THIRD DIVISION
March 30, 2016

No. 1-13-3205

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 20719
	)	
DUJUAN POWE,	)	Honorable
	)	Stanley Sacks,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

ORDER

¶ 1 *Held*: Prosecutor's closing arguments were not reversible error where the comments, when viewed in full context, did not mislead the jury and the evidence of defendant's guilt was overwhelming. Defendant's life sentence for first-degree murder was not excessive, but his 21-year sentence for aggravated kidnapping requires remand for resentencing where the trial court misapprehended the applicable sentencing range.

¶ 2 Defendant Dujuan Powe was found guilty of first-degree murder and aggravated kidnapping. The trial court sentenced him to a term of natural life in prison for murder, and a consecutive 21-year term for aggravated kidnapping. On appeal, defendant contends (1) the State misstated an expert witness's testimony regarding gunshot residue in its closing argument; (2) his

life sentence for murder is excessive; and (3) remand is necessary for resentencing on his aggravated kidnapping count where the trial court misapprehended the applicable sentencing range for the offense as charged. We affirm defendant's murder conviction, but remand for resentencing on his aggravated kidnapping count.

¶ 3 The State charged defendant and his brother, Darron Brewer, with the aggravated kidnapping and first-degree murder of Brewer's wife, Kenyatae Collier. Defendant's aggravated kidnapping charge was predicated on his wearing of a hood or mask to conceal his identity during the commission of the offense. Defendant and Brewer were tried simultaneously, but by two separate juries.

¶ 4 At trial, Charles Reed testified that he worked as an attendant at a Marathon gas station on October 26, 2009. Shortly before 1 a.m., Reed heard someone screaming "help, help." When Reed looked towards the gas pumps, he saw Brewer screaming. Another man approached Brewer from the side, wearing a mask from the horror movie *Scream*. He made a motion to his pocket, which "looked like he was going for a gun." Brewer then got into the driver's seat of the vehicle and the masked man entered the front-passenger side. The vehicle left and Reed called the police to report a carjacking. Later that day, police officers met with Reed at the gas station and reviewed the station's surveillance footage. The State entered still-frames from that video into evidence, including one depicting Brewer looking into the vehicle's trunk. Reed later identified Brewer in a police lineup and at trial.

¶ 5 Taron Webb, defendant and Brewer's cousin, testified that he spoke with defendant early in October, 2009. Defendant told Webb that Brewer wanted defendant to kill his wife, Collier, to collect life insurance Brewer had acquired through the military. Brewer was worried that Collier

had discovered that he was gay and planned to divorce him, and therefore he would "get no money" from the military. Defendant told Webb that he had gone to Collier's home intending to strangle her. However, he first had sex with Collier and "couldn't carry through" with killing her. On October 26, 2009, defendant called Webb and stated, "I got her" and "I got that bitch." The following morning, Webb called the police. Webb also testified that he had previously seen defendant with a *Scream* mask "a year or two" prior to the murder.

¶ 6 Tasha Nash, defendant and Brewer's aunt, testified that defendant called her on October 25, 2016, and asked her if she "had or knew someone with .38 shells." He called her again at 10 p.m. on October 26, 2016. He asked Nash to come pick him up and seemed "anxious and agitated." When Nash asked why he needed to be picked up, defendant indicated that his pregnant girlfriend was sick and he could not "take it." Defendant's tone was "hyper" and Nash testified that she had never heard him so anxious, so she asked what was wrong. Defendant repeatedly stated "I did something stupid." He eventually stated that he had taken Collier's car. When Nash suggested he return the car, defendant replied, "No, it's more than that." Defendant stated that he had "acted as if he was carjacking" Brewer, Collier, and their children at a gas station. He got in the car with them and drove off. They stopped in an alley where defendant put Collier in the trunk. He then dropped Brewer and the children off at their home. Afterwards he drove to a different alley and opened the trunk. Collier started to get out, "begging and pleading." Defendant stated that Collier asked to use the bathroom, which he allowed. When she was getting back into the trunk, he shot her in the head. Upon hearing this, Nash hung up.

¶ 7 Benita Wallace, defendant's girlfriend, testified that defendant was at her home periodically the week before the murder. He had a *Scream* mask which they used to scare

children in the house during the week. Wallace was also with defendant at her home at 11 p.m. on October 25, 2016. Defendant received a phone call on Wallace's phone and left the room to answer it. Two to three minutes later, he returned the phone and left the house. Defendant returned around 8 a.m. the next morning and Wallace let him in through her bedroom window. They went to sleep on a pile of mattresses in the corner. Defendant also returned to Wallace's home the following day and left a duffel bag with his belongings in her bedroom. Wallace further testified that the Marathon gas station was half a block away from her home.

¶ 8 Theresa Jones, Collier's mother, testified that she spent October 25, 2009, together with Collier until Collier left for work that afternoon. The parties stipulated that she was at work until 11 p.m. that night. Jones further testified that the following morning, Brewer arrived at Jones's house. When Jones asked him whether he had seen Collier, Brewer responded that he had not seen her since 1 a.m. that morning. Both agreed to call the other if they heard from Collier. Brewer then left.

¶ 9 Joshua Maddox testified that he was a friend of Brewer and that the two were "intimate." He dropped Brewer and his daughter off at Brewer's mother's home at 11 p.m. on October 25, 2006. When Maddox awoke the following morning, he found that Brewer had texted and called during the night. When Maddox called Brewer back, Brewer said that his wife and car were missing. Maddox offered to drop Brewer's children off at daycare. When Maddox arrived, Brewer, his children, and defendant got into Maddox's car. Brewer drove to the daycare where they dropped off the children. The three men drove to a police station, where Brewer went in alone. Later, the men drove to a storefront church and defendant exited the car holding something balled up "like a jacket or something." Defendant went behind the church for a couple

minutes, and then returned. Maddox did not notice if he still had the bundle. Brewer and Maddox subsequently dropped defendant off about a half-block away from the church. Later that night, Maddox was driving through the city with Brewer in the passenger seat directing him. As they passed an alley, Brewer said, "I think I just saw my car." They circled back to the alley and found Brewer's car. Looking in through the windows, Maddox noted that it looked "ransacked." Brewer called 9-1-1, and the recording of that call was played in court. During the call, Brewer never stated that he had been carjacked. The men waited for 30 minutes, but left when the police did not arrive.

¶ 10 Chicago police officer Mariusz Chojnacki testified that he and his partner drove to an alley on October 26, 2009, in response to a 9-1-1 call. When they arrived, the caller was not present. The officers approached the car and found it was unlocked. When they opened its trunk, Chojnacki found Collier dead, with blood stains on her face and upper body.

¶ 11 Dr. Lawrence Cogan testified that he had performed Collier's autopsy. Collier had two gunshot wounds to her head, with one at her temple and one at the top of her head. Evidence indicated that the gun had fired from less than 18 inches away. Cogan found one intact bullet and the fragments of another in Collier's skull.

¶ 12 Chicago police officer Scott Korhonen testified that he went to Wallace's house with several other officers on October 27, 2009. Theresa Smith, Wallace's mother, gave the officers consent to search the house. In Wallace's room, Korhonen found a loaded, semiautomatic handgun between mattresses stacked in the corner. The parties stipulated that an evidence technician recovered the .380-caliber handgun as well as a bag containing a glove, a hat, and a

wallet with various ID cards belonging to defendant. He also recovered several articles of clothing.

¶ 13 Two experts testified regarding the recovered hand gun. Justin Barr, a firearms identification expert, testified that the bullets found in Collier's skull were .380-caliber and had been fired from the handgun recovered from Wallace's bedroom. Jennifer Belna, a DNA analyst, testified that she tested the handgun and found a single, low level DNA profile which she concluded could not have come from defendant, Brewer, Collier, or Maddox. She explained that it was possible that the DNA was transferred from the mattresses where the gun was found.

¶ 14 Robert Berk, a trace evidence analyst, testified that he tested the glove recovered from Wallace's bedroom for traces of gunpowder residue. A modern bullet's percussion primer creates smoke that contains particles of three elements. In analyzing materials, a scientist can identify particles and determine if they are tri-component particles, containing all three elements; consistent gunshot residue particles, containing at least two of the elements; or particles unrelated to gunshot residue. Berk noted that tri-component particles typically only come from percussion primers used in a bullet or similar primers used in some airbags, though residue from airbag primers is generally distinguishable. Consistent particles are found when a gun has been fired, but can also come from other "environmental or occupational" sources. In order for a test to positively indicate the presence of gunshot residue, an analyst would have to find at least three tri-component particles. Examining the recovered glove, Berk found two tri-component particles and over 100 consistent particles. Because Berk did not recover three tri-component particles, he concluded that it was "a negative gunshot residue kit." According to Berk, a negative result indicates:

> "[T]he sample area may not have contacted a [gunshot residue] related item, or may not have been in the environment of the discharged firearm. If it was, then the particles were not deposited. They were removed by activity or they were not detected by the procedure."

Berk explained that an item could be in the presence of a gunshot, but then have the residue particles fall off due to movement or activity. On cross-examination, defense counsel asked whether the particles Berk found "were all background[?]" Berk responded, "We refer to that population particles, where it doesn't have the tri-component particles, it doesn't have an excessive amount of consistent particles as simply being backgrounds [sic] as levels." On redirect examination, Berk clarified that the tri-component particles are from a percussion primer being detonated, and "[t]ypically *** we find percussion primers in live ammunition *** and they are also present in some passenger-side airbag formulations."

¶ 15 Two evidence technicians with the Chicago police testified that they processed Brewer's car and the alleyway where it was found. Three suitable fingerprints were found in the car: two from inside the trunk, and one on the rearview mirror. Joseph Wohrstein, a forensic scientist, testified that the fingerprint taken from the center of the trunk interior's top matched Collier. The other two prints did not match defendant or Brewer.

¶ 16 The parties stipulated that Brewer was the beneficiary, through his service in the National Guard, of two insurance policies totaling $105,000 and covering the life of Collier. The State also presented the testimony of Sergeant Sarah Campbell, who provided a foundation for the introduction of Brewer's insurance paperwork into evidence.

¶ 17 Chicago police detectives Jose Cardo and Tony Noradin testified regarding their investigation into Collier's murder. They described speaking with witnesses, searching Wallace's house, and viewing the Marathon station surveillance video.

¶ 18 Defendant's sole witness was Chicago police detective Donald Falk, who testified that a member of Collier's family indicated that Collier had had "problems with [Brewer] for a while."

¶ 19 Following arguments, the trial court instructed the jury. It noted that closing arguments are not evidence and instructed the jury to disregard any statement during argument that was not based on evidence. While instructing the jury on the charges, the court referred to aggravated kidnapping under subsection 10-2(a)(4) of the Criminal Code (720 ILCS 5/10-2(a)(4) (West 2008)), predicated on the wearing of a mask or disguise.

¶ 20 The jury found defendant guilty of first-degree murder and aggravated kidnapping. At the sentencing hearing, the State presented victim impact statements from Collier's younger sister and both of her parents. The State argued that the premeditated and cruel nature of the murder required a maximum sentence. It also stated that defendant faced a sentencing range of 21 to 45 years on the aggravated kidnapping charge. Defense counsel argued in mitigation that defendant was 20 years old, had no prior criminal history, was employed, and had a supportive family.

¶ 21 The trial court noted that the crime was one of "cold-hearted ruthlessness" and the evidence indicated it was planned. It stated that both defendant and Brewer were "beyond useful citizenship" and found that they "cannot be restored." The court also indicated:

> "I read the facts in aggravation and mitigation concerning matters set forth in the statute. I read the [presentencing investigation report] as to both men. I considered the arguments of the lawyers, the statements given by the family of Kenyatae Collier."

It further stated:

> "I'm well aware that both men are young guys. I considered that circumstance. I'm well aware that there are no records for either one of them. I'm well aware of both those things."

The court then noted that for aggravated kidnapping based on "the use of a firearm, I think the sentencing minimum is 21 years for that one." It sentenced defendant to life in prison for the murder charge and a 21-year term for aggravated kidnapping to run consecutively.

¶ 22 Defendant first contends that the State mischaracterized Berk's testimony on gunshot residue. He argues that the State falsely claimed that Berk found two particles of gunshot residue, and falsely claimed that the particles could only have come from a gun or an airbag, when they could have come from background environmental sources. The State responds that its argument correctly reflected the expert's testimony. It argues that even if its statements were incorrect, any error was harmless because the trial court instructed the jury that arguments were not evidence and the evidence of guilt was overwhelming.

¶ 23 Prosecutors are given wide latitude when making closing arguments. *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007). A conviction will only be reversed due to the State's closing argument if a prosecutor's improper remarks engendered “substantial prejudice,” and thus constituted a material factor in the defendant's conviction. *Id*. In closing, the State may comment on the evidence presented and draw reasonable inferences from that evidence. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005). However, a prosecutor may not argue assumptions or facts that are not supported by the record. *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). Closing arguments must

be viewed in their totality, considering any challenged remarks in their full context. *Wheeler*, 226 Ill. 2d at 122.

¶ 24 The appropriate standard of review for closing arguments is currently unclear. In *Wheeler*, our supreme court applied a *de novo* standard of review to the issue of prosecutorial statements during closing arguments. *Wheeler*, 226 Ill. 2d at 121. However, the *Wheeler* court cited with favor its decision in *People v. Blue*, 189 Ill. 2d 99, 128 (2000), which applied an abuse of discretion standard. We need not resolve the issue of the proper standard of review in the instant case, as our holding would be the same under either standard. See *People v. Thompson*, 2013 IL App (1st) 113105, ¶¶ 76-77 (acknowledging conflict regarding standard of review).

¶ 25 During closing arguments, the State indicated that Berk testified that the glove found in Wallace's bedroom "had two particles of gunshot residue." Defense counsel objected, but the trial court overruled the objection. The State continued:

> "He can't say that's positive for [gunshot residue]. You learned that to say it is positive there has to be three particles. He only found two.
>
> ***
>
> He found two. He cannot say that that is positive for [gunshot residue], but he can tell you there is only one of two ways those particles can get on something; an airbag or if you are in the area of a discharged firearm, and we know Kenyatae Collier wasn't killed by an airbag."

¶ 26 In defense counsel's closing argument, he stated, "Gunshot residue was checked on this left-hand glove, and what was it? Bottom line. Negative. Period."

¶ 27 During rebuttal, the State again referred to the two tri-component particles and defense counsel objected. After the trial court overruled the objection, the State continued, "The glove has two tri-component particles of lead, barium, and antimony fused together. Not enough for a positive result, which you need three."

¶ 28 Defendant argues that the expert witness, Berk, indicated the tri-component particles were consistent with background levels, and that the State's reference to "two particles of gunshot residue" converted the expert's negative finding into a positive one. However, Berk's reference to background and environmental sources appears to refer to the category of consistent particles, rather than tri-component particles. Also, while we acknowledge that Berk indicated that he found two tri-component particles, and that he never explicitly stated that he found two particles of gunshot residue, we find defendant's argument that the State misrepresented Berk's findings to be unpersuasive. The State immediately followed the challenged comment by explaining that Berk had not made a positive finding of gunshot residue. It later repeated that Berk had not made a positive finding. In his own closing argument, defense counsel reminded the jury that the test for gunshot residue returned a negative result. In rebuttal, the State once more clarified that Berk had only found two tri-component particles, which were not enough for a positive result. Viewing the entirety of closing arguments, we cannot say that the State's comments amounted to unreasonable inferences or misled the jury as to Berk's testimony.

¶ 29 Even if we accepted defendant's contention that the State's comments were factually incorrect, it is clear from the record that the misstatements were not substantially prejudicial. See *Wheeler*, 226 Ill. 2d at 123. Generally, improper argument by a prosecutor only constitutes reversible error where "there is doubt as to whether the jury would have rendered a guilty verdict

absent any improper comments." *People v. Schneider*, 375 Ill. App. 3d 734, 755 (2007). The trial court instructed the jury that closing arguments did not constitute evidence and that they should disregard any statements not based upon the evidence. Both parties reminded the jury that Berk did not make positive finding of gunshot residue. Moreover, the evidence of defendant's guilt was overwhelming. Defendant admitted guilt to multiple people. His statements to his cousin communicated his intent to kill Collier and his eventual success. His admission of guilt to his aunt actually described the kidnapping and murder in detail. These details were corroborated by the testimony of the gas station attendant, the stills from the surveillance video, the location of the car, and the injuries to Collier. According to defendant's aunt, defendant was looking for ".38 shells" the night before Collier was killed by a .380-caliber handgun. Moreover, the handgun, which expert testimony indicated had killed Collier, was found in between the mattresses in Wallace's bedroom. The murder weapon was found in the bed where defendant periodically slept, and had slept hours after the murder, according to Wallace's testimony. Wallace also testified that defendant had a mask like that used in the kidnapping just days before the murder. In the face of such overwhelming evidence of guilt, we cannot say that there is doubt as to whether the jury would have rendered a guilty verdict absent the State's comments. Accordingly, we conclude that the State's comments during closing arguments were not substantially prejudicial and therefore not reversible error.

¶ 30 Defendant next contends that his sentence of natural life imprisonment is excessive. He notes that he was 20 years old at the time of the murder and had no prior criminal history. The State responds that defendant's sentence is appropriate given the planned and brutal nature of the crime.

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

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

¶ 33 First-degree murder generally has a sentencing range of 20 to 60 years. See 730 ILCS 5/5-4.5-20(a) (West 2008). Because defendant personally discharged a firearm that proximately caused death, he was subject to a mandatory enhancement of 25 years to life imprisonment. 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2008). Thus, the effective sentencing range for defendant was 45 years to life. A sentencing decision that falls within the statutory range is entitled to great deference. *People v. Hill*, 408 Ill. App. 3d 23, 29 (2011). Such a sentence will not be overturned unless it is "greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense." *People v. Fern*, 189 Ill. 2d 48, 54 (1999).

¶ 34 Defendant's sentence was within the statutory range. The trial court explicitly stated that it reviewed all aggravating and mitigating factors. The court noted that the evidence indicated defendant had planned out the crime well in advance. It also explained the cruelty evident in the crime, noting that defendant had shot Collier twice as she begged him to spare her life for the sake of her children. The court also considered the impact statements given by Collier's family.

Given the planned nature of the crime and the manner in which it was carried out, a life sentence was not at great variance with the spirit of the law or manifestly disproportionate to the offense.

¶ 35 Moreover, defendant does not argue that trial court refused to consider defendant's age and criminal record as mitigating factors; rather, he argues that the court incorrectly undervalued them. We will not reverse the sentencing court just because the factors could have been weighed differently. *Streit*, 142 Ill. 2d at 19. We find that the trial court did not abuse its discretion in sentencing defendant to imprisonment for natural life.

¶ 36 Finally, defendant contends, and the State concedes, remand for resentencing on the aggravated kidnapping count is required because the trial court erroneously believed that the sentencing range for the offense as charged was 21 to 45 years in prison. We note that defendant did not contemporaneously object to the error and did not include it in his motion to reconsider sentence. Typically, such a failure would result in defendant's claim being deemed forfeited. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). However, where the State does not raise a forfeiture argument, the forfeiture issue itself is forfeited. *People v. Higgins*, 2014 IL App (2d) 120888, ¶ 15.

¶ 37 The trial court stated that the aggravated kidnapping count required a sentencing range of 21 to 45 years. However, the crime was charged and submitted to the jury under subsection 10-2(a)(4) of the Criminal Code (720 ILCS 5/10-2(a)(4) (West 2008)), which predicated aggravated kidnapping on the use of a mask or hood to conceal one's identity. Under this section, aggravated kidnapping carried an actual sentencing range of 6 to 30 years. 720 ILCS 5/10-2(b) (West 2008); see also 720 ILCS 5/5-4.5-25(a) (West 2008). Where the trial court misapprehends the applicable sentencing range, the case must be remanded for resentencing, regardless of whether the

sentence falls within the actual guidelines. *People v. Myrieckes*, 315 Ill. App. 3d 478, 438-84 (2000). Accordingly, we accept the State's concession and remand for resentencing on the aggravated kidnapping count.

¶ 38 For the foregoing reasons, we find that the State's comments in closing argument, viewed in context, were not misleading and not substantially prejudicial in light of the overwhelming evidence of defendant's guilt. As such, the comments were not reversible error. We also find that defendant's life sentence for first-degree murder was not an abuse of discretion given the planned and cruel nature of the crime. Finally, we find that the trial court misapprehended the proper sentencing range when it sentenced defendant to 21 year's incarceration for aggravated kidnapping. Accordingly we vacate defendant's aggravated kidnapping sentence and remand for resentencing on that count; the judgment of the circuit court of Cook County is affirmed in all other respects.

¶ 39 Affirmed, in part; vacated, in part; and remanded.