

THIRD DIVISION
January 21, 2015

No. 1-13-3212

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. 12 CR 3748
)	
ADRIAN PEREZ,)	Honorable
)	William T. O'Brien,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justices Hyman and Mason concurred in the judgment.

O R D E R

- ¶ 1 *Held:* Evidence at trial was sufficient to prove defendant's intent to kill the victim beyond a reasonable doubt where witnesses testified that defendant followed the fleeing victim in a van, accelerated, and hit the victim throwing him 10 feet into the air. Defendant's sentence was not excessive where it fell within statutory range and he failed to show that the trial court improperly considered an element of the offense as a factor in aggravation.
- ¶ 2 Following a bench trial, defendant Adrian Perez was found guilty of attempted first degree murder, aggravated battery to a senior citizen, aggravated battery with a deadly weapon and possession of a controlled substance. The trial court sentenced defendant only for the

attempted first degree murder charge, sentencing him to 30 years in prison. On appeal, defendant contends that the State failed to prove beyond a reasonable doubt that he intended to kill the victim. He also contends that his sentence is excessive in light of mitigating factors. Finally, defendant contends that the trial court improperly considered the victim's age as a factor in aggravation. We affirm.

¶ 3 Defendant was charged by indictment with two counts of attempted first degree murder, four counts of aggravated battery and one count of possession of a controlled substance. The charges arose out of an incident on December 2, 2011. While crossing a street on foot, Frank Kinney slapped the front of defendant's van as it inched into the crosswalk. Defendant reversed, drove onto the sidewalk and hit Frank sending him into the air. Defendant backed off the sidewalk and fled the area. Shortly thereafter, officers arrested defendant.

¶ 4 At trial, John Morahan testified that he was driving on Hollywood Avenue in Chicago on the evening of December 2, 2011. Morahan sat at a red stop light on the west side of Winthrop Avenue behind defendant's van. Traffic was heavy and the cars on the other side of Winthrop had backed up into the east crosswalk. Frank and Katherine Kinney were walking along the east side of Winthrop and began to cross Hollywood Avenue in the crosswalk. At the same time, defendant slowly rolled through the red light and began to inch into the crosswalk. As defendant inched forward he nearly hit Frank as he crossed. Frank hit the front of the van with his hand and said, "What are you doing?" The Kinneys finished crossing and continued walking along the Winthrop sidewalk. Defendant reversed his van, turning towards the Kinneys. After pausing, he "gunned" it, causing his tires to screech, and accelerated onto the sidewalk towards the couple. Katherine ran towards the adjacent building; Frank ran towards grass bordering the street. Defendant steered towards Frank and accelerated even faster, reaching at least 35 miles per hour.

Defendant's van hit Frank throwing him 10 feet up into the air and forwards. After hitting Frank, defendant's van continued forward for five or six feet before stopping, backing off of the sidewalk, and driving away down Hollywood. Frank did not move on the ground; he appeared to be dead.

¶ 5 Gary Abbott testified that he was walking by Winthrop and Hollywood that evening and observed the incident. His testimony was consistent with Morahan's.

¶ 6 Katherine Kinney testified that she was walking home from dinner with her husband, Frank Kinney, on the evening of December 2nd, 2011. They walked north along the east side of Winthrop avenue, approaching the intersection with Hollywood Avenue. When they got to the corner, they waited for the walk signal. Traffic was heavy due to rush hour, and one car remained in the crosswalk as the walk signal came on. Katherine and Frank were walking around the car when a minivan came through the intersection, getting closer and closer to the couple. The van got so close that they had to walk single-file. Katherine waved her hands at the van, but it continued "jerking" towards them. Frank said "Hey," and hit the hood of the van with his open hand. As Frank cleared the front of the van he swatted the van with the back of his hand near its headlight. The couple finished crossing the street and continued to walk along Winthrop. Katherine heard tires squeal behind her. She turned around and saw the van quickly reverse into the intersection. The van drove partially onto the sidewalk and stopped in the handicap ramp. Several seconds passed before the van "squealed forward" down the sidewalk towards the couple. Katherine threw herself against the nearby building. Frank ran down the sidewalk. He looked over his shoulder and ran left towards the parkway. The van steered towards Frank and went even faster. It hit Frank in the back. Frank flew "really far" through the air and landed "like a sack of potatoes." Katherine thought he was dead. The van then backed up into the street and

drove west down Hollywood Avenue. Katherine went to Frank, who lay crumpled up on his side, unresponsive. The police and an ambulance arrived and the ambulance took Frank to the hospital.

¶ 7 Frank Kinney testified that he was 61 years old at the time of the incident. As he and Katherine crossed Winthrop, a van came through the intersection through a red light. The couple waved at the van to make sure the driver could see them. They continued to walk. Once the van entered the crosswalk it moved forward twice and Frank thought it had hit Katherine's leg. He either touched or slapped the van to get it to stop. The couple finished crossing the street and from that point Frank remembered just "snatches of memory" before waking up in the hospital. He remained in the hospital for three days.

¶ 8 Dr. Marc Adajar testified that he treated Frank in the emergency room following the accident. Frank had significant head trauma and bruising on the left side of his body and face. Frank's brain was bleeding, which could have caused his death if it had gone untreated or worsened. Frank was under observation in the intensive care unit for 24 hours, which is protocol for the hospital. He did not require additional observation.

¶ 9 Chicago police detective Nicholas Spanos testified that he interviewed defendant following his arrest. Defendant initially claimed that he was with his girlfriend and a friend when Frank was struck. Later, when Spanos told defendant that both individuals denied being with him, defendant said that he had lost control of his van and struck a man. When Spanos confronted defendant about driving on the sidewalk, he said the man had hit his car and made him "mad". Defendant said he drove down the sidewalk attempting to scare the man.

¶ 10 The parties stipulated that a packet found in defendant's van when police arrested him contained cocaine. After the close of the State's case, the trial court denied defendant's motion for directed finding. Defendant presented no witnesses and did not testify.

¶ 11 The trial court found defendant guilty of possession of a controlled substance, aggravated battery to a senior citizen, aggravated battery with a deadly weapon, and attempted first degree murder. In explaining its findings on defendant's intent, the trial court noted that "Illinois Courts have addressed specific intent cases mostly in shooting cases." The court then cited several attempted murder cases involving the use of a gun. It also cited *People v. Mitchell*, 105 Ill. 2d 1 (1984), for the proposition that "abandonment of the intent to kill once the elements of attempt murder are complete is no defense to the crime."

¶ 12 At defendant's sentencing hearing, the State presented victim impact statements from both of the Kinneys. The State also noted a stipulation that defendant had no driver's license and defendant's statements in the presentence investigation report that he had used cocaine and consumed a six-pack of beer on the day of the incident. Defendant noted he had no criminal record and presented letters from two employers stating that he was a good employee. His mother and his younger sister each wrote letters stating that defendant was a good person and supported his family. His mother also testified that he was a good son and had two young daughters. Defendant spoke in allocution, thanking the court and stating "when I'm out, this won't ever happen again." While discussing the factors in aggravation, the trial court stated defendant became "enraged because a senior citizen slammed their hand on his car. And for that, he commits the very sinister act of running these people down." The trial court sentenced defendant to 30 years' imprisonment. Defendant appeals.

¶ 13 Defendant first contends that the State failed to prove beyond a reasonable doubt that he intended to kill Frank. Defendant notes that he stopped his van after hitting Frank and stated to officers that he intended only to scare Frank. He also argues that the trial court improperly compared his actions to the shooting of a gun.

¶ 14 The State responds that the evidence was sufficient to convict defendant beyond a reasonable doubt, arguing the case is factually similar to *People v. Smith*, 402 Ill. App. 3d 538 (2010).

¶ 15 Due process requires the State to prove each element of a conviction beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004), citing *In re Winship*, 397 U.S. 358, 364 (1970). When reviewing the sufficiency of evidence, a reviewing court must decide " 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *Cunningham*, 212 Ill. 2d at 278, quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

¶ 16 In Illinois, an attempted first degree murder occurs when: (1) a defendant intended to kill a victim and (2) performed an act that is a substantial step towards killing. *Smith*, 402 Ill. App. 3d at 547; see also 720 ILCS 5/8-4(a) (West 2010). Defendant does not challenge the sufficiency of the evidence to prove that he performed a substantial step towards killing Frank. Intent may be proven by circumstantial evidence including the nature of the assault, the use of a deadly weapon and the nature of the victim's injuries. *People v. Parker*, 311 Ill.App.3d 80, 89 (1999). A fact-finder may infer a defendant's intent to kill when he has willingly committed an act with the natural tendency to destroy another's life. See *Smith*, 402 Ill. App. 3d at 547, citing *People v. Koshiol*, 45 Ill. 2d 573, 578 (1970).

¶ 17 We find *Smith* instructive. In *Smith*, a police officer “boxed” the defendant's car into a parking spot. *Id.* at 540. The officer left his car, stood on the sidewalk in front of the defendant's car and identified himself as a police officer. *Id.* The defendant looked down, and then stared at the officer for 15 seconds. *Id.* at 547. The defendant drove onto the sidewalk, hitting the officer as he dove out of the way. *Id.* The defendant then continued his attempt to flee. See *id.* at 540.

The *Smith* court held that there was sufficient evidence of intent, noting, “[t]he natural consequences of the defendant's act would be to cause Officer Johnson harm or to destroy Officer Johnson's life had he not dived out of the way.” *Id.* at 547.

¶ 18 The present facts are similar to those of *Smith*. Ample evidence suggests defendant intended to kill Frank. He chose to reverse his vehicle out of traffic, to leave the street and to drive his van onto the sidewalk. Once he had aimed his van at the Kinneys, he paused for several seconds. Multiple witnesses testified that he accelerated so quickly that it caused his tires to squeal. When Frank attempted to flee by running in a different direction, defendant followed him. Multiple witnesses testified that defendant had accelerated to 35 miles per hour when he hit Frank, causing him to fly forward and up 10 feet in the air. Defendant struck Frank with his van, a deadly weapon. *People v. Schmidt*, 392 Ill. App. 3d 689, 704 (“It is well settled that a vehicle can be used as a deadly weapon.”) Frank was in the hospital for three days, and Dr. Adajar testified that his injuries could have been fatal without treatment or if they had worsened. The nature of the crime, the use of a deadly weapon and Frank's injuries all support a finding of intent to kill. As in *Smith*, the natural consequence of defendant's action was the destruction of Frank's life.

¶ 19 Defendant argues that he intended only to scare Frank, not to kill him. He points to his statements to Officer Spanos. On review we view the evidence in the light most favorable to the

State. The fact-finder could have discredited defendant's statements, particularly given the fact that he denied purposefully hitting Frank multiple times before claiming he had only wanted to scare him. Frank was clearly scared when he fled from the van, yet rather than stopping defendant followed Frank to ensure impact. Furthermore, defendant's contention that he "had complete control over his weapon" and "could stop his vehicle and control the impact or damage before it happens" is belied by the evidence. The evidence does not show that defendant stopped his van upon impact nor that he controlled the impact to ensure he committed only a battery. Multiple witnesses testified that defendant continued for five to six feet after hitting Frank. The van did not tap Frank, but sent him 10 feet into the air.

¶ 20 Defendant also notes that he did not hit Frank a second time, arguing that his fleeing the scene is clear evidence that he did not intend to kill Frank. As the trial court noted, defendant's abandonment of the attempt once he had taken the substantial step towards killing Frank is not a defense. *People v. Mitchell*, 105 Ill. 2d 1, 10 (1984). Defendant contends that the trial court misapplied *Mitchell*, as that court held that circumstances following an attempt can be considered to determine intent. See *id.* However, in *Mitchell* the defendant stopped beating a child, attempted to revive her, and then took her to the hospital. *Id.* The *Mitchell* court reasoned that these actions were inconsistent with an intent to kill. *Id.* Here, defendant fled the scene of the crime. Such an action is not inconsistent with the intent to kill, and thus *Mitchell's* further holding is inapposite. In addition, both Morahan and Katherine testified that Frank appeared to be dead after being hit. While defendant argues that he knowingly and intentionally left Frank alive, an alternative explanation is that he did not hit Frank again because defendant believed he had already succeeded in killing Frank.

¶ 21 Taking the evidence in the light most favorable to the prosecution, a rational fact-finder could find beyond a reasonable doubt that defendant intended to kill Frank. As defendant does not challenge that he committed a substantial step towards killing Frank, we affirm his conviction for attempted first degree murder.

¶ 22 Defendant next contends that his 30-year sentence is excessive given his age, lack of a criminal record, and dependent family. He notes that he is 25 years old and has no criminal history. He has two young daughters and a mother that depend on him. He also argues that the trial court placed too much emphasis on the harm to the Kinneys.

¶ 23 The State argues that defendant's sentence is appropriate given the nature of defendant's actions and its effect on the Kinneys. The State also notes the sentence is in the middle of the statutory sentencing range.

¶ 24 All sentences must reflect the seriousness of the offense committed and the objective of rehabilitating offenders to useful citizenship. *People v. Cooper*, 283 Ill. App. 3d 86, 95 (1996). The trial court must consider all factors of mitigation and aggravation. *People v. Quintana*, 332 Ill. App. 3d 96, 109 (2002). The court may consider impact statements from the victims and their families. *People v. Pavlovskis*, 229 Ill. App. 3d 776, 782 (1992).

¶ 25 A reviewing court may only reduce a sentence when the record shows that the trial court has abused its discretion. *People v. Streit*, 142 Ill. 2d 13, 19 (1991); *People v. Martin*, 2012 IL App (1st) 093506, ¶ 47. The reviewing court may not reverse the sentencing court just because it could have weighed the factors differently. *Streit*, 142 Ill. 2d at 19.

¶ 26 Attempted first degree murder generally has a sentencing range of 6 to 30 years. See 720 ILCS 5/8-4(c)(1) (West 2010); 730 ILCS 5/5-4.5-25 (West 2010). Because the victim was over 60 years old, defendant was subject to an extended sentence of up to 60 years. 730 ILCS 5/5-5-

3.2(b)(3)(ii), 5-8-2 (West 2010). A sentencing decision that falls within the statutory range is entitled to great deference. *People v. Hill*, 408 Ill. App. 3d 23, 29 (2011). Such a sentence will not be overturned 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. Fern*, 189 Ill. 2d 48, 54 (1999).

¶ 27 Defendant's sentence was well within the statutory range. The trial court explicitly stated that it reviewed all aggravating and mitigating factors. The court noted that defendant was behind the wheel without a license, and earlier in the day he had used cocaine and consumed a six pack of beer. Defendant became enraged when Frank slapped the front of his van and "unexplainably" responded by running Frank down. Through their letters, both of the Kinneys explained that their lives had been significantly and detrimentally changed by defendant's actions. The court also noted that in his allocution defendant focused on himself and showed no remorse for his actions. Given the nature of the crime and the impact on the Kinneys, a 30-year sentence was not at great variance with the spirit of the law or manifestly disproportionate to the offense.

¶ 28 Moreover, defendant does not argue that trial court refused to consider defendant's age and criminal record as mitigating factors; rather, he argues that the court incorrectly undervalued the mitigating factors while overvaluing the impact on the Kinneys. We will not reverse the sentencing court just because the factors could have been weighed differently. *Streit*, 142 Ill. 2d at 19. We find that the trial court did not abuse its discretion in sentencing defendant to 30 years in prison.

¶ 29 Finally, defendant also argues that the trial court improperly focused on elements of the crime by considering the victim's age during sentencing, as the victim's age was an aggravating

factor. The sentencing court may not consider factors implicit in the underlying offense. *People v. James*, 255 Ill. App. 3d 516, 531 (1993). Defendant bears the burden of establishing that the trial court based a sentence on improper considerations. *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 9. A sentencing court may mention aggravating factors when summarizing the circumstances of a case. See *id.* ¶ 12 (distinguishing between the consideration of a factor and the mere "summary of the circumstances of the case.")

¶ 30 The trial court alluded to Frank's age only once while explaining the sentence, stating defendant became "enraged because a senior citizen slammed their hand on his car. And for that, he commits the very sinister act of running these people down" The court did not state that it considered Frank's age to be an aggravating factor. In the court's one reference to the victim's age, the focus centered on the disproportionate nature of defendant's response rather than the fact that Frank was over 60 years old. The trial court's single allusion to Frank's age was merely a reiteration of the circumstances of the case and thus defendant has failed to show the trial court based the sentence on improper considerations.

¶ 31 For the foregoing reasons, we conclude that the State sufficiently proved beyond a reasonable doubt that defendant intended to kill Frank Kinney when he struck him with his van. We also conclude that the trial court did not abuse its discretion in sentencing defendant to 30 years' imprisonment nor did the court improperly consider an element of the offense when sentencing him. Accordingly we affirm the judgment of the circuit court.

¶ 32 Affirmed.