2017 IL App (1st) 142945-U

No. 1-14-2945

Order filed December 19, 2017

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 CR 6466
	)	
DEAJUANN MCCALL,	)	Honorable
	)	Evelyn B. Clay,
Defendant-Appellant.	)	Judge, presiding.

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

ORDER

¶ 1 *Held*: We affirm defendant's conviction for aggravated arson over his contention that he did not effectuate a valid waiver of his right to a jury. We also affirm defendant's sentence over his contention that the trial court considered improper sentencing factors.

¶ 2 Following a bench trial, defendant was convicted of aggravated arson (720 ILCS 5/20-1.1 (West 2012)) and sentenced to 12 years' imprisonment. On appeal, defendant contends that his conviction must be reversed and the case remanded for a new trial because the trial court failed

to ensure that he made a knowing, intelligent, and voluntary waiver of his constitutional right to a jury trial. Defendant also contends that, if we affirm his conviction, we should either reduce his sentence, or remand for resentencing, because the trial court relied upon improper sentencing factors. We affirm.

¶ 3 On March 2, 2013, following the issuance of an investigative alert, defendant was arrested at 13122 South Ellis Avenue. Defendant was subsequently charged by indictment with the January 29, 2012 aggravated arson and residential arson of the building located at 13038 South Greenwood Avenue.

¶ 4 Prior to trial, on December 11, 2013, at a hearing regarding defendant's answer to discovery, defense counsel advised the court that "[w]e are ready to set this down for a bench trial." After the parties disclosed to the court that they agreed on a trial date, the court inquired "[a]nd that is indicated for bench?" Defense counsel responded "[y]es." The court then confirmed "[b]y agreement, February 26th, with for bench." On that date, the matter was continued.

¶ 5 At a status hearing on April 15, 2014, the State confirmed to the trial court that the case was set for a bench trial and that it had been continued. The court did not set a date for trial, and the matter was again continued.

¶ 6 At a status hearing on June 3, 2014, defendant and defense counsel were present. The court set July 31, 2014 as the date for trial. In doing so, the following exchange took place:

"THE COURT: What kind of trial?

DEFENSE COUNSEL: Bench trial.

THE COURT: What kind of date? Do we have your answer on file?

DEFENSE COUNSEL: Yes.

THE COURT: There is a docket book there, folks, so you all pick a date. What date we can resolve it and get an interim status date. We are really loaded, Mr. McCall, in June. July is also filling up. We may have to set you on a date for a jury and if the jury doesn't go we can do it. If it does go, you will be bumped.

DEFENDANT: It's understandable."

¶ 7 On July 31, 2014, defendant submitted a signed jury waiver to the trial court. On the same date, shortly before trial commenced, the following exchange took place:

"THE COURT: Mr. McCall, sir, you have a right to have a jury trial. Are you waiving your right to have that kind of trial?

DEFENDANT: Yes, Your Honor.

THE COURT: Court now has your oral and written waivers."

¶ 8 The case proceeded to a bench trial.

¶ 9 On the evening of January 28, 2012, defendant went to a party in Dolton, Illinois with Laquitta Simmons,[1] who he had been dating for thirteen months, and Laquitta's best friend, Kyler Bishop. The three spent the night in a hotel room, where Laquitta awoke the next morning to find defendant staring at her. The two began to argue because defendant claimed that Laquitta gave more attention to Kyler than him. Defendant demanded that Laquitta, who drove defendant and Kyler to the hotel, give him her car keys. Laquitta refused, and defendant struck her in the face with his fist. As Laquitta lifted herself off the ground, Kyler struck defendant in the face.

[1] Because Laquitta Simmons and her mother, Shurron Simmons, both testified, we will refer to all witnesses by their first name.

Defendant then told Laquitta and Kyler that he was going to "kill you bitches." Laquitta gave Kyler the keys to her vehicle, and instructed her to leave. After Kyler left, Laquitta walked to the hotel lobby and defendant followed her. There, Laquitta told the attendant that she needed the police. Defendant then struck Laquitta in the face and exited the hotel. Kyler, who was in Laquitta's car, picked up Laquitta from the entrance of the hotel lobby.

¶ 10 Kyler and Laquitta drove to Laquitta's residence at 13038 South Greenwood Avenue to retrieve some of Kyler's belongings. Laquitta lived in an apartment building with nine or ten units. From there, they went to Laquitta's mother's house at 11718 South Prairie Avenue. When they arrived there, Laquitta's mother, Shurron Simmons, was on the phone with defendant. Defendant had called Shurron, asked about Laquitta, and said that he was "going to burn down her house." Shurron ran outside to Laquitta and Kyler, and placed her phone conversation with defendant on speaker phone. Defendant then said he was going to burn down the "bitch house." Laquitta called the police, who instructed her to go to her residence.

¶ 11 Laquitta, Kyler, and Shurron went to Laquitta's residence, where Shurron saw "big clouds of smoke everywhere." The fire and police departments arrived at the scene. Kyler and Laquitta saw defendant at the back door of Laquitta's residence. In an effort to locate defendant, Officer Amanda Kogut drove Laquitta and Kyler around the area in her marked squad car. As Laquitta was inside the squad car, defendant called her. Laquitta placed defendant on speaker phone. Defendant said he could see Laquitta and that she has to get "out of here." Defendant then said he burned down Laquitta's residence, and that he was going to "beat [her] ass." While still on the phone with defendant, Laquitta saw defendant walking. Laquitta, Kyler, and Kogut exited

the squad car, and Kogut announced her office. Defendant fled, and the trio chased him but were unable to catch up to him.

¶ 12 Video surveillance showed defendant entering Laquitta's apartment, and then exiting shortly thereafter, followed by smoke coming from her apartment. Laquitta did not give defendant permission to enter her apartment.

¶ 13 Laquitta, Shurron, and Kyler encountered defendant on December 26, 2012, outside of Kyler's residence at 725 East 132nd Street. They went inside, and defendant apologized to Laquitta. He explained that on the morning of the fire, his friend picked him up after he walked along the expressway towards his home. He was wet and very angry about having to walk from 147th to 130th Street in the cold, so he and his friend broke into Laquitta's residence, where they "broke things, trashed the stuff." Defendant then left Laquitta's residence, but felt that the damage he had done was not "good enough." Defendant went back into Laquitta's residence, lit a couch pillow on fire, and walked out. He promised to pay for the property that he damaged.

¶ 14 Devona Robinson testified that on January 29, 2012, she lived at 13038 South Greenwood Avenue with her ten-month old son. Laquitta was her next door neighbor. At around 10 a.m., while sleeping with her son in her living room, she heard "banging" next door. She fell back asleep, and was later awoken by the sound of a smoke alarm. There was smoke "everywhere" in her apartment. Devona and her son exited the apartment without injury.

¶ 15 Detective John O'Donnell, a fire investigation expert, testified that he investigated a fire that occurred on January 29, 2012, at 13038 South Greenwood Avenue. There, he observed fire damage, a lot of soot damage, and some destroyed furniture. In the front room of the apartment, there was a couch and a loveseat. An open flame to either the couch or the loveseat caused the

fire. Lab tests performed on a sampling of debris from the couch revealed that it contained gasoline. O'Donnell testified that, likely, only a small amount of gasoline was poured on the couch. On the afternoon of March 3, 2013, the day after defendant's arrest, O'Donnell spoke with defendant. Initially, defendant denied involvement with the fire. Eventually, defendant admitted to setting the fire.

¶ 16 Assistant State's Attorney Elizabeth Novy testified that on March 3, 2013, she spoke with defendant about the events that took place on January 29, 2012. Defendant agreed to memorialize the conversation in writing. Novy drafted a type-written statement with defendant, and gave defendant the opportunity to read the statement and make any corrections. Defendant then signed the statement.

¶ 17 The statement was published in open court. In the statement, defendant stated that, on January 28, 2012, he was dating Laquitta and went to a party in Dolton, Illinois, with her and Kyler. They stayed in a hotel, and the next morning he and Laquitta got in an argument. He got mad at Laquitta because she left him at the hotel after their argument. He walked to Laquitta's residence and entered through the back door. There, "he took his lighter and lit a couch on fire." Defendant stated that he knew nobody was inside of Laquitta's house when he lit the couch on fire.

¶ 18 The State rested, and defendant did not present evidence. The trial court found defendant guilty of aggravated arson and residential arson, and ordered a presentence investigation (PSI) report. The court denied defendant's motions for a new trial and for the court to reconsider its finding of guilty. The case proceeded to sentencing.

¶ 19 At the sentencing hearing, the court heard arguments in aggravation and mitigation. In aggravation, the State argued that defendant should receive a "substantial sentence" because he had three previous convictions. In mitigation, defense counsel argued defendant, in light of his background, should receive the minimum sentence. Counsel pointed out that defendant was 26 years old at time of sentencing, none of his felony convictions involved violent crimes, he had attained his general education diploma (GED), and his father was not present in his life.

¶ 20 Prior to announcing its sentence, the trial court noted that:

> "Mr. McCall, I've heard the aggravation here, and the facts of this case. Person's lives were put at risk here. The foolish act of setting fire to a couch and walking out and leaving, and the building is an occupied building, which you knew as you visited that building quite frequently visiting the victim, it's just astonishing.
>
> The victim, had she been present and asleep, this could very well have been murder. Being hotheaded and not thinking about what you're doing gets you in a place where you are now.
>
> Your prior convictions have all been for drugs, so not anything nearly as aggravating as the facts of the present case that you stand to be sentenced on."

¶ 21 The court also recognized that it was "unfortunate" that defendant's father was not present during his childhood. In addition, the court noted that defendant was responsible for helping to take care of children that were not his and for having earned his GED. The court acknowledged that "there's some rehabilitative potential" and sentenced defendant to 12 years'

imprisonment on the aggravated arson count, with the residential arson count merging therein. The court denied defendant's motion to reconsider sentence. Defendant timely appeals.

¶ 22 Defendant first contends that his conviction must be reversed and the case remanded for a new trial because the trial court failed to ensure that he made a knowing, intelligent, and voluntary waiver of his right to a jury trial.

¶ 23 Initially, we note that defendant did not preserve this issue for review. It is well-settled that both a trial objection and a written post-trial motion raising the issue are required to preserve an alleged error for review. *People v. Byron*, 164 Ill. 2d 279, 293 (1995). Here, defendant did neither. However, when the State fails to bring a defendant's forfeiture of the issue to the attention of the appellate court, the State forfeits its ability to argue forfeiture by the defendant. *People v. McKown*, 236 Ill. 2d 278, 307-08 (2010); see also *People v. Williams*, 193 Ill. 2d 306, 347-48 (2000) ("The rules of waiver are applicable to the State as well as the defendant in criminal proceedings, and the State may waive an argument that the defendant waived an issue by failing to argue waiver in a timely manner."). Because the State does not argue that defendant forfeited raising the issue of a valid jury waiver on appeal, we will address defendant's argument. See *People v. Bracey*, 213 Ill. 2d 265, 270 (2004) ("Whether a defendant's fundamental right to a jury trial has been violated is a matter that may be considered under the plain error rule.").

¶ 24 The federal Constitution and the Illinois Constitution of 1970 guarantee defendants the right to a jury trial. *People v. Bannister*, 232 Ill. 2d 52, 65 (2008) (citing U.S. Const., amends. VI, XIV; Ill Const. 1970, art. I, §§ 8, 13); *Duncan v. State of La.*, 391 U.S. 145, 149 (1968) (the federal constitution protects a defendant's right to a jury trial in state court). While a defendant

has the right to a trial by jury, a defendant can also waive that right. *People ex rel. Daley v. Joyce*, 126 Ill. 2d 209, 221-22 (1988). For a jury waiver to be valid, the waiver must be made knowingly and voluntarily. *Bannister*, 232 Ill. 2d at 65. The waiver must also be understandingly made in open court. *People v. Reed*, 2016 IL App (1st) 140498, ¶7 (citing 725 ILCS 5/103-6 (West 2012); *Bracey*, 213 Ill. 2d at 269-70 (2004)). A trial court has the duty of ensuring that a defendant waives the right to a jury trial expressly and understandingly. *Bannister*, 232 Ill. 2d at 66.

¶ 25 A determination of whether a jury waiver is valid cannot rest on any precise formula but depends on the facts and circumstances of each particular case. *People v. Owens*, 336 Ill. App. 3d 807, 810 (2002). When a defendant waives the right to a jury trial, the pivotal knowledge that the defendant must understand—with its attendant consequences—is that the facts of the case will be determined by a judge and not a jury. *Bannister*, 232 Ill. 2d at 69 (citing *U.S. ex rel. Williams v. DeRobertis*, 715 F.2d 1174, 1180 (1983)). There is no specific admonishment or advice the court must provide before accepting a waiver. *Reed*, 2016 IL App (1st) 140498, ¶7. Although a signed jury waiver alone does not prove a defendant's understanding, it is evidence that a waiver was knowingly made. *Id.* Reviewing courts may also consider a defendant's prior interactions with the justice system in determining whether a jury waiver was made knowingly. *Id.* Generally, a jury waiver is valid if it is made by defense counsel in defendant's presence in open court, without objection by defendant. *Bracey*, 213 Ill. 2d at 270.

¶ 26 The defendant bears the burden of establishing that his jury waiver was invalid. *Reed*, 2016 IL App (1st) 140498, ¶7. Because the facts of this case are not in dispute, the issue is a question of law and our review is *de novo*. *Bannister*, 232 Ill. 2d at 66.

¶ 27 After examining the facts and circumstances of this case, we find that defendant made a knowing, intelligent, and voluntary waiver of his right to a jury trial. The record shows that defendant was represented by counsel and did not object when counsel informed the court, in defendant's presence, that this case was proceeding to a bench trial. When the trial court replied that its docket was "filling up" and that defendant's trial date may be "bumped" because of another scheduled jury trial, defendant responded that is "understandable." On the next court date, defendant submitted a signed jury waiver to the trial court. The court then admonished defendant of his right to a jury trial and asked him if he was "waiving his right to have that kind of trial." Defendant, who had three prior felony convictions, responded "Yes, your honor." See *People v. Tooles*, 177 Ill. 2d 462, 471 (1997) ("defendant's criminal record consisted of four previous convictions, through which he was presumably familiar with his constitutional right to a trial by jury and the ramifications attendant to waiving this right."). Given these circumstances, defendant made a knowing, voluntary, and intelligent waiver of his right to a jury.

¶ 28 Defendant nevertheless argues that his waiver is invalid because "the court made no attempt to explain the difference between a jury trial and a bench trial or to determine whether [he] understood that difference." Defendant also argues the court did not "make any attempt to ensure that the waiver was voluntarily made rather than the product of any promises or threats." He maintains that the court did not even ask him to acknowledge that he had in fact executed the written waiver.

¶ 29 However, contrary to defendant's argument, there is no specific admonishment or advice the trial court must give for a valid jury waiver. *Reed*, 2016 IL App (1st) 140498, ¶7. Moreover, there is no requirement that the record affirmatively establish that the court advised defendant of

his right to a jury trial, elicited his waiver of that right, or advised him of the consequences of the waiver. *People v. Frey*, 103 Ill. 2d 327, 332 (1984). Rather, as mentioned, the validity of defendant's waiver turns on the unique facts and circumstances of each case. *Owens*, 336 Ill. App. 3d at 810. The facts and circumstances of this case support the conclusion that defendant made a valid jury waiver.

¶ 30 In reaching this conclusion, we are not persuaded by *People v. Sebag*, 110 Ill. App. 3d 821 (1982), *People v. Ruiz*, 367 Ill. App. 3d 236 (2006), *People v. Thornton*, 363 Ill. App. 3d 481 (2006), and *People v. Scott*, 186 Ill. 2d 283 (1999), cited by defendant in support of his argument that he did not make a knowing waiver of his right to a jury. Here, unlike in *Sebag*, defendant was represented by counsel and, given his criminal history, was familiar with criminal proceedings. *Sebag*, 110 Ill. App. 3d at 829. In this case, unlike in *Ruiz* and *Thornton*, the trial court explicitly told defendant that he had the right to a jury trial and asked him whether he was waiving that right. *Ruiz*, 367 Ill. App. 3d at 239; *Thornton*, 363 Ill. App. 3d at 489. In addition, when defendant was informed that his bench trial may be "bumped' because of another jury trial, he responded "it's understandable." Moreover, unlike in *Thornton*, defendant had three prior felony convictions. *Thornton*, 363 Ill. App. 3d at 490. Finally, unlike in *Scott*, defendant was present in open court when he waived his right to a jury and his signed jury waiver did not incorrectly indicate that it was irrevocable before trial. *Scott*, 186 Ill. at 285.

¶ 31 Defendant next contends that the trial court relied on improper factors in aggravation that led to an excessive sentence.

¶ 32 The trial court has broad discretionary powers in imposing a sentence and the trial court's sentencing decision is entitled to great deference. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000).

Judges fashion a sentence by considering aggravating and mitigating factors, such as the nature and circumstances of the crime, the defendant's conduct in the commission of the crime, and the defendant's personal history, including his age, demeanor, habits, mentality, credibility, criminal history, general moral character, social environment, and education. *People v. Knox*, 2014 IL App (1st) 120349, ¶ 46. The Illinois Constitution requires such a sentence to be balanced between the seriousness of the offense and the defendant's rehabilitative potential. *People v. Lee*, 379 Ill. App. 3d 533, 539 (2008) (citing Ill. Const. 1970, art. 1, §11). In the absence of explicit evidence that the sentencing court did not consider mitigating factors, we presume that the sentencing court considered mitigation evidence presented to it. *People v. Gordon*, 2016 IL App (1st) 134004, ¶ 51. Absent an abuse of discretion by the trial court, the sentence may not be altered on review. *Stacey*, 193 Ill. 2d at 209-10. Moreover, when "a sentence falls within statutory guidelines, it is presumed to be proper and will not be disturbed absent an affirmative showing that the sentence is at variance with the purpose and spirit of the law or is manifestly disproportionate to the nature of the offense." *People v. Knox*, 2014 IL App (1st) 120349, ¶ 46.

¶ 33 Aggravated arson is a Class X felony (720 ILCS 5/20-1.1(b) (West 2012)), punishable by 6 to 30 years' imprisonment. 730 ILCS 5/5-4.5-25 (West 2012). Because defendant's sentence of 12 years' imprisonment for aggravated arson was within the permissible sentencing range, we presume it is proper. See *Knox*, 2014 IL App (1st) 120349, ¶ 46. In order to overcome this presumption, defendant argues that the trial court, in imposing its sentence, relied on improper sentencing factors.

¶ 34 In setting forth this argument, defendant is not asking us to reweigh the sentencing factors presented, nor does he claim that the trial court failed to consider mitigating evidence.

Rather, he argues that "improper factors were essentially the only aggravating factors found by the trial court, and once they are discarded, nothing in [defendant's] background justified imposing a sentence over the statutory minimum of six years in prison." In other words, defendant is asking us to determine whether the trial court's consideration of the alleged improper factors affected the length of the sentence imposed on him.

¶ 35 Defendant first argues that the trial court considered an improper sentencing factor when it announced that defendant endangered lives and knew that someone was in the building he set on fire, as those are factors inherent to the offense of aggravated battery. See 720 ILCS 5/20-1.1 (West 2012) ("A person commits aggravated arson when in the course of committing arson he or she knowingly damages, partially or totally, any building or structure […and] he knows or reasonably should know that one or more person are present therein"). Defendant also argues that the court improperly relied upon speculation in fashioning its sentence, when it announced that Laquitta Simmons could have been murdered had she been asleep inside her apartment.

¶ 36 The question of whether a court relied on an improper factor at sentencing is reviewed *de novo*. *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 8. Even if a sentencing court considered an improper factor, resentencing is not necessary if the record shows that the weight given to the factor was so insignificant that it did not lead to a greater sentence. *People v. Walker*, 392 Ill. App. 277, 301 (2009); see also *People v. Zapata*, 347 Ill. App. 3d 956, 966 (2004) (after reviewing entire record, we found that "the trial judge's distaste for gang violence was the dominant factor in the determination of defendant's sentence" despite no evidence the murder was gang-related). A reviewing court should consider the record as a whole, rather than focusing on a few words or statements by the trial court. *People v. Dowding*, 388 Ill. App. 3d 936, 943;

Zapata, 347 Ill. App. 3d at 966. Defendant bears the burden of establishing that his sentence was based on an improper sentencing factor. *Dowding*, 388 Ill. App. 3d at 943.

¶ 37 An improper factor includes the sentencing court using a factor inherent in a criminal offense as an aggravating factor, (*Dowding*, 388 Ill. App. 3d at 942), otherwise known as "double enhancement." *People v. Phelps*, 211 Ill. 2d 1, 11-12 (2004). Stated differently, the rule against double enhancement prohibits a single factor from being both an element of an offense and as a basis for imposing a harsher sentence than might otherwise be imposed. *Id.* Another improper sentencing factor is the sentencing court using speculation or prejudice as an aggravating factor. *Zapata*, 347 Ill. App. 3d 956, 964. However, sentencing courts are free to consider the nature of the offense, including the circumstances and extent of each element as committed. *People v. Bowman*, 357 Ill. App. 3d 290, 304 (2005).

¶ 38 After reviewing the record as a whole, we find that the trial court did not rely upon an improper sentencing factor. Rather, the record shows that the court's allegedly improper remarks were made in the context of referring to and acknowledging the seriousness of defendant's conduct. *People v. Flores*, 404 Ill. App. 3d 155, 159 (2010) (seriousness of the offense is the most important sentencing factor); *People v. Kibayasi*, 2013 IL App (1st) 112291, ¶¶ 53-58 (no double enhancement found where the sentencing court announced a fact inherent to the criminal offense as an aggravating factor after a review of the record showed that the court was "focused on" the circumstances and physical manner of the offense. In such a situation, references to a factor inherent in the offense suffice as "an acknowledgment that a serious offense occurred.).

¶ 39 Here, although the court noted that "person's lives were put at risk," and that defendant knew the building he set ablaze was occupied, the court was focused on the circumstances of

defendant's offense and his "foolish act of setting fire to a couch and walking out," which it found "just astonishing." In describing the seriousness of defendant's conduct, the court noted that "[t]he victim, had she been present and asleep, this could very well have been murder." See *People v. Hunter*, 101 Ill. App. 3d 692, 694-95 (1981) (affirming the defendant's sentence for aggravated arson, where the trial court was merely describing the nature and circumstances of the offense when it mentioned, among other aggravating factors, that "the blaze endangered lives of an entire family, including a small child"). The court also recounted defendant's criminal history and described defendant as "hot headed and not thinking" about the consequences of his actions, which ultimately led him to the "place where [he is] now." The court then noted that defendant's prior convictions were not nearly as aggravating "as the facts of the present case" and sentenced him to 12 years' imprisonment. See *Flores*, 404 Ill. App. 3d at 159 (seriousness of the offense is the most important sentencing factor). Given this record, the trial court did not consider an improper aggravating factor during sentencing or abuse its discretion in sentencing defendant to 12 years' imprisonment.

¶ 40 For the foregoing reasons, the judgment of the Circuit Court of Cook County is affirmed.

¶ 41 Affirmed.