2018 IL App (3d) 160500-U

Order filed December 20, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-16-0500
v.	)	Circuit No. 09-CF-861
	)	
LEE K. PONSHE,	)	Honorable Daniel J. Rozak,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Presiding Justice Carter and Justice McDade concurred in the judgment.

ORDER

¶ 1 *Held*: Plain error did not occur where the court failed to explicitly state the basis for imposing an extended-term sentence. The defendant's sentence of 75 years' imprisonment was not an abuse of discretion.

¶ 2 The defendant, Lee K. Ponshe, appeals his sentence of 75 years' imprisonment for first degree murder. The defendant argues that a new sentencing hearing is required because the trial court failed to articulate a basis for imposing an extended-term sentence. Alternatively, the defendant argues that his sentence was excessive.

¶ 3 I. BACKGROUND

¶ 4 The defendant was charged with first degree murder (720 ILCS 5/9-1(a)(2) (West 2008)) in that he struck H.B. about the head, knowing such an act created a strong probability of death or great bodily harm to H.B., thereby causing her death. The indictment alleged that the incident occurred on or about April 15, 2009.

¶ 5 Prior to trial, the State filed a notice of intent to seek a natural life sentence pursuant to section 5-8-1(c)(ii) of the Unified Code of Corrections (Code) (730 ILCS 5/5-8-1(c)(ii) (West 2008)), which stated that the court shall sentence a defendant to natural life imprisonment if the defendant had attained the age of 17 at the time of the murder and was found guilty of murdering an individual under 12 years of age.

¶ 6 A jury trial was held. Jessi Evans, H.B.'s mother, testified as to H.B.'s birth date. Based on H.B.'s birth date, she was 18 months old at the time of the incident. Evans testified that she met the defendant on a dating website in January 2009. They met in person in February 2009. Their relationship progressed, and they got engaged. Evans planned to move in with the defendant in April 2009. The defendant and his son came to Evans's residence a few days before she planned to move. The defendant watched H.B. on April 13, 2009, while Evans was at work. Evans returned home at approximately 12 a.m. on April 14, 2009. She observed a bruise on H.B.'s left cheek. The defendant said that H.B. fell off a push toy and landed on her left cheek.

¶ 7 The next morning, Evans packed her and H.B.'s belongings in totes and drove to the defendant's residence. Evans and the defendant unpacked the totes, and the defendant put them in the crawlspace. Evans left the house at approximately 6 p.m. While Evans was gone, the defendant called and told her that H.B. had fallen into the crawlspace. Evans could hear H.B. crying a little. The defendant said that H.B. appeared to be all right.

¶ 8 When Evans arrived back at the house, she did not see any new injuries on H.B. Later, the defendant put H.B. to bed, and Evans and the defendant watched a movie. Evans went to bed at approximately 12 a.m. The defendant was using the computer in the room where H.B. was sleeping when Evans went to bed. When Evans woke up, she told the defendant she could not believe that H.B. had slept through the night. The defendant said H.B. had been awake and fussy until 4 a.m., and she vomited once. Evans asked the defendant why he did not wake her, and he said he wanted Evans to sleep. Evans arose and tended to H.B. Evans observed that H.B. had a fat lip, which she did not have the night before. Evans gave H.B. a bath, and she did not observe any additional injuries.

¶ 9 Evans, the defendant, and H.B. ran errands that day. H.B. slept periodically during the errands. When they returned home, H.B. played in a sandbox. H.B. became cranky, so the defendant took her inside and laid her down on the couch to take a nap. Shortly after 7 p.m., the defendant checked on H.B. The defendant screamed that H.B. was not breathing. Evans ran into the room and saw that H.B.'s lips were blue. She told the defendant to call 911 and began performing CPR. The ambulance arrived, and Evans rode in the ambulance with H.B.

¶ 10 An emergency room doctor testified that H.B. was pronounced dead that night.

¶ 11 Detective Wayne Ratajack testified that he interviewed the defendant in connection with the instant case. The interview was recorded. The video recording was played for the jury. The defendant told the officers that H.B. had fallen into the crawlspace. After a break in the interview, the officers told the defendant the autopsy showed that H.B. did not die from a fall into the crawlspace. An officer indicated that someone hurt H.B. Eventually, the defendant said that the night before H.B. died, she kept crying. He went in multiple times to check on her. One time, he started rubbing her head. She started screaming louder, and he smacked her twice. The

defendant said that he "lost it" and it happened really fast. The defendant said that he did not intend to kill H.B. The defendant became very emotional when he talked about it.

¶ 12 An audio recording of a telephone call between the defendant and his father while the defendant was incarcerated in the county jail was played for the jury. The defendant's father asked what happened, and the defendant said he "lost it for a minute." The defendant said that "the first time [he] walked in," H.B. was breathing slowly. The next time he checked on her, she was not breathing.

¶ 13 Kelly Christopher testified that she was a death investigator for the coroner's office. On April 15, 2009, Christopher took photographs of H.B. at the hospital. Christopher testified that H.B. had a contusion on the left side of her face, three dark purple contusions on her forehead and hairline area, a laceration to her upper lip, a contusion on her left hip, and a contusion on her right thigh.

¶ 14 The State presented evidence that an autopsy was performed on H.B., and the cause of death was determined to be closed head injuries due to blunt force trauma.

¶ 15 Lucy Rorke-Adams, a neuropathologist, was certified as an expert in neuropathology, pediatric pathology, and forensic pathology. Rorke-Adams testified that she reviewed this case at the request of the State's Attorney's office. Rorke-Adams ultimately concluded that H.B. sustained considerable nonaccidental injury and died as a consequence. Rorke-Adams noted that H.B.'s lip was cut and there was bruising on H.B.'s face, forehead, and left ear. Rorke-Adams testified that the bruises on H.B.'s forehead were consistent with H.B. sustaining several blows to her head. There were two linear bruises on H.B.'s forehead that could have been from two knuckles hitting her forehead. There were several bruises on the deep layers of H.B.'s scalp that were scattered in multiple areas, separated from one another, and of varying sizes. The bruises on

the undersurface of H.B.'s scalp showed that trauma was inflicted. Each contusion represented a separate contact place for a blunt object. A strong force would have been needed to cause the contusions. Rorke-Adams noted that the defendant told the police that he hit H.B. multiple times on the top of her head, which was consistent with her injuries. There were also contusions in H.B.'s pleural cavity and hemorrhaging on the outer cover of H.B.'s spinal cord. These injuries were also consistent with blunt force trauma. Rorke-Adams opined that H.B.'s injuries were not consistent with a fall into the crawlspace.

¶ 16 Rorke-Adams testified that the blows to H.B.'s head caused concussive damage to the brain tissue. Rorke-Adams found cerebral edema, or swelling in the brain. The swelling caused the brain to push down through an opening at the base of the skull, causing the blood flow to that area of the brain to become compromised. Continued lack of blood flow would cause the individual to die because the brain would be unable to control cardiac and respiratory functions. Rorke-Adams opined that if H.B. had received early intervention treatment, her death could possibly have been prevented.

¶ 17 Rachel Eggleston, defendant's former girlfriend, testified regarding a prior incident where her 18-month-old son, T.W., was injured while in the defendant's care. The defendant told Eggleston that T.W. caused a parachute on the defendant's racecar to deploy, which hit T.W. in the face. The defendant told Eggleston that if she took T.W. to the hospital, she should say that he fell off of a big wheel. The next day, T.W. seemed afraid of the defendant and would not go near him. Photographs of T.W.'s injuries were introduced into evidence.

¶ 18 Dr. Jamie Jacobsohn, a neuropathologist, testified as an expert for the defense. Jacobsohn testified that he reviewed police reports, medical records, an autopsy report, an opinion letter from Rorke-Adams, stones from a crawlspace, autopsy photographs, and histologic slides from

the autopsy. Jacobsohn did not watch the video recording of the defendant's interview with the police. Jacobsohn opined that he observed no trauma to H.B.'s brain and that trauma did not cause her death. Jacobsohn opined that H.B. did not show signs of profound edema and that H.B.'s behavior on the day of her death was inconsistent with cerebral edema.

¶ 19 The jury found the defendant guilty of first degree murder. The jury also found the allegation that the defendant had attained the age of 17 or more and murdered an individual under 12 years of age had been proven. The court sentenced the defendant to natural life imprisonment. At the sentencing hearing, the State asserted that this sentence was mandatory based on the jury's finding as to the defendant's age and H.B.'s age.

¶ 20 On appeal, we affirmed the defendant's conviction but vacated his sentence and remanded for a new sentencing hearing. *People v. Ponshe,* 2015 IL App (3d) 130152-U, ¶ 56. We held that the defendant's mandatory life sentence relied on a statute that our supreme court had previously found to be unconstitutional in that it violated the single subject rule of the Illinois Constitution. *Id.* ¶ 51.

¶ 21 On remand, a new sentencing hearing was held. The State said that the defendant qualified for extended-term sentencing up to 100 years' imprisonment. The State noted that the usual sentencing range was 20 to 60 years' imprisonment, but it believed the sentencing range in this case was 20 to 100 years' imprisonment. The State argued that a sentence of at least 60 years' imprisonment would be appropriate, and it would not be "outside the realm of reasonableness that [the defendant's] sentence should be in the extended-term range."

¶ 22 Defense counsel agreed that the defendant was eligible for extended-term sentencing, but noted that it was not mandatory. Defense counsel stated that the sentencing range was 20 to 100

years' imprisonment, but argued that a sentence closer to 20 years' imprisonment would be appropriate.

¶ 23 The court sentenced the defendant to 75 years' imprisonment. The court noted that it had considered the presentence investigation report, the trial evidence, the evidence at the initial sentencing hearing, and the evidence at the second sentencing hearing. The court said that it had "considered all the law that applies including, but not limited to, the factors in aggravation and mitigation." In mitigation, the court found that the defendant did not have a criminal history other than a prior traffic offense and that the defendant was educated. The court said that the mitigating factor that the defendant did not cause or threaten serious harm to another did not apply because the defendant's actions "resulted in the death of an *** 18-month-old baby." The court reasoned that the mitigating factor that the defendant's criminal conduct was the result of circumstances unlikely to recur did not apply because there was evidence that the defendant had injured a child on a prior occasion.

¶ 24 Regarding the factors in aggravation, the court found that a lengthy sentence in the Department of Corrections was necessary to deter others from committing the same crime. The court reasoned:

> "If this was a case where defendant lost his temper for an instant and struck out for a second or two and then did everything he could to reverse the mistake, the sentence might be very different, but this was more than just simple striking out. This was a beating that had to have gone on for more than just a second or two. Almost—approximately 27 separate distinct injuries to this little baby, and just as tragic, it resulted in injuries, the result of which the defendant

could have changed. He had hours to do it. This occurred during the night, and it wasn't until the following evening that she passed away ***."

¶ 25 II. ANALYSIS

¶ 26 A. Extended-Term Sentencing

¶ 27 The defendant argues that the court erred in sentencing him to an extended-term sentence without either indicating that the sentence was a discretionary extended-term sentence or providing a basis for imposing a discretionary extended-term sentence. The defendant acknowledges that he forfeited this issue by failing to object or include the issue in a posttrial motion, but argues that the issue should be reviewed under the plain error doctrine. The first step in a plain error analysis is to determine whether a "plain error" occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 564-65 (2007). "The word 'plain' here is synonymous with 'clear' and is the equivalent of 'obvious.' " *Id.* at 565 n.2.

¶ 28 Section 5-8-2(a)(1) of the Code (730 ILCS 5/5-8-2(a) (West 2008)), which concerns extended-term sentencing, provided:

> "(a) A judge shall not sentence an offender to a term of imprisonment in excess of the maximum sentence authorized by Section 5-8-1 for the class of the most serious offense of which the offender was convicted unless the factors in aggravation set forth in paragraph (b) of Section 5-5-3.2 or clause (a)(1)(b) of Section 5-8-1 were found to be present. If the pre-trial and trial proceedings were conducted in compliance with subsection (c-5) of Section 111-3 of the Code of Criminal Procedure of 1963, the judge may sentence an offender to the following:
>
> (1) for first degree murder, a term shall be not less than 60 years and not more than 100 years."

¶ 29 Section 5-5-3.2(b)(4)(i) (*id.* § 5-5-3.2(b)(4)(i)) provided:

> "(b) The following factors may be considered by the court as reasons to impose an extended term sentence under Section 5-8-2 upon any offender:
>
> * * *
>
> (4) When a defendant is convicted of any felony committed against:
>
> (i) a person under 12 years of age at the time of the offense or such person's property."

¶ 30 "While the statutory requirement that the trial judge set forth on the record his reasons for a particular sentence does not obligate the judge to recite each factor and set a value on it [citation], the judge must nevertheless enumerate on the record his consideration of the requisite aggravating factors in imposing an extended-term sentence." *People v. McGhee,* 238 Ill. App. 3d 864, 882 (1992). The court is merely required to "enumerate its consideration of requisite aggravating factors that support the imposition of an extended-term sentence." *People v. Brown*, 327 Ill. App. 3d 816, 827 (2002). The court is not required to explicitly link the applicable aggravating factor to the court's decision to impose an extended-term sentence. *Id.* See also *People v. Bell*, 217 Ill. App. 3d 985, 1013-14 (1991).

¶ 31 Here, the court was permitted to impose an extended-term sentence on the basis that the defendant was convicted of a felony against a person under 12 years of age at the time of the offense. See 730 ILCS 5/5-5-3.2(b)(4)(i) (West 2008). Although the court did not explicitly say during the second sentencing hearing that it was imposing an extended-term sentence based on the age of the victim, the court clearly considered H.B.'s age in imposing the sentence. The court reasoned that the defendant had inflicted "approximately 27 separate distinct injuries to this little

baby" and that his actions had "resulted in the death of an *** 18-month-old baby." We note that the parties agreed that the defendant was eligible for extended-term sentencing, and the jury found that the State had proven beyond a reasonable doubt that H.B. was under 12 years of age at the time of the offense. Thus, the extended-term sentence in this case was clearly justified by the record. While it would have been preferable for the court to state explicitly the reason it was imposing an extended-term sentence, the court's failure to do so did not constitute plain error.

¶ 32 B. Excessive Sentence

¶ 33 The defendant alternatively argues that his sentence was excessive given his lack of criminal history and the nature of the offense. "The trial court has broad discretionary powers in imposing a sentence, and its sentencing decisions are entitled to great deference." *People v. Alexander*, 239 Ill. 2d 205, 212 (2010).

> "The trial court is granted such deference because the trial court is generally in a better position than the reviewing court to determine the appropriate sentence. The trial judge has the opportunity to weigh such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age." *People v. Stacey*, 193 Ill. 2d 203, 209 (2000).

"In considering the propriety of a sentence, the reviewing court must proceed with great caution and must not substitute its judgment for that of the trial court merely because it would have weighed the factors differently." *People v. Fern*, 189 Ill. 2d 48, 53 (1999).

¶ 34 "A reviewing court may not alter a defendant's sentence absent an abuse of discretion by the trial court." *Alexander*, 239 Ill. 2d at 212. "A sentence within statutory limits will not be deemed excessive unless it is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense." *Fern*, 189 Ill. 2d at 54.

¶ 35 Here, the 75-year sentence was well within the statutory extended-term sentencing range of 60 to 100 years' imprisonment. 730 ILCS 5/5-8-2(a)(1) (West 2008). Given the seriousness of the offense and the need for deterrence, the court did not abuse its discretion in imposing the 75-year term of imprisonment. The offense was very serious. The defendant struck H.B., an 18-month-old child multiple times on the head, causing multiple contusions and cerebral edema. H.B. subsequently died of her injuries. The defendant failed to seek medical attention for H.B. prior to her death, even when he saw that she was breathing slowly. Evidence was presented at the trial that the defendant had previously injured another 18 month-old child, T.W., under similar circumstances. The trial court also expressly found that a lengthy sentence was necessary for its deterrent effect.

¶ 36 We reject the defendant's argument that the sentence was excessive in light of his lack of criminal history, the fact that he did not intend to kill H.B., and his rehabilitative potential. "[M]itigating factors are not entitled to more weight than the seriousness of the offense." *People v. Smith*, 362 Ill. App. 3d 1062, 1090 (2005). We decline to reweigh the sentencing factors considered by the trial court.

¶ 37 III. CONCLUSION

¶ 38 The judgment of the trial court is affirmed.

¶ 39 Affirmed.