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2015 IL App (3d) 130543-U

Order filed August 11, 2015

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois.
Plaintiff-Appellee,)	
v.)	Appeal No. 3-13-0543
DEONTRAY E. JOHNSON,)	Circuit No. 12-CF-1040
Defendant-Appellant.)	Honorable Kevin Lyons, Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices Carter and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held:* (1) Prosecutor's comment during closing argument regarding reasonable doubt was not error.
(2) Trial court's application of the mandatory firearm enhancement to defendant's sentence did not violate defendant's constitutional rights.
(3) Defendant received a fair sentencing hearing, and his sentence was not excessive.

¶ 2 Following a jury trial, defendant, Deontray Johnson, was convicted of first degree murder (720 ILCS 5/9-1(a)(1),(2) (West 2012)) and aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1) (West 2012)) and sentenced to 80 years in prison. On appeal, he argues that (1)

the prosecutor made improper and prejudicial remarks regarding reasonable doubt during closing arguments, (2) his mandatory 80-year sentence is unconstitutional under the United States Supreme Court's holding in *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455 (2012) and the Illinois Supreme Court's ruling in *People v. Miller*, 202 Ill. 2d 328 (2002), and (3) his sentence should be reduced because the trial court failed to properly weigh the aggravating and mitigating factors.

¶ 3 At trial, Officer Jacob Faw testified that he was sitting in a parked police car facing Club Apollo in Peoria around 3 a.m. in the morning when he heard six gunshots and saw several people running from an empty lot across the street from the club. He got out of his car and approached the lot. He found six or seven people standing around a man who had been fatally shot. Faw later identified the man as Robreco King.

¶ 4 Dr. John Denton conducted an autopsy on King. He testified that a bullet entered King's back and severed his aorta, causing his death.

¶ 5 The State presented several witnesses who were at the club that evening. Queen Elizabeth Warfield testified that she was part of the security detail at Club Apollo on the night of the shooting. Warfield and other security personnel broke up a fist fight between King and a person called "Twin." Warfield kicked Twin out of the club and allowed King to stay. She testified that later that evening she saw King talking to another security guard. A few moments later, King was gone. Within 30 seconds, she heard gunshots outside the club.

¶ 6 Quennel Augusta recalled being at a cookout at Rochelle Criss' house the afternoon before the shooting. He attended the gathering along with his friends Jerome Jones, Jerome's twin brother, Jermaine Jones, their cousin, Zach Jones, and defendant. After the cookout, they drove Augusta's car to a club called LA Connection and then to Club Apollo. They arrived at

Club Apollo around 2:30 in the morning. Augusta parked the car in a vacant lot across the street. Inside the club, King hit Jermaine with a bottle and a fight ensued. Club security broke it up and asked Jermaine and Jerome to leave.

¶ 7 About 20 minutes later, someone told Augusta that the twins wanted a ride home so he left the club and walked to his car. As he backed out of the empty lot, the twins approached the car. Jerome opened the passenger door and got in the front seat, and Jermaine was getting in the backseat behind Jerome. Zach was about to get in the backseat behind Augusta when King walked up and said, "Get away from his car, I'm going to kick your butt." Zach then ran around the car and attempted to get in the other side. Augusta heard arguing for about 20 or 30 seconds, and then he heard two gunshots. He did not see who fired the shots. When he heard a third shot, he drove away. Augusta testified that he saw two bullet holes in the roof of his car the next day. He also found a fired bullet inside the car between the driver's seat and the door.

¶ 8 Jerome saw defendant position himself behind the rear passenger side of the car and fire a chrome .357 over the top of the car. He heard five shots and then witnessed King falling to the ground. He told Augusta to drive away. Augusta stopped the car to pick up Jermaine and then drove to Criss' house. Zach and defendant ran from the scene and joined them at Criss' house.

¶ 9 The next day, Officer Cary Hightower and his partner stopped a car driven by Zach Jones. Defendant was sitting in the passenger seat. Zach gave the officers consent to search the car. Hightower recovered a gun from the compartment in the armrest on the passenger side door.

¶ 10 Dustin Johnson, a forensic scientist specializing in firearms identification, stated that the gun found in the car was a .357 magnum revolver. He compared the gun to the fired bullet removed from Augusta's car and to bullet fragments removed from King's body. He opined that the bullet found in Augusta's car was fired from the gun found in Zach's vehicle. He testified

that the bullet fragments removed from King's body could not be identified or eliminated as having been fired from the revolver because they were too small.

¶ 11 Terry Broadway is Zach's cousin. He testified that he owned the car Zach was driving when he was stopped by police. The day after the shooting, defendant and Zach came to Broadway's house and borrowed the car. While they were there, defendant told Broadway that he shot King and that he saw him "go down." Defendant told him that he saw Zach arguing with King and that Jerome told him to shoot. Broadway stated that he saw Zach with the weapon the day he talked to defendant. Defendant also handled the gun. It was a .357 revolver. Broadway identified the gun, marked as Exhibit 3, as the gun he saw at his house.

¶ 12 Sherrick Newborn testified that he was 22 years old and that he was in federal custody awaiting sentencing for possession of a firearm. He also has prior convictions for armed robbery and misuse of a credit card. The State had not promised him a deal for testifying in this case, but he had been told that his cooperation would be relayed to the federal sentencing judge.

¶ 13 He stated that in August 2012, he and defendant were jailed together. Defendant told him about an incident outside Club Apollo in which King threatened to beat up some people. Zach Jones and one of the twins approached defendant and asked for his gun. Defendant ran to the car, leaned over it and fired several shots from a .357 revolver. Defendant told Newborn that whenever the twins had a problem, they called defendant because he had a gun.

¶ 14 Juan Nesbit also had several prior convictions and was awaiting sentencing for attempt armed robbery at the time of trial. He testified that, pursuant to a plea agreement for a sentence reduction, he agreed to testify against defendant and his co-defendant.

¶ 15 Nesbit testified that in June 2012 he shared a cell with defendant. Defendant asked Nesbit if it could be determined whether a bullet came out of a particular gun. Defendant then

told him that he fired five shots at a man named King outside Club Apollo because King "was running up on somebody." He told Nesbit that he shot King with a .357 revolver. Nesbit reported these statements to Detective Erin Barisch, who then outfitted Nesbit with a wire. Once he was back in the cell, Nesbit asked defendant to tell him everything again. Defendant said that Nesbit was being "fishy," but he again told Nesbit about the shooting and said that he shot King. However, at the end of the conversation, he stated that Zach was the shooter.

¶ 16 The next day, while Nesbit was still wearing the wire, defendant admitted that he touched the gun that police found in Broadway's car. Later, Nesbit asked defendant if he emptied the gun and put more bullets in it. Defendant replied, "[y]eah-not gonna have an empty gun on me."

¶ 17 On the third day, defendant and Nesbit discussed whether ballistics could determine if a bullet came out of a certain gun. Defendant then stated that the investigators could not identify the gun that the bullet was fired from in his case because they only had the top of the bullet. He told Nesbit, "They can't tell that bullet came out of that .357. There's a lot of .357s, they don't know that's the gun." Edited recordings of the conversations between Nesbit and defendant were published to the jury.

¶ 18 Tiffany Rose testified as a defense witness. She stated that on the morning of June 18, 2012, she and her boyfriend, King, attended Club Apollo and that King got into a fight with one of the twins. The twins left, and shortly thereafter she and King left. King walked ahead of her toward the lot across the street. He was talking to the twins and Zach. Rose heard gunshots, but she did not see who fired the shots. She told Detective Barisch that Zach walked around Augusta's car and reached in the back seat and that the shots came from the car.

¶ 19 Detective Barisch testified that Rose made several conflicting statements about the incident. In one statement, she said that Zach fired the gun. In another statement, she said that

she was standing approximately 100 yards away when she heard the shots. In another statement, she said that she heard shots at the same time she saw Zach reach toward the back of the car, that she took off running and that she stopped when she realized King was not with her. Rose said that she thought Zach was the only person near the car but that it was too dark to see anyone else.

¶ 20 During closing arguments, the prosecutor made the following comments:

"So first we have to prove that the defendant performed the acts which caused the death of Robreco King, and I would submit to you we have done that beyond a reasonable doubt, and you will not receive any instruction about reasonable doubt. We are not allowed to define it in Illinois. That is up to you to decide as ladies and gentlemen of the jury, but I would submit that we have proven that beyond a reasonable doubt."

¶ 21 The jury found defendant guilty of first degree murder and aggravated unlawful use of a weapon. It also found that defendant personally discharged a firearm that proximately caused another person's death.

¶ 22 At sentencing, the trial court found in aggravation that defendant had a criminal history, that the nature and circumstances of the offense involved serious harm and that it was necessary to sentence defendant to a significant term of imprisonment to deter others from committing the same crime. While discussing the aggravating factors, the court noted that "Robreco King wasn't looking, and others weren't looking because they were just having a good time, and you ran up and shot him." The court found that the mandatory firearm statute applied, as well as consecutive sentencing requirements. It then sentenced defendant to 50 years on the first degree murder charge, with an additional 30 year-enhancement for personally discharging a firearm, for an aggregate sentence of 80 years.

¶ 23

ANALYSIS

¶ 24

I

¶ 25

Defendant contends that the prosecutor committed reversible error when she attempted to define reasonable doubt for the jury by stating that "it is up to you to decide [reasonable doubt] as ladies and gentlemen of the jury." Defendant acknowledges that he forfeited review of this claim but asks this court to consider the issue under both prongs of the plain error analysis.

¶ 26

Before we can determine whether the plain error doctrine applies in this case, we must first determine whether an error actually occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) (to obtain relief under plain error, defendant must first show that a clear or obvious error occurred). Prosecutors are afforded wide latitude in closing argument, and improper remarks will not merit reversal unless they result in substantial prejudice to the defendant. *People v. Kitchen*, 159 Ill. 2d 1, 38 (1994) (citing *People v. Pittman*, 93 Ill. 2d 169, 176 (1982)). Although the United States Constitution does not prohibit courts from defining reasonable doubt (*Victor v. Nebraska*, 511 U.S. 1, 5 (1994)), Illinois law is clear that neither the court nor counsel should attempt to define the reasonable doubt standard for the jury (*People v. Speight*, 153 Ill. 2d 365, 374 (1992); *People v. Malmenato*, 14 Ill. 2d 52, 61 (1958)). The reasoning behind this rule is that "reasonable doubt" is self-defining and needs no elaboration. *Malmenato*, 14 Ill. 2d at 61.

¶ 27

In *People v. Downs*, 2015 IL 117934, defendant was charged with first degree murder and tried before a jury. During deliberations, the jury sent a note to the court asking for a definition of "reasonable doubt." After discussing the question with both parties, the court responded with this written reply: "We cannot give you a definition it is your duty to define." After further deliberation, the jury found defendant guilty. *Id.* ¶ 7.

¶ 28 On appeal, defendant admitted that he had forfeited the issue, but sought plain error review. The appellate court relied on *People v. Turman*, 2011 IL App (1st) 091019, and *People v. Franklin*, 2012 IL App (3d) 100618, and held that the trial court's reply inappropriately defined reasonable doubt. *People v. Downs*, 2014 IL App (2d) 121156, ¶¶ 23-28. It then concluded that the defendant met his burden to establish plain error and remanded the cause for a new trial. *Id.* ¶ 44.

¶ 29 Our supreme court reversed the appellate court's decision, stating that the trial court's answer in response to the jury's inquiry was "unquestionably correct." *Downs*, 2015 IL 117934, ¶ 24. The court held that the trial court's reasonable doubt comment was not error and declined to apply the plain error doctrine. *Id.* ¶¶ 32-33. In reaching its decision, the supreme court noted that the trial court's response honored the rule in Illinois that neither the court nor counsel should define reasonable doubt. *Id.* ¶ 24.

¶ 30 In this case, the prosecutor stated that "[reasonable doubt] is up to you to decide," and that the parties "are not allowed to define it in Illinois." In light of the ruling in *Downs*, we find no error in the prosecutor's comments. She did not attempt to define reasonable doubt, nor did she elaborate on its meaning. Her comments could not have been used to manipulate the standard by which the jury measured defendant's guilt. Thus, defendant has failed to show that a clear or obvious error occurred. We therefore decline to apply the plain error doctrine.

¶ 31 II

¶ 32 Defendant maintains that the mandatory nature of the firearm enhancement provision found in section 5-8-1(d)(iii) of the Unified Code of Corrections (Code) (730 ILCS 5/5-8-1(d)(iii) (West 2012)) violates both the United States and Illinois Constitutions as applied to him because it contravenes the principles set forth in *Miller v. Alabama* and *People v. Miller*. He

asks that we remand the case for resentencing to allow the trial court to exercise discretion in applying the 25-years-to-life enhancement.

¶ 33 Section 5-8-1(d)(iii) of the Code states that "if, during the commission of the offense, the person personally discharged a firearm that proximately caused great bodily harm, *** or death to another person, 25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court." 730 ILCS 5/-5-8-1(d)(iii) (West 2012). In this case, defendant was found guilty of first degree murder and personally discharging a firearm resulting in death to another person. Defendant faced a mandatory minimum term of 20 years for first degree murder plus 25 years for the firearm enhancement for a total minimum sentence of 45 years. See 730 ILCS 5/5-4.5-20(a)(1) (West 2012); 730 ILCS 5/5-8-1(d)(iii) (West 2012).

¶ 34 In *Miller v. Alabama*, the United States Supreme Court considered two cases in which 14-year-old defendants received sentences of life in prison without parole following murder convictions. The Supreme Court held that mandatory life imprisonment without parole for juvenile offenders violated the eighth amendment's ban on cruel and unusual punishment. *Miller*, 132 S. Ct. at 2475.

¶ 35 In *People v. Miller*, a 15-year-old defendant was convicted of murder based on accountability and sentenced to a mandatory term of nature life imprisonment under section 5-8-1(a)(1)(c)(ii) of the Unified Code of Corrections. See 730 ILCS 5/5-8-1(a)(1)(c)(ii) (West 1996). The Illinois Supreme Court found that the defendant's sentence violated the proportionate penalties clause of the Illinois Constitution as applied to a juvenile offender who had "one minute to contemplate his decision to participate in the incident and stand as a lookout during the shooting." *Miller*, 202 Ill. 2d at 341.

¶ 36 Here, defendant was sentenced for a homicide in which he was an active participant. Although he was under 18 years of age when he committed the crime, he was not sentenced to death or natural life without the possibility of parole, as were the defendants in *Miller v. Alabama* and *People v. Miller*. We find that those cases do not impose a categorical ban on mandatory non-life sentences such as the 30-year enhancement imposed on defendant. See *People v. Pacheco*, 2013 IL App (4th) 110409, ¶ 51 (holding that the *Miller* prohibition is limited to the imposition of mandatory minimum sentences of the death penalty or life without the possibility of parole); but see *People v. Dupree*, 2014 IL App (1st) 111872, ¶ 58 (noting that the convergence of a mandatory minimum 25-year firearm enhancements and a mandatory consecutive sentence for murder and attempt murder, resulting in a sentence that exceeds a juvenile's life expectancy, "raises serious constitutional issues").

¶ 37 III

¶ 38 Defendant also argues that he was denied a fair sentencing hearing because the court failed to properly weigh the mitigating and aggravating factors.

¶ 39 A trial court's sentencing decisions are entitled to great deference and weight and will not be altered on appeal absent an abuse of discretion. *People v. Alexander*, 239 Ill. 2d 205, 212-13 (2010). A sentence is an abuse of discretion if it is "greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *People v. Stacey*, 193 Ill. 2d 203, 210 (2000). While a sentencing judge must consider a defendant's youth and rehabilitative potential as factors in mitigation, the judge need not give them greater weight than the seriousness of the offense. *People v. Jones*, 297 Ill. App. 3d 688, 693 (1998). The trial court is not obligated to recite and assign value to each fact presented at the sentencing hearing. *People v. Meeks*, 81 Ill. 2d 524, 534 (1980). It is presumed to have considered all relevant

factors, including any mitigating evidence, absent some indication in the record to the contrary. *People v. Franks*, 292 Ill. App. 3d 776, 779 (1997).

¶ 40

A

¶ 41 First, defendant claims that the trial court improperly imposed a *de facto* life sentence and failed to consider his youth as a mitigating factor in violation of *Miller v. Alabama*. We disagree.

¶ 42 Defendant was subject to a sentence of 20 to 60 years' imprisonment, plus a firearm enhancement of 25 years to natural life. See 730 ILCS 5/5-4.5-20(a)(1) (West 2012); 730 ILCS 5/5-8-1(d)(iii) (West 2012). The trial court exercised discretion in imposing a sentence of 50 years for first degree murder and 30 years for the use of a firearm and sentenced defendant to an aggregate term of 80 years in prison. Although the imposed sentence was significantly greater than the minimum term, he was not sentenced to a term of natural life and his sentence was not barred by the eighth amendment or the proportionate penalties clause. The trial court properly exercised its discretion in sentencing defendant to an 80-year term.

¶ 43 Even if we consider defendant's sentence a *de facto* life sentence, the trial court did not abuse its discretion in imposing the aggregate term. As previously mentioned, *Miller* does not invalidate the penalty of natural life without parole, only its mandatory imposition on juveniles. See *Miller*, 132 S. Ct. at 2475. A minor may still be sentenced to life imprisonment without parole so long as the sentence is at the trial court's discretion. *People v. Davis*, 2014 IL 115595, ¶ 43. In this case, the trial court exercised its discretion and imposed a term between 45 years and natural life in prison. Moreover, the trial court's failure to specifically state that it had considered defendant's youth does not mean that the court did not properly consider the factor in sentencing defendant. See *Meeks*, 81 Ill. 2d at 534.

¶ 44

B

¶ 45

Defendant also argues that the trial court erred in considering the serious harm caused in committing the offense as a factor in aggravation.

¶ 46

In imposing a sentence, the trial court may not consider an inherent factor in the underlying offense for which the defendant was convicted as a factor in aggravation. *People v. James*, 255 Ill. App. 3d 516, 531 (1993). However, a court may consider the nature and circumstances of an offense, including the nature and extent of each element of the offense as committed by the defendant, as aggravating factors at sentencing. *Id.* at 532.

¶ 47

It is only necessary to remand a cause for resentencing where a reviewing court is unable to determine the weight given to an improperly considered factor. *People v. Newlin*, 2014 IL App (5th) 120518, ¶ 23. Where it can be determine from the record that the weight placed on the improperly considered factor was insignificant and did not lead to a greater sentence, it is not necessary to remand the case. *People v. Beals*, 162 Ill. 2d 497, 509-10 (1994).

¶ 48

Here, a review of the court's comments reveals that the court understood that the threat of serious harm was an inherent factor in the underlying offense. In reference to factors in aggravation, the court stated:

"In other words, looking unfavorably upon the defendant when sentencing him. These things: that the defendant has a history of prior delinquency or criminal activity, that the defendant's conduct did cause or threaten serious harm that may be inherent in the offense, but it is what it is. And that the sentence given is necessary to deter others from committing the same crime, and that the defendant was on parole, was he not?"

¶ 49 The trial judge made one brief reference to causing serious harm and promptly noted that it was an inherent element of the offense of murder. The judge otherwise stated that he considered numerous factors in mitigation and aggravation, the history and character of defendant, and the circumstances and nature of the offense. He also considered defendant's prior criminal history and the necessity to deter others from committing the same crime. In mitigation, the trial court noted that there was little to be said in defendant's favor other than defendant's contentions regarding his young age. Thus, it is clear from the record that the trial court properly considered several factors in aggravation and mitigation in sentencing defendant. The trial court placed minimal weight on the inherent factor of the serious harm caused. Nothing in the record indicates that the court sentenced defendant to a greater sentence based on that factor.

¶ 50 C

¶ 51 Last, defendant contends that his sentence hearing was unfair because the trial judge mischaracterized the offense as a cold-blooded assassination when he stated that "Robreco King wasn't looking, and others weren't looking because they were just having a good time, and you ran up and shot him."

¶ 52 In determining whether the trial court based its sentencing decision on proper aggravating and mitigating factors, a court of review must consider the record as a whole and must not merely focus upon a few words or statements that were made by the trial court. *People v. Dowding*, 388 Ill. App. 3d 936, 943 (2009).

¶ 53 When considering the court's words in the context of the whole sentencing record, it is apparent that the trial judge was attempting to make a comparison between his grandmother's description of a person's character and the character defendant revealed in this case. A full account of the court's statement is as follows:

"Now cellphones take pictures, but when I was younger, you would take a picture with a camera, and then you would have to take it to a store, a developing place, and they would take the film out. They would take it into this darkroom apparently. I don't know how it worked, and then a picture would develop.

And my grandmother would say things regarding that. She would say your character is like a photograph. It develops in the dark when nobody's looking. And Robreco King wasn't looking, and others weren't looking because they were just having a good time, and you ran up and shot him, but your character was on display there, Mr. Johnson, because you ran away into the dark.

Character is like a photograph. It develops in the dark, and when you ran away from pulling the trigger, you became a murderer, and you can say it all you want, but you did it."

A complete reading of the trial judge's statement demonstrates that he did not characterize the murder as a "cold-blooded assassination." The court's narrative, while ill-advised and irrelevant, was merely an attempt to emphasize the severity of the defendant's conduct and his lack of remorse and explain the sentence the court was imposing.

¶ 54 A trial court has broad discretionary powers in determining an appropriate sentence for a defendant because the trial court is better able to assess the credibility of witnesses and to weigh evidence presented during the sentencing hearing. See *People v. Jones*, 168 Ill. 2d 367, 373 (1995). During sentencing the trial court specifically stated that it had considered the presentencing investigation report, defendant's statement in allocution and the factors in

aggravation and mitigation. The court noted that defendant had a criminal history, which included a felony conviction while serving probation. The presentencing report also demonstrated that defendant displayed a blatant disregard of authority and had been disciplined on multiple occasions for violence at school. The trial court noted these factors in aggravation and also stated that few factors weighed in defendant's favor in mitigation. Defendant's sentence fell within the statutory range permissible. The trial court did not abuse its discretion in sentencing defendant to 80 years in prison.

¶ 55

CONCLUSION

¶ 56

The judgment of the circuit court of Peoria County is affirmed.

¶ 57

Affirmed.