2015 IL App (4th) 130430-U

NO. 4-13-0430

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
May 11, 2015
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Sangamon County
OLADAPO AJIBOLA,	)	No. 11CF327
Defendant-Appellant.	)	
	)	Honorable
	)	John P. Schmidt,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Turner and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed in part and reversed in part, concluding (1) defendant's sixth-amendment confrontation rights were not violated; (2) the State failed to prove criminal damage to a residence door; and (3) the trial court did not abuse its discretion in sentencing defendant to 22 1/2 years' imprisonment on the home invasion conviction.

¶ 2 Following a December 2012 jury trial, defendant, Oladapo Ajibola, was sentenced to 22 1/2 years' imprisonment for home invasion and 364 days in jail for two misdemeanor criminal damage to property convictions. On appeal, defendant contends (1) his sixth-amendment confrontation rights were violated when he was not allowed to question the State's complaining witness about accommodations granted her on a pending driving on a suspended license charge; (2) his conviction for criminal damage to a "residence door" should be reversed as a result of the State's failure to prove the crime as charged; and (3) the trial court abused its discretion in sentencing him to 22 1/2 years' imprisonment on the home invasion

conviction because the trial judge overemphasized factors inherent in the offense and failed to accord proper weight to his history and character. We affirm in part and reverse in part.

¶ 3 I. BACKGROUND

¶ 4 In April 2011, following an incident at 29 Belle Place in Springfield, Illinois, the State charged defendant by information with one count of home invasion (720 ILCS 5/12-11(a)(2) (West 2010)) (count I), one count of aggravated domestic battery (720 ILCS 5/12-3.3(a) (West 2010)) (count II), two counts of criminal damage to property (720 ILCS 5/21-1(1)(a) (West 2010)) for damage to car window (count III) and damage to a residence door (count IV), and one count of domestic battery (720 ILCS 5/12-3.2 (West 2010)) (count V). Following a December 2012 jury trial, defendant was found guilty on all five counts. The trial court entered judgment on the first four counts, dismissing count V under the one-act, one-crime rule.

¶ 5 A. Evidence Against Defendant

¶ 6 At trial, the State presented testimony from three witnesses who resided at 29 Belle Place at the time of the incident and a police detective who interviewed defendant following his arrest.

¶ 7 1. *Julie Lemmond's Testimony*

¶ 8 Julie Lemmond testified she lived at 29 Belle Place and knew defendant as her daughter Christina Leonard's ex-boyfriend. She stated, on the evening of April 26, 2011, defendant had "shown up" at the house, wanting to talk to Leonard. She told defendant he was not welcome and asked him to leave. She testified defendant did not leave, and later that evening, she heard two crashes—defendant's fist hitting Leonard's car window, and a brick being thrown through the front room window. Photographs of the broken windows were shown to the jury and introduced into evidence. Lemmond then testified she walked into the front room after

she heard defendant screaming from inside the house and saw defendant punch and kick Leonard in the face before he ran out of the house.

¶ 9 2. *Della Stroder's Testimony*

¶ 10 Della Stroder also testified she lived at 29 Belle Place. Stroder explained she was Leonard's aunt and knew defendant as Leonard's ex-boyfriend. She testified defendant came to the house just before dark on April 26, 2011, and knocked on the door to ask for Leonard. She told defendant Leonard was not home and he should leave. She testified she heard a crash in the front room later that evening after Leonard returned home. She called 9-1-1 after she saw the front window had been broken and a brick was lying on the floor. She testified she unlocked the door and opened it to see if defendant was still at the house. While the door was open, defendant jumped on the porch and "just barreled in *** like a football player attacking somebody." Stroder stated she fell backward into the refrigerator as defendant made his way into the house. She then testified she saw defendant hit Leonard in the face, kick her, and slam his foot into her face before he ran out of the house.

¶ 11 Stroder's 9-1-1 call was played for the jury. During the call, she identifies defendant as the man in the house, tells defendant to leave several times, and indicates Leonard needs medical attention because defendant "beat the piss out of her."

¶ 12 3. *Christina Leonard's Testimony*

¶ 13 Leonard testified she had been in a dating relationship with defendant for about a year, but she had ended it in September 2010 as a result of physical abuse. She described a March 2011 incident where defendant had punched her twice in the face. On the night of the April 26, 2011, incident, Leonard testified she and a friend had driven by the house and saw defendant sitting on the front steps. She kept driving and took her friend home before she drove

back to her house. When she got back, defendant was standing on the porch. Leonard stated she started walking toward the house and defendant tried to talk to her but she told him she did not want to "deal with anything." She testified she went inside the house and locked the door.

¶ 14 Later that evening, defendant knocked on the front room window. Leonard explained she started talking to him, but the conversation turned into a confrontation when she refused to go outside. She walked away and heard a crash coming from the front room a few minutes later. She walked into the front room and saw the window had been broken. Stroder opened the door to see if defendant was still outside, and Leonard saw defendant push his way past Stroder into the house. She started backing up when she saw defendant entering the house, and she picked up a bat and a knife to try to defend herself. She testified she dropped the bat and the knife when defendant began punching her in the face. After what she thought was the third punch, Leonard became dizzy and fell to the ground, where defendant began kicking her in the side with his steel-toe boots.

¶ 15 Photographs of Leonard's injuries from both the March 2011 and April 2011 incidents were shown to the jury and introduced into evidence.

¶ 16 4. *Detective Mark Pointer's Testimony*

¶ 17 Detective Mark Pointer of the Springfield police department testified he met with defendant following his arrest. A video and transcript of Pointer's interview with defendant was published to the jury. During the interview, defendant stated, "Yea I snapped. I haven't been there since then." He later stated, "I threw a rock inside that window….inside the house while she was still sitting there next to me. That's how much she hurts me man." Pointer asked defendant if he was in the house, to which defendant responded, "Yes, I was in the house."

Defendant told Pointer he hit Leonard "[m]aybe five times." He explained it was not the first time he had hit her; he hit her approximately three times in the past.

¶ 18 B. Cross-Examination of Christina Leonard

¶ 19 On cross-examination, defendant's attorney, Mark Wykoff, asked Leonard, "have you received any special favors or assistance from the State in exchange for you prosecuting this case against your former boyfriend?" Leonard responded she had not. Defense counsel then asked Leonard about the emergency order of protection she had taken out against defendant the day after the incident. He specifically asked whether she had apprised the trial judge of the fact she had been wielding a knife and a baseball bat at the time of the incident. Leonard responded she had not.

¶ 20 Defense counsel then asked Leonard if she had already been released from "the jail" when she went to the State's Attorney's office to discuss the incident. The State objected, and counsel apologized, stating he meant to say "hospital" instead of "jail." The State asked to approach the bench and the following exchange occurred:

> "[THE STATE]: There's evidence that our victim in this case had a warrant for failure to appear on driving on suspended license. The State is of the opinion that is certainly not relevant to these proceedings and if Mr. Wykoff is trying to get into that, we would object to any line of questioning.
>
> THE COURT: I don't think he is. I think he's backing off it. I think he got terms confused.
>
> [DEFENSE COUNSEL]: I did. However, Your Honor, I will say that she [was] asked if she received any special treatment

or favoritism from the State. She did have an existing warrant at the time on 27 April, that warrant was recalled and I'm a little dubious as to how that happened."

The trial court determined defense counsel's comment was "clearly a misstatement" and Leonard had not received any special treatment because she was a victim of a crime. Defense counsel explained he had evidence that proved Leonard did receive special treatment and asked to make an offer of proof. The following exchange occurred outside the presence of the jury.

"THE COURT: Now, the issue has come up that evidently Ms. Leonard had a warrant for her arrest for a driving offense and the warrant was quashed and Mr. Wykoff wishes to inquire on the witness—of the witness about the warrant being quashed, is that correct, Mr. Wykoff?

[DEFENSE COUNSEL]: No. At this juncture, I didn't want to inquire of this witness. I was ultimately going to establish through a law enforcement officer that responded to this event, if you would like me to proceed, Your Honor?

THE COURT: Yes, please do. Make your offer of proof."

¶ 21 Defense counsel explained Leonard was checked via dispatch and found to have a valid Sangamon County warrant for failing to appear at a "time-to-pay" hearing on December 21, 2010. He further explained the docket detail in that case showed Leonard was given a new "time-to-pay" hearing date on the same day she went to the State's Attorney's office, even though there was no proceeding set in the matter for that day. He stated, "Your Honor, I intended to establish the existence of the warrant through officer R. Castles. But if you're going to foreclose

me from doing that, at this time, I would make an offer of proof of that police report. And then also as part of my offer of proof, I would be offering the docket detail in 2010 TR 030244." He continued, "And, Your Honor, this is absolute proper cross-examination as to whether or not a witness has received any preferential treatment because it goes to their bias to testify in a way that comports with the wishes of the State. And, Your Honor, my first inquiry was whether or not she received any preferential treatment and her answer was no."

¶ 22 The State responded:

> "[THE STATE]: *** If you would like me to ask questions of the witness, I can. But I believe in this case she was brought in front of a judge, specifically, I believe, it was Judge Troemper and I believe the Judge looked at her face and ORed her based on her injuries and the Judge not wanting an individual in her condition to be in the jail, from what I understand. That's what happened. Certainly wasn't any special treatment on behalf of the State. Certainly wasn't any special treatment at all."

¶ 23 The trial court denied defense counsel's request to inquire into the area of Leonard's warrant. It explained,

> "THE COURT: *** It's not relevant. Number one, she said she didn't receive any special treatment. Number two, she is the alleged victim of this case. She had no choice but to report it to the police. They showed up. She reported what happened to her. She was taken to the hospital. The fact that she had a warrant for her arrest does not make it more likely or less likely that she is being

truthful or untruthful before this jury. I find it to not be relevant. I find that any—in the event that someone should find it relevant, that any prejudicial affect[*sic*] of that far outweighs any probative value of it in this matter.

Your request to inquire into that area, again, is denied for those stated reasons."

¶ 24 C. Defense Counsel's Objection to the State's Jury Instruction

¶ 25 While going through jury instructions, the State presented a modified Illinois Pattern Instruction (instruction) referencing criminal damage to a "house window." Defense counsel objected to the instruction, stating the information in this case charged defendant with criminal damage to a "residence door." The State explained there had been a scrivener's error on the information indicating it was a door rather than a window. It further explained all the discovery given to defendant and all the evidence presented at trial referenced damage to a house window and argued there could be no surprise to defendant over the variance. The court agreed with the State and allowed the instruction.

¶ 26 D. Defendant's Sentencing Hearing

¶ 27 In February 2013, defendant's sentencing hearing commenced. Before hearing arguments, the trial court vacated defendant's conviction on count II under the one-act, one-crime rule. Defendant's presentence investigation report (PSI) indicated he had been involved in nine major fights, had five major rule violations and seven minor rule violations, and had received one ticket during his 663 days in jail. Attached to the PSI was a letter from Leonard which stated, "There's no way you could ever get enough time for the hurt and trauma you put into my life." Defendant also attached a letter to the PSI wherein he apologized for his actions.

¶ 28 Defense counsel called defendant's father, Rasaq Ajibola, who testified he had taken defendant to two mental-health institutions in the past, and he expressed his belief defendant had never received the mental-health treatment he needs. He explained defendant was a good person before he met Leonard and had been attending college in Nigeria, where he was studying to be an engineer.

¶ 29 The State asked for a sentence in the range of 25 to 28 years. It placed emphasis on defendant's behavior in jail, his history of violence against Leonard, his behavior in the current case, and the fact he had two pending felony charges involving the use of force or violence against another. Defense counsel asked for a sentence of seven years. He argued defendant had no felony criminal history, there would be no deterrent effect because domestic violence crimes are crimes of passion, and imprisoning defendant would be a waste of taxpayer dollars as he would likely be removed back to Nigeria following his sentence.

¶ 30 After hearing arguments from both parties, the trial court sentenced defendant to 22 1/2 years' imprisonment on the home invasion conviction to run consecutive with two concurrent 364-day sentences on the criminal damage to property convictions. In announcing the sentence, the court explained it was not considering defendant's two pending cases or the fact he caused or threatened serious bodily harm. The court then stated defendant's sentence was necessary to protect society because his actions demonstrated unacceptable behavior. It further emphasized the psychological trauma defendant had caused Leonard and the serious nature of the home invasion in this case.

¶ 31 In March 2013, defendant filed a motion to reconsider his sentence. Following a May 2013 hearing, the trial court denied defendant's motion.

¶ 32 This appeal followed.

¶ 33 II. ANALYSIS

¶ 34 A. Defendant's Sixth-Amendment Rights Were Not Violated

¶ 35 Defendant first argues the trial court's refusal to allow him to cross-examine Leonard about accommodations granted her on a pending driving while license suspended charge violated his sixth-amendment (U.S. Const., amend. VI) confrontation rights and denied him a fair trial. The State argues it did not violate the confrontation clause because defense counsel did not attempt to cross-examine Leonard about her arrest. In the alternative, the State argues any constitutional error was harmless beyond a reasonable doubt. For the following reasons, we agree with the State.

¶ 36 1. *Defendant Did Not Attempt To Cross-Examine Leonard Regarding Her Arrest*

¶ 37 "A defendant states a violation of the confrontation clause by 'showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias' and thereby exposing the jury to facts from which it could reasonably draw inferences about the witness' reliability." *People v. Ciavirelli*, 262 Ill. App. 3d 966, 976, 635 N.E.2d 610, 618 (1994) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986)). The State contends defendant cannot show he was prohibited from engaging in otherwise appropriate cross-examination because he expressly declined to cross-examine Leonard about the subject he now raises on appeal—whether she received favorable treatment in return for her testimony. We agree with the State.

¶ 38 While cross-examining Leonard, defense counsel mistakenly asked her if she had just gotten out of "jail" when she went to talk to the State's Attorney about the charges against defendant. Defense counsel immediately corrected his mistake, indicating he meant to say "hospital," but the State requested a side bar with the trial judge. Outside the presence of the

jury, the State explained it believed defense counsel was attempting to question Leonard about her arrest on a warrant in an unrelated traffic case. Defense counsel explained he had gotten his words confused, but he stated, "I will say that she [was] asked if she received any special treatment or favoritism from the State. She did have an existing warrant at the time on 27 April, that warrant was recalled and I'm a little dubious as to how that happened." The trial court explained Leonard was a victim of a crime and it was not going to allow defense counsel to "get into it." At that point, defense counsel asked the court if he could make an offer of proof. The jury was dismissed and the following exchange occurred:

> "THE COURT: Now, the issue has come up that evidently Ms. Leonard had a warrant for her arrest for a driving offense and the warrant was quashed and Mr. Wykoff wishes to inquire on the witness—of the witness about the warrant being quashed, is that correct, Mr. Wykoff?
>
> [DEFENSE COUNSEL]: *No. At this juncture, I didn't want to inquire of this witness. I was ultimately going to establish through a law enforcement officer that responded to this event, if you would like me to proceed, Your Honor?*" (Emphasis added.)

¶ 39 Defendant asserts this court should not allow defense counsel's "out-of-context comment" to form the basis of a finding of waiver. We disagree defense counsel's direct answer to the trial court's inquiry into attempted cross-examination was an "out of context" comment. See *United States v. Olano*, 507 U.S. 725, 733 (1993) (holding waiver is the intentional relinquishment or abandonment of a known legal right).

¶ 40 Defense counsel plainly stated he intended to establish Leonard's warrant through the testimony of a law enforcement officer. He then stated he intended to establish favorable treatment through the introduction of a docket detail showing Leonard was given a new "time-to-pay" hearing in the traffic case on the same day she went to the State's Attorney's office to discuss the charges against defendant. In light of these statements, we find it abundantly clear defense counsel was not attempting to cross-examine Leonard regarding any incentive she may have had to testify against defendant. Accordingly, defendant's first argument on appeal is waived.

¶ 41 2. *Defendant's Constitutional Rights Were Not Violated*

¶ 42 Even if we view defendant's offer of proof as an attempt to cross-examine Leonard, we find no error in the trial court's refusal to allow this line of questioning.

¶ 43 The confrontation clause guarantees a defendant the right to cross-examine a witness against him for the purpose of showing the witness' bias, interest, or motive to testify falsely. *People v. Dall*, 207 Ill. App. 3d 508, 524, 565 N.E.2d 1360, 1369 (1991). Indeed, "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Van Arsdall*, 475 U.S. at 678-79. However, where a defendant seeks to "impeach a witness by showing that the witness has been arrested or charged with a crime[,] *** the arrest(s) or charge(s), to be used against the witness must give rise to the inference that the witness has something to gain or lose by his testimony." *People v. Triplett*, 108 Ill. 2d 463, 481, 485 N.E.2d 9, 18 (1985). A trial court retains broad discretion to impose reasonable limits on cross-examination. *Van Arsdall*, 475 U.S. at 679. This includes excluding evidence of bias that is too remote or uncertain. *People v. Frieberg*, 147 Ill. 2d 326, 357, 589 N.E.2d 508, 522 (1992).

¶ 44 In framing the issue on appeal, defendant contends the trial court refused to allow defense counsel to cross-examine Leonard about accommodations granted her on a *pending* driving while license suspended charge. However, a thorough review of the record reveals there was no "pending" traffic charge. The docket detail defense counsel entered into evidence during his offer of proof shows Leonard had already been convicted of the driving while license suspended offense in September 2010. Moreover, at the time Leonard testified against defendant, her fines had been turned over to a private debt collection agency. We conclude the State had nothing to offer Leonard, and Leonard had no reason to testify against defendant other than to report the crime committed against her.

¶ 45 Defendant also contends, as he did at trial, Leonard was allowed to "escape some responsibility for her driving offense" when she was arrested pursuant to the warrant and later released from incarceration on the same day she spoke with the State's Attorney regarding the current case. He specifically contends he should have been allowed to use the evidence contained in his offer of proof to show Leonard received favorable treatment in return for her testimony. We disagree.

¶ 46 "When a line of questioning is objected to or denied by the trial court, the defendant must set forth an offer of proof either to convince the trial court to allow the testimony or to establish on the record that the evidence was directly and positively related to the issue of bias or motive to testify falsely." *People v. Tabb*, 374 Ill. App. 3d 680, 689, 870 N.E.2d 914, 923 (2007).

¶ 47 Defendant's offer of proof consisted of a police report detailing Leonard's arrest and a docket detail showing Leonard was assigned a new hearing date on the same day she spoke with the State's Attorney regarding the current case. We find this offer of proof insufficient. Not

only did defendant's theory fail to provide direct evidence of bias or motive to testify falsely, but it also failed to present any evidence of State involvement in the matter. See *People v. Wright*, 234 Ill. App. 3d 880, 894, 601 N.E.2d 817, 827 (1992) (holding informal offers of proof must contain more than speculation and conjecture). Following defendant's offer, the State explained Leonard had been brought before a trial judge who had released her on her own recognizance based solely on her injuries, a position defendant now adopts on appeal. Accordingly, we find no abuse of discretion in the trial court's exclusion of this evidence. Any possible connection between Leonard's release from jail and her decision to testify against defendant was too remote and uncertain to have given rise to an inference she had anything to gain or lose by testifying.

¶ 48 3. *Any Error Was Harmless Beyond a Reasonable Doubt*

¶ 49 Even assuming, *arguendo*, we were to find an infringement of defendant's constitutional rights, reversal is not required where such error "is shown to be harmless beyond a reasonable doubt." *People v. Prevo*, 302 Ill. App. 3d 1038, 1048, 706 N.E.2d 505, 512 (1999). In determining whether error is harmless beyond a reasonable doubt, we consider: " 'the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.' " *People v. Young*, 128 Ill. 2d 1, 43-44, 538 N.E.2d 461, 470 (1989) (quoting *Van Arsdall*, 475 U.S. at 684).

¶ 50 Leonard was one of three witnesses who testified defendant had entered the residence without permission and brutally attacked her. Stroder's 9-1-1 call was played for the jury, and the State presented photographic evidence of both the broken windows and Leonard's injuries. Moreover, defendant's actions of being in the house, breaking a window, and attacking

Leonard were independently established by his own admissions to Detective Pointer in his postarrest interview that was played for the jury. Given the record before us, we conclude any alleged constitutional error was harmless beyond a reasonable doubt. We affirm defendant's conviction on count I.

¶ 51 B. Defendant's Conviction for Criminal Damage to a Residence Door Is Reversed

¶ 52 Count IV of the information alleged defendant "knowingly damaged property of Christina Leonard, being a residence door, located at 29 Belle Place, Springfield, Sangamon County, Illinois, without the consent of Christina Leonard, said damage being less than $300.00." The State never amended the information. Over defense counsel's objection, the State submitted a modified instruction using the language "house window." Defendant was convicted of the offense.

¶ 53 On appeal, defendant relies on *People v. Bueno*, 35 Ill. 2d 545, 548, 221 N.E.2d 270, 271 (1966), and argues his conviction must be reversed because the State failed to prove the crime as set forth in the information. The State disagrees. Relying on *People v. Collins*, 214 Ill. 2d 206, 219, 824 N.E.2d 262, 269 (2005), the State argues the question is one of variance and reversal is only required if the variance between the crime charged and the proof adduced at trial (1) is material and (2) could have misled defendant in making his defense. For the reasons that follow, we agree with defendant.

¶ 54 As our supreme court explained in *People v. Simpkins*, 48 Ill. 2d 106, 111, 268 N.E.2d 386, 389 (1971), "each complaint [must] state[ ] the name of the accused, the name, date and place of the offense, cite[ ] the statutory provision alleged to have been violated and set forth in the language of the statute the nature and elements of the offense charged." The State is required to prove these essential elements "as alleged and without variance." *People v. Miller*,

253 Ill. App. 3d 1032, 1036, 628 N.E.2d 893, 896 (1993); see also *People v. Givens*, 135 Ill. App. 3d 810, 816-17, 482 N.E.2d 211, 216 (1985) ("Essential allegations must be proved without variance."); *People v. Thomas*, 137 Ill. 2d 500, 522, 561 N.E.2d 57, 65 (1990) ("[A] variance between the facts alleged and the proof is *** fatal if the facts in question are *** essential elements of the offense charged.").

¶ 55 Our supreme court has long held, "Where an indictment [or information] charges an offense either against persons or property, the name of the person or property injured, if known, must be stated, and the allegation must be proved as alleged." *People v. Walker*, 7 Ill. 2d 158, 161, 130 N.E.2d 182, 183 (1955). For example, in *People v. Daniels*, 75 Ill. App. 3d 35, 40, 393 N.E.2d 667, 672 (1979), a grand jury indicted the defendant on the charge of armed robbery based on his taking of United States currency. Following a jury trial, defendant was convicted of the armed robbery, despite the fact the only proof adduced at trial in connection with the robbery concerned the taking of a watch. *Id.* The appellate court reversed, explaining:

> "It is clear from the record, and conceded by the State at oral argument, that the taking of a watch is not referred to in the indictment, and that the taking of currency was not proved or even mentioned at trial. In a criminal trial, it is the burden of the prosecution to prove beyond a reasonable doubt all material facts of the offense as charged by the indictment. [Citations.] By utterly failing to introduce proof to conform to the charge in the indictment, the State failed in its burden of proof at trial." *Id.*

¶ 56 Nonessential allegations, however, need not be proved as charged and may properly be disregarded as surplusage. *Collins*, 214 Ill. 2d at 221, 824 N.E.2d at 270. For

example, in *Collins*, the defendant was charged with reckless discharge of a weapon. The indictment named two officers who were allegedly injured as a result of the defendant firing his weapon into the air, but the State failed to present any evidence at trial concerning one of the officer's safety. On appeal, the Illinois Supreme Court affirmed the defendant's conviction, holding there was no fatal variance between the allegations and the proof adduced at trial. In so holding, the court noted, "The specific identity of the individual is not necessary to apprise a defendant of the nature of the offense [of reckless discharge of a weapon] and, thus, the inclusion of a named individual in the indictment is mere surplusage." *Id.* Thus, the issue in *Collins* was one of variance because the alleged defect involved allegations which were inessential to the charge.

¶ 57 As mentioned above, the State argues the issue in this case is one of variance. It asserts the language in the information stating defendant damaged Leonard's property by breaking a *door* was not an essential allegation, but rather a statement of the "means or manner" by which defendant damaged the *house*. In support of this argument, the State cites three cases where specific language in the charging instrument was found to be immaterial. See *People v. Taylor*, 84 Ill. App. 3d 467, 469, 405 N.E.2d 517, 519 (1980) (the defendant was charged with obstruction in that she "pushed and shoved" the officer, yet the evidence at trial showed only that she pulled his hair); *People v. Williams*, 384 Ill. App. 3d 327, 338, 892 N.E.2d 620, 630 (2008) (the defendant was charged with knowingly making physical contact of an insulting or provoking nature " 'by holding a knife, a deadly weapon, to [the victim's] throat', " yet the proof at trial showed only that the defendant had poked the victim with the knife in the head, side, and back); *People v. Lattimore*, 2011 IL App (1st) 093238, ¶¶ 1, 13, 955 N.E.2d 1244 (the defendant was

charged with aggravated battery for striking a security guard, yet the proof at trial showed only that the security guard was injured while wrestling the defendant).

¶ 58 We find the State's reliance on these cases inapposite. Unlike punching, striking, or holding a weapon to a specific part of the body, "residence door" is the name of the property allegedly injured, *i.e.*, an essential allegation of the offense of criminal damage to property. See *Walker*, 7 Ill. 2d at 161, 130 N.E.2d at 183. Accordingly, we conclude the State was required to prove the criminal damage to property charge as alleged in the information, and it failed to do so. As in *Daniels*, the breaking of a house window is not referred to in the information, and the breaking of a residence door was not proved or even mentioned at trial. "By utterly failing to introduce proof to conform to the charge in the [information], the State failed in its burden of proof at trial." *Daniels*, 75 Ill. App. 3d at 40, 393 N.E.2d at 672.

¶ 59 Even assuming, *arguendo*, we were to consider the issue as one of variance, defendant's claim still fails under the second prong—whether the defendant could have been misled in preparation of his defense. *Collins*, 214 Ill. 2d at 219, 824 N.E.2d at 269. The State argues defendant could not have been misled because he admitted he broke the window and all the discovery pertained to a broken window. However, count I of the information charged defendant with home invasion, and testimony at trial showed defendant committed the offense by forcing his way through a *residence door* with such force he knocked Stroder backward into a refrigerator. Thus, given the particular facts of this case, even if we were to address the issue as one of variance, we find it at least plausible defendant was misled in the preparation of his defense.

¶ 60 In any event, due to defense counsel's objection to the modified instruction, the State was well aware of its error and could (and should) have brought an amended information

pursuant to 725 ILCS 5/111-5 (West 2010). The State instead proceeded with the charge as initially written, which meant it was accepting its burden of proof with regard to all essential allegations, regardless of what defendant knew or should have known. Because no evidence was presented at trial showing damage to a residence door, defendant's conviction on count IV must be reversed.

¶ 61 C. The Trial Court Did Not Abuse Its Discretion in Sentencing Defendant

¶ 62 Last, defendant argues the trial court abused its discretion in imposing a 22 1/2-year sentence on the home invasion conviction because the sentencing judge (1) overemphasized factors inherent in the offense and (2) failed to accord proper weight to his history and character. We disagree.

¶ 63 1. *Standard of Review*

¶ 64 "Where a sentence falls within statutory guidelines, it will not be disturbed on review absent an abuse of discretion." *People v. Halerewicz*, 2013 IL App (4th) 120388, ¶ 40, 2 N.E.3d 333. "A trial court has wide latitude in sentencing a defendant, so long as it neither ignores relevant mitigating factors nor considers improper factors in aggravation." *People v. Roberts*, 338 Ill. App. 3d 245, 251, 788 N.E.2d 782, 787 (2003). Moreover, "[a] trial court need not articulate the process by which it determines the appropriateness of a given sentence," and it "has no obligation to recite and assign value to each factor presented at a sentencing hearing." *People v. Wright*, 272 Ill. App. 3d 1033, 1045-46, 651 N.E.2d 758, 766 (1995); *People v. Brazziel*, 406 Ill. App. 3d 412, 434, 939 N.E.2d 989, 1009 (2010) (quoting *People v. Hill*, 402 Ill. App. 3d 920, 928, 932 N.E.2d 173, 181 (2010)).

¶ 65 2. *The Trial Court Properly Considered Aggravating and Mitigating Factors*

¶ 66 Defendant argues the trial judge's comments concerning the seriousness of home invasion demonstrate his sentence was "essentially based on the inherent seriousness of the offense, not on any specific statutory aggravating or mitigating factors." See *People v. Conover*, 84 Ill. 2d 400, 405, 419 N.E.2d 906, 909 (1981) (holding a trial court abuses its discretion when it considers factors inherent in the offense). We disagree.

¶ 67 The Illinois Constitution provides, "All penalties shall be determined both *according to the seriousness of the offense* and with the objective of restoring the offender to useful citizenship." (Emphasis added.) Ill. Const. 1970, art. I, § 11. Indeed, our sister courts have referred to the "seriousness of the offense" as the most important sentencing factor. See, *e.g.*, *People v. Watt*, 2013 IL App (2d) 120183 ¶ 50, 1 N.E.3d 1145; *People v. Evans*, 373 Ill. App. 3d 948, 968, 869 N.E.2d 920, 938 (2007). Thus, we find it was appropriate for the trial court to consider the serious nature of the home invasion in this case.

¶ 68 Defendant further claims his mental-health difficulties "did not factor into the judge's sentencing decision." However, this argument ignores the following well-established rule: "when mitigating evidence is before the trial court, the court is presumed to have considered it." *Roberts*, 338 Ill. App. 3d at 251, 788 N.E.2d at 787.

¶ 69 A thorough review of the record in this case indicates the trial court properly considered both aggravating and mitigating factors in making its sentencing decision. In addition to the seriousness of the offense, the trial court considered the need to protect the public and the psychological trauma suffered by the victim in this case. See *People v. Ehrich*, 165 Ill. App. 3d 1060, 1075, 519 N.E.2d 1137, 1146 (1988) ("The circuit court may consider as an aggravating factor in determining the length of sentence to impose the degree of harm caused the victims, even where serious bodily harm is arguably implicit in the offense of which a defendant

was found guilty."). It also considered defendant's father's testimony, which the trial judge explicitly noted had an "impact" on him. Immediately thereafter, the court sentenced defendant to only 22 1/2 years' imprisonment despite the State's request for 25 to 28 years. We find no abuse of discretion in the trial court's imposition of a 22 1/2-year sentence on the home invasion conviction.

¶ 70 3. *No Sentence Reduction Is Warranted*

¶ 71 Defendant alternatively argues his lack of a criminal history, sincere apology, and acceptance of responsibility warrant a reduction in his sentence. In support of this argument, defendant contends (1) reviewing courts have repeatedly found a lack of prior criminal history to be a significant mitigating factor which justifies a lesser sentence, and (2) a defendant's history of psychological problems and hospitalization have been found to be mitigating factors. See *People v. Bigham*, 226 Ill. App. 3d 1041, 1049, 590 N.E.2d 115, 121 (1992); *People v. Wilkins*, 36 Ill. App. 3d 761, 767, 344 N.E.2d 724, 729 (1976); *People v. Margentina*, 261 Ill. App. 3d 247, 248, 634 N.E.2d 29, 30 (1994); *People v. Carlson*, 79 Ill. 2d 564, 589, 404 N.E.2d 233, 245 (1980).

¶ 72 While we recognize the trial court is charged with fashioning a sentence which "strikes the appropriate balance between the protection of society and rehabilitation of the defendant (*Bigham*, 226 Ill. App. 3d at 1049, 590 N.E.2d at 121)," we also note the weight attributed to aggravating and mitigating factors in sentencing depends upon the individual circumstances of each case. *Roberts*, 338 Ill. App. 3d at 251, 788 N.E.2d at 787. With these rules in mind, our supreme court has rejected the use of comparative sentencing from unrelated cases as a basis for claiming a trial court has abused its discretion. *People v. Fern*, 189 Ill. 2d 48, 62, 723 N.E.2d 207, 214 (1999) ("If a sentence is appropriate given the particular facts of that

case, it may not be attacked on the ground that a lesser sentence was imposed in a similar, but unrelated, case.").

¶ 73 Based on the record before us, we see no reason to disturb the trial court's sentence. The home invasion in this case was particularly brazen and calculated. Defendant sat for an extended period of time on the victim's porch after being told to leave multiple times, smashed a car window with his fist, and threw a brick through a window where he thought Leonard was sitting before he forced his way into the house and brutally attacked her. Therefore, defendant's sentence was well within the appropriate sentencing range.

¶ 74 III. CONCLUSION

¶ 75 We (1) affirm the trial court's judgment on the home invasion conviction and its imposition of a 22 1/2-year sentence; and (2) reverse the trial court's judgment on the criminal damage to property conviction. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2012).

¶ 76 Affirmed in part and reversed in part.