2015 IL App (1st) 130886-U

THIRD DIVISION
April 15, 2015

No. 1-13-0886

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 9804
	)	
DARREN REMMER,	)	Honorable
	)	William G. Lacy,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE MASON delivered the judgment of the court.
Justice Lavin and Justice Hyman concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's convictions and sentences for home invasion and armed robbery are affirmed where his claim of prosecutorial misconduct is forfeited and does not constitute plain error, and his sentence is not excessive. The traffic fine is vacated and the assessment order is further modified to reflect monetary credit for the days defendant spent in presentencing custody.

¶ 2 Following a jury trial, defendant Darren Remmer was convicted of home invasion and armed robbery, then sentenced to concurrent terms of 25 years' imprisonment. On appeal, Remmer contends that he was denied a fair trial when the prosecutor, in rebuttal argument,

diminished the State's burden from proof beyond a reasonable doubt to mere reasonableness. Remmer also contends that his sentence is excessive because the trial court gave improper consideration to factors inherent in the offense and failed to consider statutory mitigating factors. Finally, Remmer contends that the fine for a serious traffic violation must be vacated, and that he is due monetary credit for the days he spent in presentencing custody. We affirm.

¶ 3 The victim, April Pugh, purchased furniture for her daughter's bedroom from Dolton Furniture. On May 12 or 13, 2011, the furniture was delivered to her home by two men: an older, bald, dark-skinned man who was a little pudgy (identified in court as Remmer), and a younger thin man who appeared to be a teenager. After Pugh, who was nine months pregnant, directed the men to the bedroom, she went downstairs, returning only to tell the men where she wanted the furniture placed.

¶ 4 Remmer was finished after about 45 minutes. He told Pugh that the screws for the headboard were missing and that she could either go to the store to pick them up herself, or have them delivered to her home another day. Pugh chose to have the screws delivered because she did not want to make another trip to the store. Remmer then had Pugh sign a receipt acknowledging that she had received the furniture in good condition, and left her house.

¶ 5 On Saturday morning, May 21, 2011, Remmer appeared at Pugh's back door unannounced and she recognized him as the older man who had delivered the bedroom furniture the previous week. Remmer asked if Pugh wanted him to insert the screws into the headboard. She told him she did and admitted him to the home. Pugh's children, ages 14 and 10, were home.

¶ 6 After he pulled the headboard away from the wall, Remmer told Pugh he needed to go to his truck and left. Pugh waited at the top of the stairs until he returned.

¶ 7 A short time later, Remmer returned and headed toward the bedroom. A minute later, as Pugh sat at the top of the stairs talking on her cell phone, Remmer came around the corner, stood over her and held a flat silver box cutter to her neck. He whispered to her to hang up the phone, and she did. Remmer then asked Pugh about a diamond ring she had been wearing when the furniture was delivered. Because Pugh's hands were swollen from the pregnancy, she was not wearing the ring. Pugh showed Remmer her hands and told him she did not have the ring. Remmer told Pugh that he knew there was money or a safe in the house and that she had to give him something. She replied that there was no money, but there was a safe in the master bathroom, and she complied with Remmer's order to get up and get it.

¶ 8 Remmer followed Pugh as she retrieved the safe and told her to open it. She explained that the safe belonged to her fiancé and that she did not know the combination, but offered to call him to get it. Remmer then took Pugh's cell phone from her and ordered her to pick up the safe and carry it downstairs. Remmer descended the stairs in front of Pugh as she tried to carry the steel safe, and when she reached the middle of the staircase, he took the safe from her and exited the house through the back door. Pugh locked the door behind him and called police. The safe contained a few checks and $7,200 in cash.

¶ 9 When police arrived, Pugh told them that a man who had previously delivered furniture to her house had returned and robbed her. She described Remmer as a bald African-American man, about 5 feet 10 inches tall, weighing 180 to 190 pounds. Pugh then called her fiancé, Reginald Steele, and her brother Michael, and told them that the man who delivered the furniture the prior week had returned and robbed her.

¶ 10 After Pugh gave him a description of the man who had robbed her, Steele went later that day to Dolton Furniture and, after speaking to the manager, obtained a copy of Remmer's driver's license. The following day, Pugh gave Remmer's driver's license to police and identified him in a photo array as the man who had previously delivered furniture to her house and returned, held a box cutter to her neck, and stolen a safe. A few days later, Pugh identified Remmer in a police lineup.

¶ 11 Rajeh Jibawi, sales manager for Dolton Furniture, confirmed that Remmer delivered furniture to Pugh's home on May 12 or 13, 2011, and that he was their only delivery man at that time. After the delivery, Remmer returned to the store and gave Jibawi the receipt signed by Pugh, but said nothing about any missing screws. Remmer was never authorized to return to Pugh's home on behalf of the store to repair any furniture or add any parts. Remmer was scheduled to work on Saturday, May 14, 2011, but he never arrived for work, and consequently, his employment was terminated that day. Jibawi stated that typically the store's delivery man carries a toolbox to assemble the furniture which includes screws, a utility knife, box cutters and a drill.

¶ 12 Chicago police officer Goodner testified that when he arrived at Pugh's home in response to the robbery, she told him that she knew her attacker and that he had previously been to her home. She described him as bald, 45 to 50 years old, six feet tall, 220 pounds, with a dark complexion and brown eyes. Chicago police detective Joel Krettek testified that the following day, Pugh gave him Remmer's name and identified him in a photo array as the man who displayed a box cutter and took her safe. Chicago police detective Kevin Dwyer testified that a

few days later, Pugh viewed a lineup and immediately identified Remmer with certainty. The description she had given police immediately after the robbery matched Remmer.

¶ 13 Prior to closing arguments, the trial court instructed the jury that what the attorneys say in closing arguments is not evidence, but merely what they believe the evidence has shown. The court further stated "[t]he arguments should be limited to the evidence and to reasonable inferences to be drawn from the evidence."

¶ 14 Defense counsel argued that the missing screws constituted reasonable doubt, asserting:

> "[t]here's holes in this case and reasonable doubt you can't really put a number on it. It's just a feeling you have. Use your common sense. Use your life experiences. Use your logical reasoning and come to one – the only conclusion that we believe is – is the right conclusion and that conclusion is that Mr. Remmer is not guilty 'cause the State cannot prove beyond a reasonable doubt that he was, in fact, the person who committed these crimes."

¶ 15 In rebuttal, the prosecutor argued:

> "[t]he State does have to prove this case beyond a reasonable doubt and, ladies and gentlemen, that's not proof beyond any doubt. That's not proof beyond all doubt. That's proof beyond a reasonable doubt. No one can determine what the reasonable doubt is. Only you can determine what – what the reasonable doubt is."

¶ 16 The prosecutor then asked the jury if it was "reasonable to believe" that Remmer saw valuable items in the house when he delivered the furniture and decided to return to steal them. She answered in the affirmative. The prosecutor pointed out Pugh's testimony that Remmer told

her someone from the store would return with the missing screws, and that he later returned and said he was there to fix the bed. The prosecutor asked the jury "is it reasonable that it happened that way? Absolutely it is." The prosecutor argued that Pugh did not identify the wrong delivery man, and told the jurors to use their "common sense" during deliberations and "think about what happened in this case. Think about what is reasonable in this case."

¶ 17 During jury instructions, the trial court explained that when considering the testimony of any witness, the jury could consider, among other things, "the reasonableness of his testimony considered in the light of all the evidence in the case." The court reiterated that closing arguments "should be confined to the evidence and to reasonable inferences to be drawn from the evidence," but do not constitute evidence themselves. The court also instructed the jury that the State had "the burden of proving the guilt of the Defendant beyond a reasonable doubt and this burden remains on the State throughout the case." Following deliberations, the jury found Remmer guilty of home invasion and armed robbery.

¶ 18 At sentencing, the State noted that the presentence investigation report (PSI) indicated that Remmer was raised in a stable family environment, graduated from high school, attended two colleges, received a certification in carpentry and performed volunteer work for the local YMCA and a church. The State argued, however, that despite those factors, Remmer had "a very long and violent history" including prior convictions for robbery, aggravated battery and two separate aggravated robberies. The State argued that the current offense demonstrated that Remmer continued to commit violent crimes and showed no signs that he could be rehabilitated, and requested a significant term of imprisonment.

¶ 19 Defense counsel argued that Remmer was 50 years old, had earned 24 hours of college credit while previously incarcerated, and had a supportive family that was present in court during the trial. Counsel pointed out that Remmer had certificates in carpentry, wood crafting and HVAC, and had been previously employed at the furniture store, the Drake Hotel, and as a manager at McDonald's. Counsel also argued that Remmer recovered from a previous drug problem, was involved in the community, performed volunteer services at the YMCA, and participated in a Bible study group and a 12-step recovery program while incarcerated, which included speaking with other inmates. In addition, counsel asked the court to consider the fact that Pugh was not injured.

¶ 20 In imposing sentence, the trial court stated that it considered the arguments of counsel in aggravation and mitigation, reviewed the PSI, and considered the facts of the case along with Remmer's criminal background, noting each of his prior convictions and sentences, and emphasizing that they were all violent crimes. The court acknowledged that Pugh was not injured, but nevertheless, this was Remmer's fourth violent crime. The court expressly stated that it considered the statutory factors in aggravation and mitigation, and concluded that the appropriate sentence was concurrent terms of 25 years' imprisonment.

¶ 21 On appeal, Remmer first contends that he was denied a fair trial when the prosecutor, in rebuttal argument, diminished the State's burden from proof beyond a reasonable doubt to mere reasonableness. Remmer acknowledges that the prosecutor properly discussed reasonable doubt, but claims that she conflated reasonable doubt with the question of whether the State's theory was "reasonable," thereby shifting the burden to Remmer. He argues that these are distinct concepts which likely confused the jurors into thinking that if they found the State's theory

reasonable, the State met its burden. Remmer acknowledges that he waived this issue when he failed to object during argument and raise the issue in a posttrial motion, but urges this court to consider it as plain error, claiming that the evidence in this case was closely balanced.

¶ 22 As a threshold matter, Remmer asserts that the proper standard of review for this issue is *de novo*, relying on *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007), where our supreme court held that the determination of whether a prosecutor's remarks were so egregious that a new trial is required is a question of law subject to *de novo* review. Remmer acknowledges, however, that there is currently a conflict in this court as to whether the appropriate standard of review for issues of prosecutorial error in closing arguments is *de novo* or abuse of discretion, the standard applied by the supreme court in *People v. Blue*, 189 Ill. 2d 99, 128 (2000). We have repeatedly declined to determine the appropriate standard of review where, as here, the result would be the same regardless of whether a *de novo* or abuse of discretion standard applies. *People v. Cosmano*, 2011 IL App (1st) 101196, ¶¶ 52-53; *People v. Anderson*, 407 Ill. App. 3d 662, 675-76 (2011); *People v. Maldonado*, 402 Ill. App. 3d 411, 421-22 (2010).

¶ 23 Because the parties agree that defendant forfeited this issue, see *People v. Ceja*, 204 Ill. 2d 332, 356 (2003), we consider defendant's contention that his claim should be reviewed as plain error. Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999). The plain error doctrine is a limited and narrow exception to the forfeiture rule; it exists to protect a defendant's rights, and the reputation and integrity of the judicial process. *People v. Herron*, 215 Ill. 2d 167, 177 (2005). To obtain plain error review, defendant must first demonstrate that a clear or obvious error occurred. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). Thereafter, defendant must show either that the evidence at trial was so closely balanced that the guilty verdict may have resulted from the error,

or that the error was so substantial that it deprived him of a fair trial. *People v. McLaurin*, 235 Ill. 2d 478, 489 (2009). The burden of persuasion is on defendant, and if he fails to meet his burden, his procedural default will be honored. *Hillier*, 237 Ill. 2d at 545.

¶ 24 A prosecutor is given considerable latitude in closing argument and is allowed to comment on the evidence and any fair, reasonable inferences that can be drawn therefrom. *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). Comments made during closing argument must be reviewed in context and in consideration of the entire closing argument of both the State and defendant, and those invited or provoked by defense counsel's argument will not be held improper. *Glasper*, 234 Ill. 2d at 204. Defendant's conviction will not be disturbed unless he demonstrates that the challenged remarks were so prejudicial that he was denied real justice or that the verdict would have been different absent the remarks. *People v. Runge*, 234 Ill. 2d 68, 142 (2009).

¶ 25 In this case, we find that the plain error doctrine does not apply because no error occurred. Remmer concedes, and the record confirms, that the prosecutor used permissible language when she discussed the reasonable doubt standard with the jury. The prosecutor's further arguments regarding whether it was "reasonable" to believe Pugh's account of what Remmer told her about the missing screws and whether it was "reasonable" to believe that Remmer had seen valuable items in Pugh's home when he delivered the furniture and formulated a plan to return to steal them, were fair comments on the evidence and did not seek to shift the burden of proof.

¶ 26 Further, the evidence against Remmer was overwhelming. Pugh had ample opportunity to observe Remmer both when he delivered the furniture and when he returned a week later.

Remmer was Dolton Furniture's only delivery person and his appearance was markedly different from that of the teenager he brought with him to the initial delivery. Pugh positively identified Remmer from a photo array and in a lineup. Accordingly, because the evidence was not closely balanced, the plain error doctrine cannot be applied and we honor defendant's procedural default of this issue. *Hillier*, 237 Ill. 2d at 545.

¶ 27 Remmer next contends that his 25-year sentence is excessive because the trial court improperly considered that he had a weapon and took property as aggravating factors when they are factors inherent in the offense. Remmer also contends that the court failed to give adequate consideration to the statutory factors in mitigation, his potential for rehabilitation, and the financial cost of keeping him in prison. Remmer points out that he is now 52 years old and argues that a 25-year sentence may be a *de facto* life sentence, and that due to his age, it is unlikely that he will commit another offense.

¶ 28 Home invasion and armed robbery while armed with a dangerous weapon other than a firearm are both Class X offenses with a sentencing range of 6 to 30 years' imprisonment. 720 ILCS 5/12-11(a)(1), (c) (West 2010); 720 ILCS 5/18-2(a)(1), (b) (West 2010); 730 ILCS 5/5-4.5-25(a) (West 2010). The trial court has broad discretion in imposing an appropriate sentence, and where, as here, that sentence falls within the statutory range, it will not be disturbed on review absent an abuse of discretion. *People v. Jones*, 168 Ill. 2d 367, 373-74 (1995). An abuse of discretion exists where a sentence is at great variance with the spirit and purpose of the law, or is manifestly disproportionate to the nature of the offense. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010).

¶ 29 The sentence imposed here was not excessive. The record shows the trial court expressly stated that it considered the statutory factors in aggravation and mitigation, the arguments of counsel, the information contained in defendant's PSI, and the facts of this case along with Remmer's criminal background.

¶ 30 Although the trial court is generally prohibited from considering a factor implicit in the offense as an aggravating factor at sentencing (*People v. Phelps*, 211 Ill. 2d 1, 11 (2004)), the court may consider as a sentencing factor the nature of the offense, including the circumstances and extent of each element as committed (*People v. Bowman*, 357 Ill. App. 3d 290, 304 (2005)). When discussing the facts of this case, the court noted that Remmer was armed with a weapon and took property that did not belong to him. The record, however, shows that the court did not use these facts to impose a harsher sentence, but instead, mentioned them when discussing the nature of the offense in this case. Consequently, we find that the court did not improperly use these facts as an aggravating factor.

¶ 31 The record further reveals that the trial court gave significant consideration to Remmer's criminal background, noting each of his prior convictions and sentences, and emphasizing specifically that this was Remmer's fourth violent crime. We observe that a sentencing court need not give a defendant's potential for rehabilitation greater weight than the seriousness of the offense (*Bowman*, 357 Ill. App. 3d at 304), and when the trial court determines that a severe sentence is warranted, defendant's age has little import (*People v. Rivera*, 212 Ill. App. 3d 519, 526 (1991)). Here, the court expressly found that Remmer's violent criminal history demonstrated that he lacked potential for rehabilitation. Remmer was 49 years old when he committed the home invasion and armed robbery in this case. In light of his criminal history,

Remmer's claim that it is unlikely that he will commit another offense due to his age is unpersuasive. This court will not reweigh the sentencing factors or substitute our judgment for that of the trial court (*Alexander*, 239 Ill. 2d at 213), and based on the record before us, we cannot say that the sentence imposed by the court is excessive, manifestly disproportionate to the nature of the offense, or that it departs significantly from the intent and purpose of the law. *People v. Fern*, 189 Ill. 2d 48, 56 (1999).

¶ 32 Remmer next contends, the State concedes and we agree that the $35 assessment for a serious traffic violation pursuant to section 16-104d of the Illinois Vehicle Code (625 ILCS 5/16-104d (West 2010)) must be vacated because he was not convicted of a traffic violation. We therefore vacate the $35 assessment from the Fines, Fees and Costs order.

¶ 33 Finally, the parties agree that Remmer is entitled to the $5 per day presentence incarceration credit pursuant to section 110-14 of the Code of Criminal Procedure (725 ILCS 5/110-14 (West 2010)) to be applied against his fines. Remmer spent 621 days in presentence custody and is therefore entitled to have his $80 assessment in fines offset in full. Pursuant to our authority (Ill. S. Ct. R. 615(b)(1) (eff. Aug. 27, 1999)), we direct the clerk of the circuit court to amend the Fines, Fees and Costs order to reflect an $80 credit against the fines imposed. Thus, Remmer's adjusted total assessment should be $370.

¶ 34 For these reasons, we vacate the $35 traffic violation assessment from the Fines, Fees and Costs order, and direct the clerk of the circuit court to further amend that order to reflect a credit that offsets Remmer's $80 in fines. We affirm Remmer's convictions and sentences in all other respects.

¶ 35 Affirmed as modified.