2016 IL App (1st) 131303-U

FOURTH DIVISION
May 5, 2016

Nos. 1-13-1303 & 15-0202 Cons.

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. 08 CR 23253
	)	
ISAAC PEREZ,	)	Honorable
	)	Evelyn B. Clay,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion in admitting other-crimes evidence during defendant's trial for armed robbery, and defendant's mandatory life sentence did not violate the Eight Amendment or proportionate penalties clause.

¶ 2 Following a jury trial, defendant, Isaac Perez, was convicted of two counts of armed robbery, and was sentenced to mandatory life imprisonment as a habitual offender. In this appeal, defendant contends that the trial court erred in admitting other-crimes evidence, and that the habitual criminal provision under which he was sentenced is unconstitutional as applied to him.

¶ 3 The record shows that defendant was charged with two counts of armed robbery in violation of 720 ILCS 5/18-2(a)(1) (West 2010). The charges stemmed from a November 8, 2008, incident in which defendant was alleged to have approached two Hispanic females in the parking lot of a McDonald's restaurant in the Humboldt Park neighborhood in Chicago, leaned inside their vehicle, and demanded jewelry at knifepoint.

¶ 4 Before trial, the State filed a motion to allow evidence of other crimes, alleging that defendant had been charged, and identified as the perpetrator, in six other armed robberies. The State initially sought to introduce other crimes evidence as to all six offenses, but later withdrew the request as to two of the armed robberies. The remaining four armed robberies occurred within the span of 30 days in the Humboldt Park neighborhood, and each involved an offender, identified as defendant, approaching a Hispanic female and demanding money or jewelry at knifepoint. The State alleged that the evidence could be used to prove defendant's identity, motive, intent, knowledge, modus operandi, consciousness of guilt, and absence of mistake in the instant offense.

¶ 5 After a hearing on the State's motion, the court granted the motion in part, allowing the State to enter evidence of only one of the four requested other offenses. The court limited the State to evidence involving the armed robbery that occurred on October 28, 2008, which was the closest in time prior to the offense at issue. In ruling on the State's motion, the court specifically found the evidence was admissible to establish identity, and that it was not admissible to establish modus operandi.

¶ 6 The evidence at trial established that around 9:30 a.m. on November 8, 2008, Elizabeth Gonzalez, her sixteen year old sister, Tanairi Colon, and their uncle, Weserlao Cruz, went to the McDonald's restaurant located at 3241 West North Avenue in Chicago. Gonzalez drove the three

to the restaurant, and parked her car in the McDonald's parking lot. The group entered the restaurant, ordered food, and sat down to eat. As they ate, Gonzalez and Colon noticed a man, whom they identified as defendant, sitting at a table without food and looking around. Gonzalez testified that she saw defendant "constantly visualizing [their] area."

¶ 7 After the group finished eating, they exited the restaurant and walked to Gonzalez's car in the parking lot. Colon sat in the back seat, and Cruz sat in the front passenger seat. Before Gonzalez entered the car, she spent a few minutes attempting to put a child's seat inside the trunk. The seat, however, would not fit, and Gonzalez eventually put it back into the back seat. Gonzalez began to enter the driver's seat but before she was able to close the door, defendant approached and held a kitchen knife to Gonzalez.

¶ 8 Colon testified that she saw defendant approach and place the kitchen knife to Gonzalez's left torso area near her ribs, and Gonzalez testified that defendant put the knife to the side of her face. Gonzalez testified that she honked the horn and shouted for help, but that no one came to their aid. Defendant then moved the knife to Gonzalez's waist, and said "Don't move or I'll kill you" and "Nobody move or I'll kill her." He demanded jewelry, and pointed to Cruz, who was wearing a gold bracelet. Cruz gave Gonzalez the bracelet, who then gave it to defendant. Gonzalez testified that she also gave defendant her necklace, and shouted to Colon, "Give me your jewelry because he [is] going to kill me." Colon took off her necklace and handed it to Gonzalez, who gave it to defendant. Gonzalez testified that defendant's knife punctured her jacket and cut her. Defendant then demanded the car keys, which he kicked under the car, and fled.

¶ 9 Gonzalez called the police and two police officers arrived a short time later. Gonzalez and Colon described the offender to the responding police officers as a Hispanic male. Colon

testified that she remembered telling the officers that the offender had a teardrop tattoo on his left eye.

¶ 10 On November 22, 2008, Colon and Gonzalez went to the police station to view a lineup. They separately viewed the lineup through a one-way mirror, and both Colon and Gonzalez identified defendant as the man who robbed them. Gonzalez immediately identified defendant by his face, and testified, "You can't forget a face that injured you." Colon looked at the lineup for about five minutes before identifying defendant.

¶ 11 The State introduced surveillance video from inside the McDonald's restaurant and in the restaurant parking lot. Gonzalez identified herself, Colon, and Cruz in the video. She also identified defendant, who can be seen in the McDonald's restaurant, and wandering around the parking lot near the victims, before approaching Gonzalez's car. Gonzalez testified that defendant could no longer be seen in the video during the offense because he was bent over and leaning in to the car.

¶ 12 The State then presented the testimony of Canusco Figueroa via an interpreter. Before Figueroa took the stand, the court gave the following limiting instruction to the jury:

> "Evidence will be received that the Defendant has been involved in an offense other than that charged in this indictment. This evidence will be received on the issue of the Defendant's identification, and may be considered by you only for that limited purpose. It is for you to determine whether the Defendant was involved in that offense and, if so, what weight should be given to this evidence on the issue of identification."

¶ 13 Figueroa, a 46-year old Hispanic woman, testified that on October 28, 2008, at 12:15 p.m., she was bringing her nine-year-old son over to her mother's house at 1931 North St. Louis Avenue in Chicago. As she got to the door and rang the bell, Figueroa noticed a man getting off of a bicycle on the street near her mother's house. The man, whom she identified as defendant, left the bicycle and came inside her mother's gate. He walked up the stairs towards Figueroa and her son and asked Figueroa "about some names, if they live[d] on the third floor."

¶ 14 Defendant then pulled out a kitchen knife, and asked Figueroa if she "care[d] a lot for the child." Defendant told her to give him all the money in her pockets and the chain she was wearing, or he would hurt the child. Figueroa gave defendant an envelope of money and the chain. Defendant then went back down the stairs to his bicycle, and shouted at Figueroa to not call the police. Figueroa yelled back that she was not afraid and was going to call the police.

¶ 15 A teacher at a nearby school came outside and called the police, who arrived soon after. The teacher interpreted for Figueroa as she communicated with the responding officers. Figueroa could not remember the description she gave of the offender, other than that he was "a thin person." She believed she said that the offender was Puerto Rican, because he "look[ed] Spanish. He looked Latino, Mexican or Puerto Rican."

¶ 16 On November 22, 2008, the police called Figueroa and asked her to view a lineup. Figueroa went in to the station, viewed the lineup, and identified defendant as the man who robbed her. Figueroa testified that she was able to recognize him because "at the time he was asking me questions, asking me about the people that live upstairs, I saw his features and his face. And I cannot erase that when I saw the knife."

¶ 17 Detective Bruce Kischner testified that he is a robbery detective who works mostly in the Humboldt Park area, and he was assigned to investigate the November 8, 2008, robbery of Colon

and Gonzalez. On November 22, 2008, Detective Kischner contacted Gonzalez and Colon to come to the station to view a lineup. After they arrived, Detective Kischner first brought Gonzalez into the room to view the lineup. He explained the procedure to Gonzalez and provided her with a lineup advisory form, which she read and signed. Upon viewing the lineup, Gonzalez immediately identified defendant as the person who robbed her, and started shaking and crying.

¶ 18 Detective Kischner then brought Colon in the room to view the lineup. He went through the same procedure with Colon, who also read and signed the lineup advisory form. After viewing the lineup, Colon also identified defendant as the offender. Detective Kischner agreed that Colon did not immediately identify defendant, but believed that it took a "[c]ouple minutes" not five minutes.

¶ 19 On cross-examination, Detective Kischner testified that defendant did not have a teardrop facial tattoo on November 22, 2008, at the time of the lineup.

¶ 20 Chicago Police Officer Kimberly Oppedisano testified that she placed defendant under arrest on November 22, 2008. She included a physical description of defendant in the report, including his height, weight, hairstyle, race and gender. She testified that the way she obtained that information was either through an identification card, or by asking defendant. Officer Oppedisano identified defendant's arrest photo and testified that it accurately depicted his appearance on the date he was arrested. She noted that his appearance had changed since his arrest in that he had gained weight and obtained eyeglasses.

¶ 21 The State rested, and the defense called Detective Robert Carrillo, who testified that he was assigned to the investigation of the armed robbery of Figueroa. He interviewed her via an interpreter, and Figueroa described the offender as a Puerto Rican male, five-foot nine-inches

tall, 150 pounds, and wearing a cap or hat. She also told him that the offender had a light complexion, a skinny face with stubble, short hair, and an overbite with his teeth showing.

¶ 22 The parties then stipulated that Chicago Police Officer Michael Sanchez would testify that he responded to a call of an armed robbery on November 8, 2008, and met with Gonzalez, Colon and Cruz. During the interview, the following description of the offender was given: "5'10 [*sic*], 30 years old, 170lbs, brown hair, brown eyes, unknown hair style, medium complexion and tear drops tattoo on the left eye, tan hoody [*sic*] hooded sweatshirt, and black jacket." Officer Sanchez prepared an "Original Case Incident Report" relating to the incident. He did not put in the report that Gonzalez told him that the offender placed a knife to her head, or that she hit the car horn and shouted for help. He also did not put in the report that Gonzalez told him that "the offender leaned down between the car door or that the offender punctured her coat with his knife." He did not put in the report that she told him that she saw the offender in the parking lot before getting into her car, that she believed he was a panhandler, or that she looked at his face in the parking lot prior to getting into her car.

¶ 23 The defense rested, and the parties presented closing arguments. The court read the jury instructions, including the instruction regarding the other crimes evidence. After deliberations, the jury returned a verdict finding defendant guilty of the armed robberies of Gonzalez and Colon. Defendant filed a motion for a new trial, however, it appears that the motion was temporarily overlooked.

¶ 24 The matter eventually proceeded to sentencing, and the State informed the court that because defendant had two prior Class X felony convictions for home invasion with a firearm in 2006 and armed robbery in 1997, he was required to be sentenced to natural life in prison under the habitual criminal provision. The court stated that it had considered the presentence

investigation report and the mitigating circumstances, and sentenced defendant to natural life in prison. The court then denied his motion to reconsider that sentence, reasoning that the sentence was mandatory. Defendant filed a notice of appeal on April 11, 2013.

¶ 25 On December 5, 2014, the court became aware that it had failed to rule on defendant's previously filed motion for a new trial. The court heard argument, and denied the motion. Defendant filed a second notice of appeal on December 19, 2014.

¶ 26 In this appeal, defendant maintains that the trial court erred in permitting the State to introduce evidence of the armed robbery of Figueroa. Defendant also contends that, as applied to him, Illinois's habitual criminal provision is unconstitutional because it is disproportionate to the severity of the offense and constitutes cruel and unusual punishment. Specifically, defendant contends that his sentence "violates the proportionate penalties clause of the Illinois Constitution and the Eighth Amendment of the United States Constitution" because "it mandates a life sentence without the possibility of parole even though no one was physically harmed during the robbery."

¶ 27 Defendant first argues that the trial court erred in allowing the State to introduce evidence of other crimes, specifically the armed robbery of Figueroa. He contends that the evidence was not admissible to show identity because there was "no physical evidence recovered to connect [defendant] to the charged crime and the other crime" and it was also not admissible to show *modus operandi* because "the two crimes were not similar and distinct enough to corroborate his identification." The State, however, asserts that the court properly exercised its discretion in admitting this evidence, or, in the alternative, even if the admission was erroneous, any such error was harmless in light of the overwhelming evidence of defendant's guilt.

¶ 28 A court's decision of whether to admit evidence of other crimes will not be reversed absent an abuse of discretion. *People v. Johnson*, 406 Ill. App. 3d 805, 808 (2010). Such an

abuse will be found only where "the trial court's evaluation is unreasonable, arbitrary, or fanciful, or where no reasonable person would adopt the trial court's view." *Id*. Evidence of crimes for which a defendant is not on trial is inadmissible to show that defendant's propensity to commit a crime. *People v. Martin*, 2012 IL App (1st) 093506, ¶ 35 (citing *People v. Quintero,* 394 Ill. App. 3d 716, 725 (2009)). Such evidence may, however, be admitted when relevant to prove any other material issue in a case, including defendant's identity. *People v. Monroe,* 366 Ill. App. 3d 1080, 1090 (2006) (citing *People v. Kimbrough,* 138 Ill. App. 3d 481, 484 (1985)).

¶ 29 Other crimes evidence may be admissible to show identity in one of two ways. First, it may be admissible to "link[] the defendant to the offense at issue through some evidence, typically an object, from another offense." *Quintero,* 394 Ill. App. 3d at 727. Second, the evidence may also be admitted under a theory of "*modus operandi*," which involves reliance on an inference that a distinctive pattern of criminal activity earmarks the crimes as the work of a particular individual or group. *People v. Robinson*, 167 Ill. 2d 53, 65 (1995).

¶ 30 In this case, the trial court permitted the State to introduce evidence of other crimes as to the issue of "identity." Because the trial court explicitly found that the evidence was *not* admissible to show "*modus operandi*," presumably, the trial court intended to admit the evidence under the first method, in which defendant is linked to the offense through some evidence. The State contends that this was proper because, in addition to the offenses having "much in common," there was also "a piece of evidence that linked them together—the kitchen knife."

¶ 31 Although the victims of both crimes testified that defendant was armed with the same *type* of weapon, namely, a kitchen knife, the weapon was never recovered or identified. There was no evidence elicited at trial that would show that the same kitchen knife was used in both offenses so as to "link[] the defendant to the offense at issue through some evidence, typically an object, from another offense." *Quintero*, 394 Ill. App. 3d at 727; see *People v. Clark*, 2015 IL

App (1st) 131678, ¶ 51 (where there was no common piece of evidence linking two crimes, evidence from the other crime could not be admitted under the identity exception to the bar on other-crime evidence); *cf.*, *People v. Martin*, 408 Ill. App. 3d 44 (2011) (where shell casings recovered from the scenes of two separate shootings were found to have been fired by the same gun, the identification of defendant as being the shooter in one shooting was properly admitted to show his identity as the shooter in the other shooting); *Martin*, 2012 IL App (1st) 093506 (same); *People v. Coleman*, 158 Ill. 2d 319 (1994) (where the evidence showed that the same gun was used in two different shootings, the evidence showing that defendant shot and killed the other-crime victim linked the defendant to the instant offense). In these circumstances, the first identity exception to the bar on other-crime evidence would not apply.

¶ 32 The State also contends that the evidence could have been admitted to show defendant's "*modus operandi*." However, before turning to the merits of this argument, we must address the applicable standard of review. Defendant maintains that, because the trial court specifically found that the evidence was not admissible for *modus operandi*, this court may not find the evidence admissible for that purpose without finding that the trial court abused its discretion.

¶ 33 As stated, a trial court's ruling on the admission of other crimes evidence is reviewed for an abuse of discretion. However, it is the correctness of the result reached, not the reasoning employed by the trial court, which is before this court. *People v. York*, 29 Ill. 2d 68, 71 (1963). Similarly, a reviewing court "can sustain the decision of a lower court for any appropriate reason, regardless of whether the lower court relied on those grounds and regardless of whether the lower court's reasoning was correct." *People v. Novak*, 163 Ill. 2d 93, 101 (1994). Specifically, "[w]here a trial court's admission of evidence is proper on some ground, it will not be disturbed even though the court gave the wrong reasons." *Id.* at 101-02, quoting *People v.*

Church, 102 Ill. App. 3d 155, 166 (1981). Thus, the question before this court is whether the trial court abused its discretion in admitting the other crimes evidence, not whether the trial court was correct in the reasoning it provided for the evidence's admission.

¶ 34 The *modus operandi* exception has been described as circumstantial evidence of identity on the basis that crimes committed in a similar manner suggest a common author and strengthens the identification of the defendant. *People v. Shief*, 312 Ill. App. 3d 673, 681 (2000). Where such evidence is offered to prove modus operandi, "there must be a high degree of similarity between the facts of the crime charged and the other offenses in which the defendant was involved." *Id*. quoting *People v. Illgen*, 145 Ill. 2d 353, 372–73 (1991). Distinctive links may be found in evidence that the defendant "used similar weapons, dressed the same, acted with the same number of people, or used a distinctive method of committing the particular offense." *Quintero*, 394 Ill. App. 3d at 726, citing *People v. Phillips*, 127 Ill. 2d 499 (1989). Although there must be a persuasive showing of similarity, the "test is not one of exact, rigorous identity" (*Id*. citing *Phillips*, 127 Ill. 2d at 520–21) and "some dissimilarity will always exist between independent crimes" (*Id.* citing *People v. Taylor*, 101 Ill. 2d 508, 521 (1984)).

¶ 35 In these circumstances, we find enough similarities between the charged offense and the other crime so as to earmark the crimes as the handiwork of defendant and permit introduction of evidence under the theory of *modus operandi*. The armed robberies occurred within 11 days of each other and less than a mile apart. Both offenses took place in public, during daytime hours. In both offenses, the perpetrator acted alone and used a kitchen knife to threaten Hispanic female victims. He also made specific threats of harm to the victims, and demanded and received jewelry in each case. Given the foregoing similarities, we conclude that the trial court did not abuse its discretion in admitting the evidence of other crimes.

¶ 36 We also note that no objection has been made that the jury instructions were improper. We agree that the jury was properly instructed at the time of the testimony and thereafter, during the general instructions at the close of the case, that the evidence of other crimes was to be considered only on the issue of defendant's identification.

¶ 37 Moreover, as stated previously, defendant had been also charged with six other armed robberies, and the State initially moved to admit other crimes evidence from those offenses, and later withdrew the request as to two of the offenses. The remaining four other armed robberies occurred within the span of 30 days in the Humboldt Park neighborhood, and each involved an offender, identified as defendant, approaching a Hispanic female and demanding money or jewelry at knifepoint. The court exercised its discretion in limiting the other crimes evidence to just one of those offenses, and in these circumstances, we find no abuse of discretion by the trial court in doing so.

¶ 38 Nevertheless, even if we were to find error, we would conclude that any error was harmless. The improper introduction of other crimes evidence is harmless error when a defendant is neither prejudiced nor denied a fair trial based upon its admission. *People v. Nieves*, 193 Ill. 2d 513, 530 (2000). Although the erroneous admission of other-crimes evidence ordinarily calls for reversal, the evidence must have been a material factor in the defendant's conviction such that, without the evidence, the verdict likely would have been different. *People v. Hall*, 194 Ill. 2d 305, 339 (2000). If it is unlikely that the error influenced the jury, reversal is not warranted. *Id.* citing *People v. Cortes*, 181 Ill. 2d 249, 285 (1998).

¶ 39 Defendant points to the alleged inaccuracies in the descriptions given by Gonzalez and Colon to argue that the evidence was not strong enough to allow a finding of harmless error. He specifically contends that, contrary to the description given of the perpetrator, he did not have a

facial tattoo, and he "weighed 207 pounds, which is significantly greater than the 170 pounds described by the witnesses." Defendant also questions the "suggestive composition" of the lineup, arguing that "two of the fillers had significantly longer hair than [defendant], and *** [defendant] is noticeably taller than the rest of the men in the lineup." We are unpersuaded.

¶ 40 We note that defendant did not argue on appeal that the trial court erred in denying his motion to suppress identification and ruling that the lineup was not suggestive. The law does not require that lineups contain near identical participants (*People v. Johnson*, 149 Ill. 2d 118, 147 (1992)), and the relatively minor differences in appearance of which defendant complains do not make the lineup suggestive. Additionally, where a witness makes a positive identification, precise accuracy in the preliminary description is not necessary. *People v. Mendoza*, 62 Ill. App. 3d 609, 616 (1978).

¶ 41 In this case, both Gonzalez and Colon made positive and unequivocal identifications of defendant as the man who robbed them, both at the lineup and at trial. Gonzalez, specifically, testified that she had three opportunities to view defendant: inside the McDonald's restaurant, in the parking lot, and during the offense. She immediately recognized defendant during the lineup and was unwavering in her identification of him as the perpetrator. Gonzalez's identification of defendant was further supported by Colon, who also observed defendant inside the McDonald's and during the offense, and also identified him as the man who robbed them. Additionally, the record includes surveillance video of defendant. Although the image quality is not independently sufficient to identify defendant, the video further supports the testimony of Gonzalez and Colon and their identification of defendant as the offender. In these circumstances, we conclude that, even if the other-crimes evidence was erroneously admitted, it was harmless beyond a reasonable doubt.

¶ 42 We next consider defendant's claims that his mandatory natural life sentence pursuant to the habitual criminal provision violates the proportionate penalties clause of the Illinois Constitution and the Eighth Amendment of the United States Constitution as applied to him, because it requires him to spend the remainder of his life in prison when no one was hurt during the offense. We review the constitutionality of a statute *de novo*. *People v. Gipson*, 2015 IL App (1st) 122451, ¶ 50.

¶ 43 Under the Act, a defendant is a habitual criminal, subject to a sentence of mandatory natural life without the possibility of parole, if he is convicted of three separate Class X offenses in 20 years, excluding time in custody. 730 ILCS 5/5–4.5–95(a) (West 2010). In this case, defendant had been previously convicted of Class X armed robbery in 1997, and Class X home invasion with a firearm in 2006. As a result of defendant's third Class X conviction for armed robbery in this case, the Act required the trial court to sentence defendant to natural life imprisonment without the possibility of parole.

¶ 44 As the State points out, our supreme court has previously upheld the constitutionality of the habitual criminal provision in the face of challenges that it violates the proportionate penalties clause of the Illinois Constitution and the Eighth Amendment of the United States Constitution. *People v. Dunigan*, 165 Ill. 2d 235, 244–48 (1995). The State argues that, in asking this court to find the habitual offender provision unconstitutional, defendant is asking this court to overrule supreme court precedent, which this court cannot do. Defendant, however, maintains that he is raising an "as applied" constitutional challenge to the habitual criminal provision, and thus contends that *Dunigan*, in which the supreme court rejected a facial constitutional challenge, does not bind this court.

¶ 45 This court recently considered a similar, "as-applied" challenge to the habitual criminal provision in *People v. Fernandez*, 2014 IL App (1st) 120508, ¶ 1 (2014). The defendant in

Fernandez was convicted of distributing more than 900 grams of cocaine, a Class X felony. *Id*. at ¶ 40. The defendant had two prior Class X felonies in his background, also for drug offenses involving large quantities, and, as a result, defendant was sentenced as a habitual offender to mandatory life imprisonment. *Id*. The defendant in *Fernandez* similarly challenged the constitutionality of the sentencing provision, claiming that the sentence violated the Eighth Amendment of the United States Constitution and the proportionate penalties clause of the Illinois Constitution. *Id*. at ¶ 2.

¶ 46 In rejecting the defendant's Eight Amendment challenge, this court considered *Harmelin v. Michigan*, 501 U.S. 957, 994–96 (1991), in which the United States Supreme Court held that mandatory life imprisonment for a first-time drug offender who was convicted of possessing 672 grams of cocaine, did not violate the Eight Amendment. The court compared the defendant in *Harmelin* to the *Fernandez* defendant, who had been convicted of distributing an even greater quantity of cocaine and who had two prior Class X drug offenses, also involving large quantities of drugs. *Id*. at ¶ 40. The court thus concluded under *Harmelin*, it could not say that the defendant's sentence violated the Eight Amendment. *Id*. Similar, but even stronger in this case, defendant's conviction is for armed robbery, and his previous two Class X offenses were for armed robbery and home invasion with a firearm, all of which are violent offenses. Under *Harmelin* and *Fernandez*, we also conclude that defendant's mandatory life sentence does not violate the Eighth Amendment.

¶ 47 Defendant next contends that his mandatory natural life sentence violates the proportionate penalties clause because "no one was physically harmed" during the offense. He contends that "requiring that [he] die in prison for an offense that he committed while addicted to drugs and that caused no physical harm contravenes our evolving standards of decency."

¶ 48 All statutes carry a strong presumption of constitutionality. *People v. Sharpe,* 216 Ill. 2d 481, 487 (2005). Defendant has the burden to demonstrate that the statute is unconstitutional. *People v. Alcozer,* 241 Ill. 2d 248, 259 (2011). The legislature has broad discretion in setting criminal penalties and may pass statutes that prescribe mandatory sentences, even if those statutes restrict the judiciary's sentencing discretion. *People v. Taylor,* 102 Ill. 2d 201, 208 (1984); *Sharpe,* 216 Ill. 2d at 487. The legislature's power is not unlimited, however, as the sentences it prescribes must satisfy constitutional constraints. *People v. Morris,* 136 Ill. 2d 157, 161 (1990). We will not overrule the legislature's sentencing mandates, unless the penalty is clearly in excess of the general constitutional limitations. *Alcozer,* 241 Ill. 2d at 259. Our review of this question of law is *de novo. People v. Masterson,* 2011 IL 110072, ¶ 23.

¶ 49 The proportionate penalties clause states that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. A statute is unconstitutionally disproportionate if the punishment for the offense is cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community. *Sharpe,* 216 Ill. 2d at 487; *People v. Miller,* 202 Ill. 2d 328, 339–41 (2002). The Illinois Supreme Court has "never defined what kind of punishment constitutes 'cruel,' 'degrading,' or 'so wholly disproportioned to the offense as to shock the moral sense of the community.' " *Id.* at 339. "This is so because, as our society evolves, so too do our concepts of elemental decency and fairness which shape the 'moral sense' of the community." *Id.*

¶ 50 We also find *Fernandez* helpful to the resolution of this issue. In *Fernandez,* the court considered a proportionate penalties challenge to the habitual criminal provision based on the nonviolent nature of the defendant's three Class X drug offenses. *Fernandez,* 2014 IL App (1st)

120508, ¶ 43-65. The court in *Fernandez* laid out the history of the habitual criminal provision, and recognized that *"Dunigan* and its progeny have uniformly upheld the Act in the face of proportionate penalties challenges, [but] none of these cases involved individuals, like defendant, whose qualifying offenses are all nonviolent, drug offenses." *Id*. at ¶ 49-50. The court thus considered "the particular question at issue in this case: whether the Act, as applied to defendant, violates the proportionate penalties clause." *Id*. at ¶ 50. The court ultimately concluded that it did not. *Id*. at ¶ 64.

¶ 51 The court noted that the legislature has broad discretion to fashion the penalties for the criminal offenses it defines, and the facts of *Fernandez* did not indicate that the Act exceeded those bounds. *Id.* at ¶ 65. Although the defendant's offenses were nonviolent, the court noted that the defendant had been convicted of drug crimes involving large quantities, and "[i]n light of the quantities of narcotics in each case, defendant has shown that he poses a significant risk to the community." *Id*. at ¶ 64.

¶ 52 As does defendant here, defendant in *Fernandez* relied on *People v. Miller*, 202 Ill. 2d 328 (2002), in support of his contention that his mandatory life-without-parole sentence violates the proportionate penalties clause. In *Miller*, the 15-year-old defendant was standing on a street corner when two others carrying guns asked him to serve as a lookout. *Id*. at 330. The defendant agreed but did not handle or touch any guns. About one minute later, the other two fired gunshots killing two people. When he heard the gunshots, the defendant ran to his girlfriend's house. *Id*. at 331. The defendant was convicted of the murders under a theory of accountability, and under the relevant multiple-murder sentencing statute the trial court was to impose a sentence of life in prison without parole. *Id*. at 331–32. The trial court refused to impose such a sentence on the defendant, finding that under the circumstances, applying the multiple-murder

sentencing statute violated both the eighth amendment and the proportionate penalties clause. Instead, the trial court sentenced the defendant to a term of 50 years' imprisonment. *Id*. at 332. The supreme court agreed, finding that the statute, as applied to defendant, a juvenile offender convicted under a theory of accountability, violated the proportionate penalties clause of the Illinois Constitution. *Id*. at 343.

¶ 53 The *Fernandez* court, however, found *Miller* distinguishable, because unlike the defendant in *Miller*, the defendant in *Fernandez* was an adult offender, was not convicted under an accomplice theory, and his participation in the offense was not a spontaneous decision. *Fernandez*, 2014 IL App (1st) 120508, ¶ 54. We too find *Miller* distinguishable from the case at bar. Here, as in *Fernandez*, defendant was an adult offender. He was not convicted under an accomplice theory, and his participation in the offense was not a spontaneous decision. In fact, as can be seen in the video footage admitted at trial, defendant spent many minutes in the parking lot watching the victims before ultimately making his move.

¶ 54 Although the court in *Fernandez* expressed some hesitation and called the defendant's punishment "harsh," (*Fernandez*, 2014 IL App (1st) 120508, ¶ 43) we do not have the same concerns which gave the court pause in that case. The court in *Fernandez* specifically observed that none of the defendant's convictions involved the use or threat of violence. *Id*. at ¶ 53. As stated, defendant in this case was convicted of armed robbery—a violent offense—and defendant's two prior Class X offenses for armed robbery and home invasion with a firearm, are also violent offenses. Although defendant attempts to characterize this offense as one in which "no one was physically harmed," we find his characterization specious, as Gonzalez testified that defendant punctured her jacket and cut her with the kitchen knife during the robbery. Nevertheless, there is no doubt that defendant's offenses were violent ones, unlike the defendant's

offenses in *Fernandez*. Specifically, in this case, defendant threatened Gonzalez at knifepoint, and told the group that he would kill her if anyone moved, before demanding jewelry and fleeing with the victim's possessions. We find no reason to depart from the holding in *Fernandez* in this case, and conclude that the habitual criminal provision does not violate the proportionate penalties clause as applied to defendant.

¶ 55 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 56 Affirmed.