked to be removed, and they didn't get me out of there quick enough, and so I went off.

Mr. Pettigrew, unfortunately that is not a defense. If that were a defense as [the] kind suggested by [your attorney,] then everybody would have a defense that, you know, I am getting agitated, please protect me from myself and protect you from myself because, if you don't do it, I might do something that will harm you.

That is not now and never has been a defense to a criminal charge. *** The defense that, 'I didn't really mean it because you didn't get me out of the courtroom quick enough,' is not a defense."

¶ 13 During defendant's August 5, 2011, sentencing hearing, Dr. Terry Killian, a psychiatrist who examined defendant and prepared a report detailing the results of his psychiatric evaluation, testified defendant "has a pattern of symptoms very consistent with the psychiatric

diagnosis of [PTSD]." According to Dr. Killian, defendant "has this autonomic or emotional arousal that is characteristic of PTSD; and part of one of the characteristic symptoms is irritability; and [defendant] has that to a great extent, a lot of irritability." While Dr. Killian could not say whether all of defendant's irritability was due to PTSD, he was "confident that a great deal of it is." Dr. Killian testified defendant's treatment records indicate defendant "does much better" when he is treated properly with antipsychotic medications or mood stabilizers.

¶ 14 According to Dr. Killian's testimony, "PTSD doesn't typically go away completely even with good treatment, but there's a good likelihood that [defendant] would be able to keep his temper under control with proper treatment." Dr. Killian referenced his report and testified defendant "felt very strongly that he was not responsible for the behavior [at issue] because he can't control his temper." However, Dr. Killian added "you and everyone else in the courtroom knows, not being able to control one's temper is not in a legal sense exonerating." In his report, Dr. Killian stated while "PTSD does not exonerate [defendant], it certainly should be kept in mind in disposition of his case and does, in my opinion, provide mitigation."

¶ 15 At the conclusion of the hearing, the trial court stated it took into consideration defendant's presentence investigation report (PSI), which showed, *inter alia*, six aggravated battery convictions. The court also considered Dr. Killian's report, which was attached to defendant's PSI, the statutory factors in aggravation and mitigation, as well as the need for an extended-term sentence. The court then sentenced defendant to seven years' imprisonment. The court also stated it would direct DOC to make a psychological evaluation and mental health treatment available, at which point the following exchange took place between defendant and the court:

"THE DEFENDANT: Fucking give me no motherfucking mental health treatment, man. I swear to God, I'm a man of my word. Fuck you, man. Man, take me back to the joint.

THE COURT: No, no. Mr. Pettigrew.

THE DEFENDANT: Bitch ass shit, man. I've been gone nine motherfucking years.

THE COURT: Mr. Pettigrew, I said [DOC] has to make those available to you, but you are not required to avail yourself of them.

THE DEFENDANT: Those bitches not going to do shit.

THE COURT: Okay. That is the judgment of the Court.

THE DEFENDANT: —my business to stand on my motherfucking—

THE COURT: You have been found guilty after trial and now been sentenced, Mr. Pettigrew. You have an absolute right to appeal.

THE DEFENDANT: Suck my dick, bitch."

At that point, defendant stood up to leave and was escorted out of court by DOC officers.

¶ 16 On August 22, 2011, defendant filed a motion to reconsider sentence, which the trial court denied following a January 24, 2012, hearing.

¶ 17 This appeal followed.

¶ 18 II. ANALYSIS

¶ 19 On appeal, defendant argues (1) he was denied a fair trial because the trial court refused to consider the defense the threat he made was involuntary because he was incapable of consciously controlling himself, (2) his sentence violates the proportionate penalties clause of the Illinois Constitution, and (3) he received an excessive sentence.

¶ 20 A. Fair-Trial Claim

¶ 21 Defendant argues he was denied a fair trial because the trial court refused to consider the defense his threat was involuntarily made because he was incapable of consciously controlling himself while in a state of automatism due to PTSD. We disagree.

¶ 22 The Merriam-Webster's Medical Dictionary defines "automatism" as, *inter alia*, "any action performed without the doer's intention or awareness." Merriam-Webster's Medical Dictionary (2010), available at <http://www.merriam-webster.com/medlineplus/automatism> (last visited August 8, 2013). While a defendant who commits a voluntary act is held accountable for his act, he is not criminally liable for an involuntary act. See *People v. Grant*, 71 Ill. 2d 551, 558, 377 N.E.2d 4, 8 (1978). The supreme court has found an automatism defense is available to defendants who lack the volition to control or prevent involuntary acts, *i.e.*, those bodily movements which are not controlled by the conscious mind. *Grant*, 71 Ill.2d at 558, 377 N.E.2d at 8. The examples set forth in *Grant* include acts committed when having a seizure, during convulsions, while asleep, or under hypnosis. *Grant*, 71 Ill.2d at 558, 377 N.E.2d at 8. However, an automatism defense need only be considered "when defendant offers evidence of his organic impairment which leads to involuntary criminal behavior." *People v. Dunigan*, 96 Ill. App. 3d 799, 826, 421 N.E.2d 1319, 1339 (1981) (finding the trial court did not err in refusing to give a specific automatism jury instruction where no psychiatric testimony was presented);

People v. Wirth, 77 Ill. App. 3d 253, 258, 395 N.E.2d 1106, 1110 (1979) (finding no error in refusing to give a specific automatism jury instruction where the defendant failed to present any actual evidence of an organic impairment because the psychiatrist's testimony consisted of hypothetical speculation instead of "specific and positive testimony").

¶ 23 In this case, defendant argues "[i]t is now well established in the medical community that people suffering from PTSD may experience periods of automatism." However, during trial, defendant did not establish he suffered from PTSD. Although defendant presented testimony from Dr. Killian regarding his mental health at sentencing, Dr. Killian did not testify during defendant's trial. Likewise, Dr. Killian's report, which was prepared after defendant threatened Judge Bauknecht but prior to trial, was not introduced during trial. We presume defendant did not call Dr. Killian or seek to admit the report because although Dr. Killian diagnosed defendant with PTSD, the report stated, *inter alia*, "PTSD does not exonerate [defendant]."

¶ 24 Thus, Dr. Killian's diagnosis defendant suffered from PTSD was never presented to the trial court. Instead, defendant alone testified he had been diagnosed with an "impulse disorder" and was off his medication at the time he threatened to kill Judge Bauknecht. In fact, the phrase "post-traumatic stress disorder" was never uttered by anyone during defendant's trial. Defendant argues he stated he had PTSD in the audio excerpt played during his bench trial. However, the excerpt played at trial began at 1:23:00 and defendant's statement he had PTSD was made at 1:18:50. Moreover, even if the court heard defendant's statement, it did not have to accept that statement as true, let alone accept it as exonerating defendant.

¶ 25 Defendant also did not present any evidence, other than his own testimony, he had

an "impulse disorder." We understand defendant to be arguing he was denied a fair trial because the trial court's comments at trial showed it refused to recognize the existence of involuntary-act defenses as a whole. However, our view of the record reveals the court's comments were directed at defendant's specific excuse for his behavior and not the legitimacy of involuntary-act defenses themselves. The trial court, as the trier of fact here, was responsible for making credibility determinations. The court did not have to believe defendant's testimony or accept his explanation of why he threatened Judge Bauknecht. On review, an appellate court will only reverse a trial court's credibility determinations if no rational trier of fact would have come to the same conclusion. See *People v. Rincon*, 387 Ill. App. 3d 708, 724, 900 N.E.2d 1192, 1206 (2008). We cannot say that is the case here. Thus, defendant's argument he was denied a fair trial because the court refused to recognize his defense fails.

¶ 26 B. Proportionate-Penalties Claim

¶ 27 Defendant argues his sentence violates the proportionate penalties clause of the Illinois Constitution where it was "impermissibly harsher than the penalty for the identical offense of aggravated assault of a State employee." We disagree.

¶ 28 The proportionate penalties clause of the Illinois constitution provides "[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. 1, § 11. We note statutes are presumed constitutional. *City of Chicago v. Morales*, 177 Ill. 2d 440, 448, 687 N.E.2d 53, 59 (1997).

¶ 29 In *People v. Sharpe*, 216 Ill. 2d 481, 517, 839 N.E.2d 492, 514 (2005), the supreme court stated "judging penalties by a comparison with penalties for offenses with different

elements should never have been part of our proportionate penalties jurisprudence." The court also stated "[a] defendant may no longer challenge a penalty under the proportionate penalties clause by comparing it with the penalty for an offense with different elements." *Sharpe*, 216 Ill. 2d at 521, 839 N.E.2d at 517. Offenses are not identical where one offense contains an additional element not required for the other offense. *People v. Koppa*, 184 Ill. 2d 159, 167, 703 N.E.2d 91, 96 (1998). Thus, in addressing defendant's argument, we first must determine whether the offenses of threatening a public official and aggravated assault of a State employee have identical elements.

¶ 30 At the time of the offense in this case, the elements of threatening a public official were as follows:

"(a) A person commits the offense of threatening a public official when:

(1) that person knowingly and willfully delivers or conveys, directly or indirectly, to a public official by any means a communication:

(i) containing a threat that would place the public official or a member of his or her immediate family in reasonable apprehension of immediate or future bodily harm, sexual assault, confinement, or restraint; or

(ii) containing a threat that would place the public official or a member of his or her immediate family in reasonable apprehension that damage will occur to property in the custody, care, or control of the public official or his or her immediate family; and

(2) the threat was conveyed because of the performance or nonperformance of some public duty, because of hostility of the person making the threat toward the status or position of the public official, or because of any other factor related to the official's public existence." 720 ILCS 5/12-9(a)(1)(i), (a)(1)(ii), (a)(2) (West 2010).

¶ 31 At the time of the offenses, the elements of aggravated assault on a State employee were as follows:

"in committing an assault, he or she knows the individual assaulted to be *** [a]n employee of the State of Illinois *** performing his or her official duties." 720 ILCS 5/12-2(b)(7) (West 2010).

¶ 32 In order for a defendant to be found guilty of threatening a public official, the State must prove the defendant conveyed a communication to a "public official" containing a threat

sufficient to satisfy the statute. The statute defines "public official" as "a person who is elected to office in accordance with a statute or who is appointed to an office which is established, and the qualifications and duties of which are prescribed, by statute, to discharge a public duty for the State or any of its political subdivisions." 720 ILCS 5/12-9(b)(1) (West 2010). By comparison, to convict a defendant of aggravated assault of a State employee, section 12-2(b)(7) requires the State prove the defendant committed an assault against *any* State employee. 720 ILCS 5/12-2(b)(7) (West 2010). Thus, to prove a defendant guilty of threatening a public official, the State must prove an additional element not required to be proved when seeking a conviction for aggravated assault of a State employee, namely, the individual to whom the threat was conveyed was a "public official." See *People v. Carrie*, 358 Ill. App. 3d 805, 812, 832 N.E.2d 863, 869 (2005); *People v. Muniz*, 354 Ill. App. 3d 392, 395, 820 N.E.2d 101, 104 (2004) (reversing the defendants' convictions for threatening a "public official" where the victim in each case was not a "public official"). Because the offenses in this case do not have identical elements, a proportionate penalty analysis is not necessary. See *Sharpe*, 216 Ill. 2d at 521, 839 N.E.2d at 517.

¶ 33 C. Excessive-Sentence Claim

¶ 34 Defendant argues his sentence is excessive considering his mental-health issues, the deficient psychiatric care he received leading up to the hearing, and his positive future prognosis with proper treatment. We disagree.

¶ 35 In this case, defendant was convicted of threatening a public official, which is a Class 3 felony (720 ILCS 5/12-9(c) (West 2010)) punishable by two to five years' imprisonment (730 ILCS 5/5-4.5-40(a) (West 2010)). The parties agree because of defendant's criminal history

he was eligible for an extended-term sentence of between 5 and 10 years in prison (730 ILCS 5/5-4.5-40(a) (West 2010)). The trial court imposed a seven-year prison sentence, which is within the statutorily permissible extended range.

¶ 36 Where a sentence falls within statutory guidelines, it will not be disturbed on review absent an abuse of discretion. *People v. Bridgewater*, 388 Ill. App. 3d 787, 797, 904 N.E.2d 171, 179 (2009) (quoting *People v. Grace*, 365 Ill. App. 3d 508, 512, 849 N.E.2d 1090, 1093-94 (2006)); *People v. Alexander*, 239 Ill. 2d 205, 212, 940 N.E.2d 1062, 1066 (2010). A sentence within the statutory range will not be deemed excessive unless it is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense. *People v. Crenshaw*, 2011 IL App (4th) 090908, ¶ 22, 959 N.E.2d 703. "A reviewing court must afford great deference to the trial court's judgment regarding sentencing because that court, having observed the defendant and the proceedings, is in a far better position to consider such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, and habits than a reviewing court, which must rely on a 'cold' record." *People v. Little*, 2011 IL App (4th) 090787, ¶ 24, 957 N.E.2d 102.

¶ 37 While defendant argues his PTSD weighs heavily in mitigation, the trial court heard testimony from Dr. Killian regarding defendant's mental-health issues. The court also stated it considered Dr. Killian's report, which was attached to the PSI. In his report, Dr. Killian stated, in relevant part, the following:

"[Defendant] pretty clearly has severe PTSD that is the result of the severe abuse he suffered during his childhood. I emphasize that the emotional arousal (which includes marked irritability) is

pretty characteristic of PTSD, especially severe PTSD. It is highly likely that had he been properly medicated at the time of the 4/01/2010 court hearing, he would not have lost his temper and blurted out the threat to Judge Bauknecht. While in my opinion is [sic] PTSD does not exonerate him, it certainly should be kept in mind in disposition of his case and does, in my opinion, provide mitigation."

There is a presumption the sentencing court considered mitigating evidence before it. *People v. Flores*, 404 Ill. App. 3d 155, 158, 935 N.E.2d 1151, 1155 (2010). That presumption will not be overcome without explicit evidence from the record the trial court did not consider mitigating factors. *Flores*, 404 Ill. App. 3d at 158, 935 N.E.2d at 1155. However, "[t]he existence of mitigating factors does not require the trial court to reduce a sentence from the maximum allowed." *People v. Pippen*, 324 Ill. App. 3d 649, 652, 756 N.E.2d 474, 477 (2001).

¶ 38 Here, the trial court noted defendant's history of violence, which included six aggravated battery convictions, and found it was not outweighed by the evidence in mitigation. Defendant was eligible for a maximum extended-term sentence of 10 years' imprisonment. After considering the factors in aggravation and mitigation, the court fashioned a seven-year prison sentence. We cannot say the court abused its discretion in sentencing defendant to seven years' imprisonment.

¶ 39 III. CONCLUSION

¶ 40 For the foregoing reasons, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this

appeal.

¶ 41 Affirmed.