

**NOTICE**  
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2014 IL App (4th) 120528-U

NO. 4-12-0528

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

**FILED**  
January 16, 2014  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Livingston County
SANDIE W. STARNS,	)	No. 11CF1360
Defendant-Appellant.	)	
	)	Honorable
	)	Heidi N. Ladd,
	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.  
Justice Knecht concurred in the judgment.  
Presiding Justice Appleton dissented.

**ORDER**

¶ 1 *Held:* The trial court did not err in (1) denying defendant's request for jury instructions on the lesser-included offense of simple robbery and (2) sentencing defendant to 28 years' imprisonment.

¶ 2 Following a March 2012 trial, a jury convicted defendant, Sandie W. Starns, of armed robbery (720 ILCS 5/18-2(a)(1) (West 2010)), and the trial court later sentenced him to 28 years in prison. Defendant appeals, arguing the trial court erred in (1) denying his request for jury instructions on the lesser-included offense of simple robbery and (2) sentencing him to 28 years' imprisonment. We affirm.

¶ 3 I. BACKGROUND

¶ 4 The following facts are relevant to resolving the issues raised on appeal. On

August 23, 2011, the State filed an information alleging defendant committed the offense of armed robbery in that he "took property, namely a van, wallet, [Global Positioning System (GPS)] device[,] and United States Currency, from Ronald Koehler by the use of force, and \*\*\* defendant was armed with a dangerous weapon, namely a rope or cord." On March 26, 2012, the trial court commenced defendant's jury trial. Koehler testified that on August 19, 2011, he drove a van for Yellow Cab and was scheduled to work from 5 a.m. to 5 p.m. Upon his arrival at the dispatch office, Koehler was advised of a fare at the Mobil Super Pantry on Neil Street in Champaign. Koehler proceeded to the Mobil Super Pantry where defendant entered the van, sitting directly behind Koehler. Koehler drove toward defendant's stated destination but as he drove, defendant advised Koehler that he needed to stop at another location to get a key. At defendant's direction, Koehler turned onto a side street and pulled into a residential driveway.

¶ 5           While parked in the driveway, defendant demanded Koehler's money. When Koehler responded that he had just begun work and had no money, defendant threatened to shoot Koehler. Koehler turned around and grabbed defendant's hands. As they struggled, defendant asked Koehler if he wanted to die. Koehler attempted to radio for help but defendant grabbed the microphone and then put a rope around Koehler's neck in an attempt to strangle Koehler. Koehler described the rope as small in diameter, "about the thickness of a venetian blind rope." As Koehler felt the rope tightening, he struggled to get his hands under the rope and pull it away. Koehler testified that the rope was around his neck for three or four seconds before he grabbed the rope and jerked it away, allowing Koehler to get out of the van. He watched as defendant drove off in the van. Koehler testified that he had a black bowling bag in the van where he kept a GPS, a satellite radio, money, flashlights, water and soda bottles, and his lunch.

¶ 6 Champaign police officer Randy Beach testified that he responded to the report of the robbery. Officer Beach spoke with Koehler but did not observe any marks or bruises on Koehler.

¶ 7 Champaign police officer David Allen testified that he processed the van after it was recovered near the scene of the robbery. He found a piece of rope hanging out of the driver's-side window of the van. According to Officer Allen, the rope was actually two pieces of rope tied together. The rope measured three to four feet in length and approximately one quarter inch in diameter. It was similar to a drawstring from a pair of sweatpants.

¶ 8 Champaign police detective Patrick Funkhouser testified that he interviewed defendant on August 24, 2011. Defendant initially denied having anything to do with the robbery but later admitted robbing Koehler. After admitting he robbed Koehler, defendant then denied having "a rope or cord or something" but later stated that "[i]t was a string from my pants." According to defendant, he tried to grab Koehler with the rope but Koehler grabbed the rope and got away. Then defendant "took off running."

¶ 9 After the close of the State's case, defendant exercised his constitutional right not to testify.

¶ 10 During the jury instructions conference, defense counsel requested that the jury be instructed on the lesser-included offense of robbery. Defense counsel argued that the question of whether the rope could be "considered a dangerous weapon" was a question of fact for the jury to determine. The State argued that there was nothing in the evidence to warrant a lesser-included-offense instruction. The trial court refused to give the instruction. Following closing arguments, the jury found defendant guilty of armed robbery.

¶ 11 On May 9, 2012, the trial court held defendant's sentencing hearing. In aggravation, the State called Detective Funkhouser, who testified that he investigated the armed robberies of several taxi drivers in the Champaign-Urbana area in early August 2011. A driver named Stephen Wallen had been robbed by two men at 12:45 a.m. on August 6, 2011. Wallen described one as a heavysset black male and the other as a skinny black male. Wallen reported that the heavysset black male placed him in a choke hold from behind and placed the barrel of a gun against his right cheek. The men took \$350 in cash and the van. During the course of the investigation, Detective Funkhouser identified defendant as the large black male suspect.

Detective Funkhouser asked defendant about the August 6, 2011, robbery when he questioned defendant about the instant case. Defendant said that he was present but that the other man pulled the gun. Defendant said he did not know his companion would rob the driver.

¶ 12 Detective Funkhouser also investigated the August 10, 2011, armed robbery of a cab driver named Karen Rosson, which occurred at 11:30 p.m. The man Rosson picked up told her to drive to one location and then changed his destination during the ride. As Rosson drove, the man placed a gun at the side of her head and also against her ribs. The man left with \$200 and the keys to the van. Rosson identified defendant as the robber.

¶ 13 Defendant presented in mitigation a number of letters written on defendant's behalf. Defendant made a statement in allocution, apologizing for his actions and stating he had changed.

¶ 14 In making its ruling, the trial court stated it considered the following: "the presentence report, the documents tendered in mitigation, the evidence that's been submitted for sentencing and all relevant statutory factors, including, but not limited to, the nature and

circumstances of the offense, the evidence and applicable factors in aggravation and mitigation, the character, history and rehabilitative potential of the defendant, his statement in allocution and the arguments and recommendations of counsel."

¶ 15 It noted defendant was 19 years old and had an extensive record. Defendant began his involvement with the courts in January 2008, and had been "in and out of some type of detention or incarceration basically for the last three and one half years." Defendant was last released from the Illinois Department of Corrections on August 3, 2011, and began robbing cabs within three days of his release from prison.

¶ 16 The trial court noted defendant never obtained a general equivalency diploma (GED) and never sought employment. The court highlighted the "element of planning and premeditation" engaged in by defendant. The most egregious aggravating factor to the court arose from the nature and circumstances of the offense itself, in which defendant "was ready with that rope from his sweatpants and was perfectly willing to use it to choke Mr. Koehler from behind." It further noted the following:

"The fact that [defendant] was willing to lure a[n] innocent victim in a trap and then threaten his life, was willing to strangle him for money \*\*\*, some lunch[,] and a GPS, certainly transforms this from that of a hapless, misguided young man to someone who is now presenting a very significant risk and a very calculated risk to the public."

The trial court continued, "There's no rehabilitation that has been achieved given the fact that he immediately set out to engage in yet more serious, life-threatening, very dangerous offenses

directed toward innocent victims." The court found a significant prison sentence was necessary to protect the public and sentenced defendant to 28 years in prison.

¶ 17 On May 29, 2012, defendant filed a first amended motion to reduce his sentence, which the trial court denied. This appeal followed.

¶ 18 II. ANALYSIS

¶ 19 Defendant argues the trial court erred in refusing to instruct the jury on the lesser-included offense of robbery. We disagree.

"A defendant generally may not be convicted of an offense for which the defendant has not been charged. However, in an appropriate case, the defendant is entitled to have the jury instructed on less serious offenses that are included in the charged offense. Such a practice provides an important third option to a jury. If a jury believes that a defendant is guilty of something, but uncertain whether the charged offense has been proved, the jury might convict the defendant of the lesser offense rather than convict or acquit the defendant of the greater offense." *People v. Ceja*, 204 Ill. 2d 332, 359, 789 N.E.2d 1228, 1246 (2003).

¶ 20 In Illinois, courts determine whether an offense is a lesser-included offense using the two-tiered charging-instrument approach. *Ceja*, 204 Ill. 2d at 360, 789 N.E.2d at 1246. The first tier requires a court to determine whether the charging instrument describes the lesser offense. *Ceja*, 204 Ill. 2d at 360, 789 N.E.2d at 1246. "At a minimum, the instrument charging the greater offense must contain a broad foundation or main outline of the lesser offense." *Ceja*,

204 Ill. 2d at 360, 789 N.E.2d at 1246.

¶ 21 If the charging instrument describes the lesser offense, the court moves to the second tier and determines whether the evidence adduced at trial rationally supports the conviction on the lesser-included offense. *Ceja*, 204 Ill. 2d at 360, 789 N.E.2d at 1247. "A court must 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." *Ceja*, 204 Ill. 2d at 360, 789 N.E.2d at 1247.

¶ 22 Whether a charged offense encompasses another as a lesser-included offense is a question of law requiring de novo review. *People v. Kolton*, 219 Ill. 2d 353, 361, 848 N.E.2d 950, 955 (2006). The giving of a lesser-included offense instruction to a jury is a matter resting within the sound discretion of the trial court. *People v. Castillo*, 188 Ill. 2d 536, 540, 723 N.E.2d 274, 276 (1999). Abuse of discretion occurs only where the trial court's ruling is arbitrary, fanciful, or unreasonable, or where no reasonable person could take the view adopted by the court. *People v. Ortega*, 209 Ill. 2d 354, 359, 808 N.E.2d 496, 500-01 (2004).

¶ 23 In this case, the State charged defendant by information with armed robbery in that he "took property, namely a van, wallet, GPS device[,] and United States Currency, from Ronald Koehler by the use of force, and \*\*\* defendant was armed with a dangerous weapon, namely a rope or cord." 720 ILCS 5/18-2(a)(1) (West 2010). Defendant requested that the jury be instructed on robbery. "A person commits robbery when he or she takes property \*\*\* from the person or presence of another by the use of force or by threatening the imminent use of force." 720 ILCS 5/18-1(a) (West 2010). "A person commits armed robbery when he or she violates Section 18-1 [(robbery)]; and \*\*\* he or she carries on or about his or her person or is

otherwise armed with a dangerous weapon other than a firearm." 720 ILCS 5/18-2(a)(1) (West 2010). The difference between robbery and armed robbery is that the latter offense additionally requires that the defendant is armed with a dangerous weapon. Thus, because the elements of robbery are subsumed in the offense of armed robbery, we conclude that the charging instrument in the instant case established robbery as a lesser-included offense of armed robbery.

¶ 24 That said, we cannot say that the trial court abused its discretion in refusing to instruct the jury on that offense. The evidence at trial showed defendant robbed Koehler by use of force and while armed with a dangerous weapon, namely the rope or cord. Defendant first threatened to shoot Koehler and then asked Koehler if he wanted to die, immediately placing a rope around Koehler's neck. As the trial court observed, "[a]ll of the evidence, uncontradicted, suggests that the rope was used, placed around the victim's neck and tightened." Under the circumstances in which defendant used the rope in this case, we find the evidence strongly supported a conviction for the charged offense of armed robbery. We cannot say that the evidence would have permitted the jury to rationally find defendant guilty of the lesser-included offense of robbery and not guilty of armed robbery. *Ceja*, 204 Ill. 2d at 360, 789 N.E.2d at 1247. Accordingly, the trial court did not abuse its discretion in denying defendant's request for a jury instruction on the lesser-included offense of robbery.

¶ 25 Defendant cites *People v. Skelton*, 83 Ill. 2d 58, 414 N.E.2d 455 (1980), arguing that "the trial court erroneously found that the drawstring was a dangerous weapon as a matter of law." In *Skelton*, a jury convicted the defendant of armed robbery where he used a plastic toy revolver during the robbery. *Skelton*, 83 Ill. 2d at 60, 414 N.E.2d at 455. The sole issue before the court in *Skelton* was whether the toy gun was a dangerous weapon required for conviction

under the armed robbery statute. *Skelton*, 83 Ill. 2d at 61, 414 N.E.2d at 455. The supreme court observed:

"In the great majority of cases it becomes a question for the fact finder whether the particular object was sufficiently susceptible to use in a manner likely to cause serious injury to qualify as a dangerous weapon. Where, however, the character of the weapon is such as to admit of only one conclusion, the question becomes one of law for the court." *Skelton*, 83 Ill. 2d at 66, 414 N.E.2d at 458.

The supreme court found the toy gun was not a dangerous weapon as a matter of law as it did not fire blank shells and was too small and light in weight to be used as a bludgeon. *Skelton*, 83 Ill. 2d at 66, 414 N.E.2d at 458. "It simply is not, in our opinion, the type of weapon which can be used to cause the additional violence and harm which the greater penalty attached to armed robbery was designed to deter." *Skelton*, 83 Ill. 2d at 66-67, 414 N.E.2d at 458. Accordingly, the supreme court affirmed the appellate court's judgment reversing the trial court and remanding for entry of judgment and sentence on simple robbery. *Skelton*, 83 Ill. 2d at 67, 414 N.E.2d at 458.

¶ 26 Defendant's reliance on *Skelton* is misplaced. In *Skelton*, the defendant challenged only the sufficiency of the evidence on the ground the State did not prove defendant committed the offense while possessing a "dangerous weapon." Although a jury had convicted the defendant of armed robbery, the supreme court affirmed the appellate court's reversal of the conviction, finding, *as a matter of law*, the toy gun used in the robbery was not a dangerous

weapon.

¶ 27 Here, defendant does not argue he was not proved guilty of armed robbery beyond a reasonable doubt. Defendant argues the trial court erred in refusing to instruct the jury on the lesser-included offense of robbery, requiring a wholly different analysis than that applied by a court reviewing the sufficiency of evidence to sustain a criminal conviction. Contrary to defendant's argument, the trial court did not find the rope a dangerous weapon *as a matter of law*, thereby removing from the jury's determination whether the rope in the instant case qualified as a dangerous weapon. Instead, the court found "nothing to support the giving of a lesser-included offense under the facts in this case as they've been admitted into evidence" and, therefore, denied defendant's request that the jury be instructed on the lesser-included offense of robbery.

¶ 28 Prior to deliberations, the trial court instructed the jury as follows:

"To sustain the charge of armed robbery, the State must prove the following propositions:

First Proposition: That the defendant knowingly took property from the person or presence of Ronald Koehler; and

Second Proposition: That the defendant did so by the use of force or by threatening the imminent use of force; and

Third Proposition: That the defendant carried on or about his person a dangerous weapon or was otherwise armed with a dangerous weapon at the time of the taking.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable

doubt, you should find the defendant guilty.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty." Illinois Pattern Jury Instructions, Criminal, No. 14.06 (4th ed. 2000).

The court further instructed the jury that "[a]n object or an instrument which is not inherently dangerous may be a dangerous weapon depending on the manner of its use and the circumstances of the case." Illinois Pattern Jury Instructions, Criminal, No. 4.17 (4th ed. 2000).

¶ 29 The trial court properly instructed the jury on all the elements of the charged offense of armed robbery. As defendant correctly states, "it was for the jury to determine whether [the rope] was used as a dangerous weapon."

¶ 30 Although we find the charging instrument in this case established robbery as a lesser-included offense of armed robbery, the evidence presented would not permit a rational jury to find defendant guilty of robbery but acquit him of armed robbery. Therefore, the trial court did not err in denying defendant's request for a jury instruction on the lesser-included offense of robbery.

¶ 31 Defendant next argues that the trial court's 28-year prison sentence was excessive given his youth and difficult childhood. We disagree.

¶ 32 With excessive-sentence claims, this court has explained appellate review of a defendant's sentence as follows:

"A trial court's sentencing determination must be based on the particular circumstances of each case, including factors such as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. [Citations.] Generally, the trial court is in a better position than a court of review to determine an appropriate sentence based upon the particular facts and circumstances of each individual case. [Citation.] Thus, the trial court is the proper forum for the determination of a defendant's sentence, and the trial court's decisions in regard to sentencing are entitled to great deference and weight. [Citation.] Absent an abuse of discretion by the trial court, a sentence may not be altered upon review. [Citation.] If the sentence imposed is within the statutory range, it will not be deemed excessive unless it is greatly at variance with the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense." (Internal quotation marks omitted.) *People v. Price*, 2011 IL App (4th) 100311, ¶ 36, 958 N.E.2d 341 (quoting *People v. Hensley*, 354 Ill. App. 3d 224, 234-35, 819 N.E.2d 1274, 1284 (2004), quoting *People v. Kennedy*, 336 Ill. App. 3d 425, 433, 782 N.E.2d 864, 871 (2002)).

¶ 33 In his brief, defendant acknowledges he has "amassed a significant criminal history." However, he contends the trial court failed to adequately consider as mitigating factors

his young age (18 years old at the time of the offense), and "impoverished and neglectful" childhood. The transcript of defendant's sentencing hearing demonstrates the trial court did consider those factors at sentencing. Defendant is essentially asking us to reweigh the factors considered by the trial court, which we do not have the power to do. See *People v. Alexander*, 239 Ill. 2d 205, 214-15, 940 N.E.2d 1062, 1067 (2010).

¶ 34 As to the factors noted by defendant, this court has long emphasized youth and rehabilitation are not entitled to greater weight than the other factors. See *People v. West*, 54 Ill. App. 3d 903, 909, 370 N.E.2d 265, 270 (1977). Here, defendant's lengthy criminal history, failure to successfully complete probation and parole, and pattern of escalating violence against others cast a strong shadow of a doubt on his rehabilitative potential. As to defendant's childhood, the trial court noted "an element of self-pity and blaming his own poor choices on the fact that no one encouraged him or told him he had a bright future \*\*\* and yet he's responsible for the choices he continued to make." The court continued, stating "[t]here's no guarantee you're going to have fans in life. You certainly have to make the appropriate resolution as to the kind of person you want to be."

¶ 35 Defendant cites cases where the defendant's lengthy sentence is reduced by the reviewing court. This court has stated "sentencing is emphatically an individual matter and prior authority is of little assistance." *West*, 54 Ill. App. 3d at 910, 370 N.E.2d at 271.

¶ 36 Defendant's sentence falls within the statutory guidelines. Armed robbery is a Class X felony (720 ILCS 5/18-2(b) (West 2010)), and the sentencing range for a Class X felony is 6 to 30 years' imprisonment (730 ILCS 5/5-4.5-25(a) (West 2010)). Defendant was sentenced to 28 years. Accordingly, we find the trial court did not abuse its discretion in sentencing

defendant.

¶ 37

### III. CONCLUSION

¶ 38 For the reasons stated, we affirm the judgment of the Champaign County circuit court. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 39 Affirmed.

¶ 40 PRESIDING JUSTICE APPLETON, dissenting.

¶ 41 I respectfully dissent. I believe that the element of "being armed with a dangerous weapon" is appropriately submitted to the jury, bringing into play the jury's determination of whether a drawstring is a dangerous weapon.