

No. 1-12-0502

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. 04 CR 30563
)	
LEE McGEE,)	Honorable
)	William G. Lacy,
Defendant-Appellant.)	Judge Presiding.

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

ORDER

- ¶ 1 *Held:* The trial court did not improperly "bifurcate" defendant's first degree murder sentence and firearm sentencing enhancement, nor did it consider improper factors in fashioning defendant's sentence by merely mentioning the nature of the offense.
- ¶ 2 Following a jury trial, defendant Lee McGee was convicted of attempted armed robbery in violation of section 8-4 and 18-2(a)(1) of the Criminal Code of 1961 (Criminal Code) (720

ILCS 5/8-4, 18-2(a)(1) (West 2004)), first degree murder pursuant to section 9-1(a) of the Criminal Code (720 ILCS 5/9-1(a) (West 2004)), and the statutory enhancement of personally discharging a firearm that proximately caused death of another person pursuant to section 5-8-1(a)(1)(d)(iii) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2004)). The trial court sentenced him to 15 years for the attempted armed robbery; 60 years for the first degree murder; and 25 years for personally discharging the firearm to be served consecutively for an aggregate sentence of 100 years. On appeal, defendant contends that the trial court improperly bifurcated his sentence when it determined his sentence for first degree murder and then added the mandatory 25-year firearm enhancement, rather than considering the cumulative punishment. Defendant argues that, as a result, the court improperly considered in aggravation factors inherent in the discharge of a firearm that proximately caused death.

¶ 3 Because defendant does not challenge the sufficiency of the evidence, only a summary recitation of the facts is required. LaTorria Fields, defendant's former girlfriend, solicited defendant to rob and kill In-Talk Jung. Jung was the owner of Best Fit Clothing located at 4018 West Madison Street in Chicago, where Fields worked as store manager. Defendant agreed, and recruited his nephew, codefendant Pierre Cole, who is not a party to this appeal, to help him. Shortly before 6 p.m. on October 14, 2004, defendant and Cole entered the clothing store. Defendant shot Jung three times, and Cole shot him another four or five times. Defendant then searched Jung's pockets, but could not find a wallet. He also attempted to open the cash register, but it would not open. The men then left the store and disposed of the guns.

¶ 4 After the murder, Chicago homicide detective Jose Lopez was called to the scene. He and Forensic Investigator John Miller found a hidden VCR that contained a videotape of the robbery and murder. Police also recovered fingerprints and bullets. After viewing the videotape,

Lopez arranged an interview with Fields, who identified the men in the tape as defendant and Cole. Defendant was apprehended in Manhattan, Kansas. He eventually made a handwritten statement, detailing his involvement in Jung's murder.

¶ 5 After hearing testimony and viewing the videotape of the crime, the jury found defendant guilty of attempted robbery and first degree murder, and determined that defendant had personally discharged a firearm that proximately caused Jung's death. At the sentencing hearing, the trial court commented that Jung's murder was "among the most heartless, brutal, vicious, ice-blooded crimes I have ever seen." The court noted that "[t]his sentence that I am going to impose is meant to make sure that you never present a danger to any community again." The court sentenced defendant to 15 years for attempted armed robbery; 60 years for first degree murder; and 25 years for discharging a firearm that proximately caused Jung's death to be served consecutively for an aggregate sentence of 100 years.

¶ 6 On appeal, defendant contends that the trial court (1) improperly bifurcated the first degree murder sentence and the firearm sentencing enhancement and (2) improperly considered factors inherent in the offense of first degree murder.

¶ 7 The parties disagree on the standard of review. Defendant insists that the standard of review is *de novo* when the facts are not in dispute. However, we agree with the State that in reviewing a claim that a sentence within statutory limits is excessive, an abuse of discretion standard is appropriate. An abuse of discretion occurs when the sentence is "greatly at variance with the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense." *People v. Stacey*, 193 Ill. 2d 203, 210 (2000).

¶ 8 Initially, we note defendant failed to preserve this issue for appeal; therefore, the issue was forfeited and cannot be considered on appeal unless it was plain error. Ill S. Ct. R. 615

(a)(eff. Aug. 27, 1999). In order to prevail under the plain error doctrine, the defendant must show that (1) the evidence presented at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). However, before we can determine whether an error rises to the level of plain error under either category, we must first determine whether an error in fact occurred. *People v. Crosby*, 231 Ill. 2d 262, 273 (2008).

¶ 9 The trial court is given great discretion in determining a sentence within the limits of the statute set by the legislature. *People v. Haley*, 2011 IL App (1st) 093585, ¶ 63. The court's sentencing determination must be based " 'on the particular circumstances of each case, considering such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age.' " *Id.* quoting *People v. Fern*, 189 Ill.2d 48, 53 (1999). "In imposing sentence on a defendant, a trial judge may not consider any fact implicit in the underlying offense for which the defendant was convicted." *People v. Brewer*, 2013 IL App (1st) 072821, ¶ 55. However, the trial court may consider "the nature and circumstances of the offense, including the nature and extent of each element of the offense as committed by the defendant." *Id.* There is a strong presumption that a trial court based its sentencing determination on proper legal reasoning. *People v. Gomez*, 2011 IL App (1st) 092185, ¶ 87. "Where a sentence falls within statutory guidelines, it is presumed to be proper and will be overturned only on an affirmative showing that it departs from the intent of the law or violates constitutional guidelines." *People v. Hamilton*, 361 Ill. App. 3d 836, 846 (2005).

¶ 10 Defendant argues that the court erred when it issued separate sentences, instead of incorporating the first degree murder conviction and the mandatory enhancement into one sentence. He cites *People v. Hauschild*, 226 Ill. 2d 63, 89 (2007); *People v. Guevara*, 216 Ill. 2d

533, 546 (2005); *People v. Hill* 199, Ill. 2d 440, 447 (2002) as standing for the proposition that the trial court should evaluate a defendant's cumulative sentence when a mandatory firearm add-on applies. Defendant is correct that in these three cases our supreme court referred, in varying degrees, to considering the firearm enhancement as part of a cumulative sentence with an increased range. However, contrary to defendant's arguments on appeal, we find nothing in these cases that mandates a particular procedure or methodology for doing so. We believe the decisive question is, and should be, whether the sentence falls within the correct statutory range and whether the trial court abused its discretion in imposing the sentence ultimately imposed. More importantly, we believe that it is immaterial whether the trial court imposes a "base" sentence and then adds the firearm enhancement or adds the enhancement to the base sentencing range and then selects a sentence within the new range. The only question that should concern a reviewing court is whether the sentence ultimately imposed, by whatever method, represents an abuse of discretion.

¶ 11 Here, the court gave defendant the maximum sentence of 60 years for murdering Jung, emphasizing the nature of the crime and defendant's potential threat to society. The court then added the mandatory 25-year enhancement to his sentence pursuant to section 5-8-1(a)(1)(d)(iii) of the Unified Code. 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2004). On review of the record, we find no evidence that the trial court abused its discretion in sentencing defendant on either portion of the "bifurcated" sentence. Furthermore, the ultimate cumulative sentence was within the statutory guidelines, and given the nature of the crime, we find that it is not greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense. *Stacey*, 193 Ill. 2d at 210.

¶ 12 Next, we find that the trial court did not improperly consider factors inherent in the offense of first degree murder during sentencing. Defendant contends that the court included the 25-year mandatory enhancement for discharging a firearm that proximately caused death, after the "method" that defendant used to murder defendant was already considered in fashioning his 60 year sentence. Specifically, defendant argues that, in its pronouncement, the court improperly considered that defendant murdered Jung "in the most cold-blooded of fashions" and noted the video of defendant shooting Jung. We disagree. The trial court is not required to refrain from any mention of sentencing factors which constitute elements of an offense, and a mere reference to the existence of such a factor is not reversible error. *People v. Jones*, 299 Ill. App. 3d 739, 746 (1998). The record shows the court considered everything that is "relevant and material in determining an appropriate sentence," including arguments of counsel, defendant's pre-sentence investigation report, and financial burden to defendant's family. The court did not err by merely referencing the nature and circumstances of Jung's murder in its pronouncement. Absent error, there can be no plain error.

¶ 13 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 14 Affirmed.