2019 IL App (1st) 152640-U

FIRST DIVISION
June 17, 2019

No. 1-15-2640

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the Circuit Court of
	) Cook County
Plaintiff-Appellee,	)
	)
v.	) No. 12 C6 61051
	)
WILFRED MCCLENDON,	) Honorable Luciano Panici
	) Judge Presiding
Defendant-Appellant.	)

JUSTICE GRIFFIN delivered the judgment of the court.
Justices Pierce and Walker concurred in the judgment.

ORDER

¶ 1 *Held*: There was sufficient evidence for the jury to find defendant guilty of home invasion beyond a reasonable doubt. Defendant is not entitled to a new trial where the record demonstrates he knowingly and voluntarily waived his right to counsel. The trial court abused its discretion in sentencing defendant to 40 years in prison, so we remand for resentencing.

¶ 2 Defendant Wilfred McClendon entered the home of then-98-year-old Margaret Voss and stole jewelry from her. Defendant was charged with and convicted of home invasion. He was sentenced to 40 years in prison. On appeal, defendant argues that the evidence at trial was insufficient to prove him guilty beyond a reasonable doubt because Voss's identification of him

was questionable. Defendant also argues that his waiver of his right to an attorney was not valid. Defendant challenges his sentence as excessive, and he argues that the trial court considered multiple improper factors in formulating his sentence. We affirm defendant's conviction for home invasion, vacate his sentence, and remand for a new sentencing hearing.

¶ 3 BACKGROUND

¶ 4 On June 29, 2012, Margaret Voss, then 98 years old, woke up to find that her niece's bedroom door was closed. The fact that the door was closed was suspicious to Voss because she had discovered her 60-year-old niece dead on the living room couch earlier in the evening, and the bedroom door was open at the time. When Voss opened the bedroom door, she observed a man in the room holding a butcher knife. The man pushed Voss, knocked her down several times, and struck her in the face. The man went through Voss's belongings looking for money, but being that she did not have any money there, took some jewelry and left.

¶ 5 Voss had not contacted the authorities about finding her niece dead earlier in the evening because she could not find her phone. So she similarly could not call the police about the home invasion and the robbery. Around 5 a.m., Voss observed a police car that was next door for an unrelated reason. She flagged down the police and told the officer about the robbery. Voss did not identify the perpetrator at the time.

¶ 6 Another one of Voss's nieces, Lara Stozek, told the detective investigating the case that Voss had confided in her that the offender was "Chi Chi," a man who lived across the street and to the right. The detective went to the house across the street and spoke to defendant Wilfred McClendon to get his name and date of birth. The detective used that information to make a photo array, and he went to speak to Voss about the incident. Voss identified defendant in the photo array as the man who entered her house that night, assaulted her, and stole her jewelry.

¶ 7 During the investigation, the detective learned that defendant had recently gone to a local pawn shop to pawn jewelry. The detective went to the pawn shop and viewed the item that defendant had pawned there. The detective also viewed a surveillance video of the transaction. The item was a medallion with a small, rare gold coin wrapped in 14-karat gold inside a gold setting. When the detective met with Voss, he showed her a picture of the jewelry from the pawn shop, and she indicated that it was the piece stolen from her room. It turned out that the piece of jewelry was made for Voss by her brother Clarence who had made similar medallions for Voss and other family members. Clarence identified the piece of jewelry that defendant pawned as the piece he had made for Voss. Voss's niece, Lara Stozek, produced a similar medallion that Clarence had made to show to the detective for comparison.

¶ 8 Defendant was arrested and charged with aggravated battery and home invasion. He informed the court that he wanted to represent himself. The trial court inquired into defendant's education, and defendant indicated that he had completed two years of college. The trial court informed defendant that he was charged with a Class X felony and that he was eligible for extended-term sentencing of 6 to 60 years. The trial court informed defendant that he would be held to the same standard as an attorney, and that the home invasion charge he was facing was very technical. The trial judge continued the case to let defendant think more about it. A month later, defendant told the court that he still wanted to represent himself. Then, two months after that, defendant stated that he had changed his mind and wanted his original public defender back. The public defender was reappointed.

¶ 9 A year after the public defender was reappointed to represent defendant, the public defender informed the court that the defense was still not ready for trial because defendant was being uncooperative so they could not prepare a defense. Defendant, on the other hand, made

several complaints about his public defender's representation. Defendant requested that a different public defender be appointed to his case. The trial court informed defendant that it was not an option to have another public defender. Defendant insisted that he would not go to trial while being represented by his current public defender, but that he still did not want to represent himself. The State took the position that, since the complainant in the case, Voss, was then 100 years old, defendant was tactically trying to delay the trial.

¶ 10 After more back and forth about defendant's representation for the next several months, defendant again stated that he wanted to represent himself. The trial court inquired again into defendant's level of education and defendant replied that "we done already went through that." The trial court stated that it needed to be sure that defendant knew what he was doing, and replied that "[w]e're going to go over it again because [the court] is not satisfied." When the trial court tried to admonish defendant again about the ramifications of representing himself, defendant said, "Well, I'm not going to answer, I plead the Fifth, man."

¶ 11 When the trial date arrived, defendant indicated that he was not ready. The trial court gave defendant an extension. The next time the trial date arrived, defendant again indicated that he was not ready. The trial court gave defendant another extension. The next time the trial date arrived, defendant indicated that he did not feel well, and the trial court gave him another extension. On the morning of the day the trial was set to begin, defendant informed the court that he was not going to go forward with a trial that day, and told the court that it could not force him. The trial court indicated that the trial would begin in the afternoon with or without defendant's participation.

¶ 12 Defendant refused to participate in voir dire, refusing to come out of lock up. Defendant told the deputy that he would never be ready for trial. The trial court noted on the record that it

had continued the case many times to accommodate defendant, that it had tried to advise defendant about what it meant for him to represent himself, and that defendant was refusing to participate. The trial court found defendant to be disruptive, noting that defendant had used profanity when addressing the court, and found that his delays and non-participation were dilatory in nature. After the jury was selected, defendant requested a lawyer. The trial did eventually begin, and defendant participated, representing himself.

¶ 13 Voss testified about the incident consistent with the facts set out above. The investigating detective also testified, as did Voss's brother Clarence who made the jewelry, the victim's niece Lora Stozek, and the manager at Cash America pawn shop, Undra Pillows. Defendant testified on his own behalf. Because defendant was representing himself, he testified in narrative form.

¶ 14 Defendant testified that he and his fiancé were friends with Kathy May, Voss's niece who lived with her and died the night of the robbery. Defendant had never met Voss, however, because she did not leave the house. Defendant stated that he had given Kathy his phone charger to borrow, so he went to her house around midnight to get it back. Voss spoke to defendant through the door and informed him that Kathy was not feeling well, so he went home. Defendant's fiancé woke him up the next day to inform him that Kathy had died. Defendant saw the police outside and he spoke to them to confirm that Kathy had died. Defendant also informed the officers that he had stopped by the night before.

¶ 15 Defendant testified that his fiancé had introduced him to pawning things. Defendant admitted that it was him on the pawn shop surveillance video, but stated that he wears lots of jewelry and that the medallion the State was representing as stolen was, in fact, his jewelry. Defendant testified that the detective stole the medallion from his residence in order to present it

as an item he had stolen it from Voss. Defendant also testified that his nickname was not "Chi Chi" as he was not "Mexican or a fag" and that no black person would go by such a name. The jury could not come to a conclusion on the aggravated battery charge, but found defendant guilty of the offense of home invasion.

¶ 16 Defendant accepted the reappointment of the public defender for the purpose of preparing posttrial motions. In his posttrial motion, defendant raised 11 claimed errors including that he was denied a fair trial because his waiver of counsel was not knowing and voluntary. Defendant also argued that the jury erred in finding him guilty where the victim did not make an in-court identification of him. After a hearing, the trial court denied defendant's posttrial motion.

¶ 17 Before sentencing, defendant did not cooperate with the probation department so that it could complete a presentence investigation report. Voss submitted a victim impact statement. The State argued that the crime was egregious, being that Voss was elderly and vulnerable and defendant was her neighbor. Defendant had seven prior felony convictions. The offense was a Class X felony, so the sentencing range was between 6 and 30 years, but the sentence was extendable to 60 years because of Voss's age. Defendant argued in mitigation that he was almost 50 years old, was engaged to be married, and has children and grandchildren. The trial court sentenced defendant to the maximum 30-year term on the Class X offense and an additional 10-year extended term due to the victim's age for a total sentence of 40 years in prison.

¶ 18 On appeal, defendant argues that the State failed to prove him guilty of home invasion beyond a reasonable doubt. His primary contention on this point is based on Voss purportedly being unable to make an in-court identification of him during trial and that Voss's identification was otherwise unreliable due to her age and the other circumstances surrounding the incident. Defendant also argues that his waiver of counsel was not constitutionally firm because he was

not adequately admonished by the court about waiving his right to an attorney. Defendant argues that the trial court erred when it considered improper aggravating factors during sentencing and that his 40-year prison sentence is excessive.

¶ 19 ANALYSIS

¶ 20 I. Sufficiency of the Evidence

¶ 21 We begin with defendant's contention that the State failed to prove him guilty of home invasion beyond a reasonable doubt. When a defendant challenges the sufficiency of the evidence, we must decide whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v. Jones*, 219 Ill. 2d 1, 33 (2006). A reviewing court will not substitute its judgment for that of the jury, and will not reverse a conviction for insufficient evidence unless the evidence admitted is so unreasonable, improbable, or unsatisfactory that it raises a reasonable doubt of defendant's guilt. *Id*. It is not the reviewing court's function to retry the defendant. *People v. Betance-Lopez*, 2015 IL App (2d) 130521, ¶ 40. The trier of fact assesses the credibility of the witnesses, determines the appropriate weight of the testimony and resolves conflicts or inconsistencies in the evidence. *People v. Johnson*, 2015 IL App (1st) 123249, ¶ 21.

¶ 22 Defendant's main focus regarding the sufficiency of the evidence is on the reliability of Voss's identification of him. When she was testifying, Voss was asked if she could identify the perpetrator in open court. When the State was trying to elicit an in-court identification, Voss did not identify defendant and said the offender was wearing a police uniform. Defendant buttresses his argument about the unreliability of the identification by pointing out that Voss was 98 years old at the time of the incident, had the shock of just discovering her niece dead on the couch, and

had just woken up when the offense took place. Defendant also points to Voss's testimony in which she intimated that she was scared because the offender was carrying a large knife, and that she did not identify the offender for a week as evidence of the identification's unreliability.

¶ 23 A positive identification of the accused even by a single witness is sufficient to sustain a conviction, provided that the witness had an adequate opportunity to view the accused under conditions permitting a positive identification. *People v. Slim*, 127 Ill. 2d 302, 307 (1989). In evaluating the reliability of an identification, we look to the following five factors: (1) the witness's opportunity to view the offender; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the criminal; (4) the witness's degree of certainty; and (5) the length of time between the crime and the confrontation. *Id*. at 307-08. A trier of fact's assessment of the witness's identification testimony, like its resolution of all factual questions, will be upheld so long as, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have come to the same conclusion the trier of fact did beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985).

¶ 24 A witness's inability to make an in-court identification is not fatal when the other evidence in the case is sufficient to meet the burden of proof. *People v. Hernandez*, 2012 IL App (1st) 092841, ¶ 79; see also *People v. McCreary*, 123 Ill. App. 3d 880, 885 (1984); *People v. Durham*, 131 Ill. App. 2d 1033, 1035-36 (1971) (a crime victim's inability to make an in-court identification does not preclude a conviction where the testimony is materially supported by other evidence, such as when items taken in a robbery are subsequently found in defendant's possession or the victim knowing the offender's name). Voss was elderly, her in-court identification was questionable, she was scared; those considerations were all presented to the jury. Each of those putative deficiencies in the identification evidence goes to the weight of the

identification, but it is for the jury to weigh evidentiary deficiencies against their strengths. See, *e.g.*, *People v. Austin*, 328 Ill. App. 3d 798, 805 (2002) (the lapse of time between a crime and an identification goes only to the weight of the testimony, a question for the jury); *United States v. Mitchell*, 429 F. App'x 271, 275 (4th Cir. 2011) (a witness's advanced age and its effect on identification testimony is to be assessed by the jury). Defendant had all of the supposed deficiencies in Voss's identification available to him in order to urge the jury to find the evidence insufficient.

¶ 25 Nonetheless, defendant's contention here is that the identification evidence was so unreliable that no rational trier of fact could have found him guilty beyond a reasonable doubt. The testimony demonstrated that Voss had several minutes to view the offender from a short distance. She originated the name of "Chi Chi" and that he was a neighbor from across the street. Voss identified defendant in a photo array as the perpetrator.

¶ 26 Performing detective work, the police uncovered that defendant had recently pawned jewelry in the area. It turned out that one of the pieces defendant pawned was unique to Voss as it was made by her brother. Voss, her niece, and the brother who made the piece of jewelry testified that it was hers. The family had other similar medallions, and the pawn shop manager testified that it was a "piece of unique jewelry" and characterized it as "rare." The evidence that the piece belonged to Voss and was stolen from her was strong. The defense that defendant presented to the jury—that the medallion was his and that he just happened to pawn it three days after the robbery—was suspect. Similarly, the theory that defendant presented to the jury—that the detective stole the item from his table during the investigation—is implausible. The pawn shop manager was the one who originated that piece, giving it to the detective and averring that it came from defendant. Viewing the evidence in the light most favorable to the State, a rational

trier of fact could have found the identification evidence to have been sufficient to prove that defendant was the perpetrator beyond a reasonable doubt.

¶ 27 II. Waiver of Counsel

¶ 28 Defendant argues that he was denied a fair trial because his waiver of the right to counsel was not constitutionally valid. Defendant acknowledges that he waived his right to counsel twice and that "the first time [he] waived counsel, the trial court did substantially comply with the [rule governing waivers of the right to attorney in Illinois]." Defendant, however, argues that the trial court failed to comply with the rule governing waivers of counsel the second time and, therefore, his "second waiver of counsel was invalid, and [he] is entitled to a new trial." Defendant acknowledges that he did not raise this issue previously, including in a posttrial motion, but urges us to consider the issue for plain error.

¶ 29 Illinois Supreme Court Rule 401 (eff. July 1, 1984) provides the requirements that a trial court must follow before accepting a defendant's waiver of counsel.

> "Any waiver of counsel shall be in open court. The court shall not permit a waiver of counsel by a person accused of an offense punishable by imprisonment without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:
>
> (1) the nature of the charge;
>
> (2) the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences; and
>
> (3) that he has a right to counsel and, if he is indigent, to have counsel appointed for him by the court." Ill. S. Ct. R. 401(a) (West 2016) (eff. July 1, 1984).

The purpose of the waiver of counsel rule is to ensure that a waiver of counsel is knowingly and voluntarily made. *People v. Haynes*, 174 Ill. 2d 204, 241 (1996). Each determination of whether there has been an intelligent waiver of the right to counsel depends on the particular facts and circumstances of the case, including the background, experience, and conduct of the accused. *People v. Baez*, 241 Ill. 2d 44, 116 (2011). Strict, technical compliance with the waiver of counsel rule is not always required. *Haynes*, 174 Ill. 2d at 236. Substantial compliance is sufficient for a valid waiver of counsel if the record indicates that (1) the waiver was made knowingly and voluntarily and (2) the trial court's admonishment did not prejudice the defendant's rights. *Id.* Although the court may consider a defendant's decision to represent himself unwise, a defendant's knowing and intelligent election to represent himself *must* be honored. *Id.* at 235.

¶ 30 Specifically, after acknowledging that his first waiver of counsel was constitutionally adequate, defendant contends that the trial court failed to admonish him a second time about "the nature of the charges, the possible sentences, or his right to have counsel provided." Defendant acknowledges that he refused to answer any of the judge's questions when the judge tried to admonish him about waiving his right to counsel the second time, but argues that his refusal to answer the judge "did not in any way prevent the trial court from informing [him] of the nature of the charges and the sentencing range as it was required to do under Rule 401(a)."

¶ 31 Once a defendant makes a valid waiver of counsel, that waiver remains in effect throughout later stages of the proceedings, including posttrial stages. *People v. Baker*, 92 Ill. 2d 85, 91-92 (1982). Here, defendant waived his right to counsel in the very same stage of proceedings in which he now argues that his waiver was constitutionally invalid. Defendant did express a desire to be represented after executing his admittedly valid waiver which, under some

circumstances, requires readmonishment. See *People v. Cleveland*, 393 Ill. App. 3d 700, 705 (2009) (overruled on other grounds). But the flip flop defendant now selects in an attempt to challenge his jury waiver is accompanied by overall circumstances that demonstrate that his waiver was made knowingly and voluntarily. As our Supreme Court has observed and is applicable here, "[g]iven the circumstances present in this case, we find that the lapse of time between the admonishments and the waiver did not negate the effectiveness of the admonishments." *Haynes*, 174 Ill. 2d at 242.

¶ 32 Here, the trial court advised defendant about the nature of the charges against him and that home invasion was "a very technical offense." The trial court informed defendant that he was facing extended sentencing and could be sentenced from anywhere between 6 and 60 years in prison if found guilty. Defendant knew he had the right to have a public defender represent him, but he wanted an attorney other than the one the government provided to him. The trial court even consulted with a supervisor at the public defender's office to see if it was possible to have another public defender assigned to defendant, and the supervisor informed the court that it was not possible.

¶ 33 When defendant made the waiver that he now maintains was invalid, the trial court tried to readmonish defendant, but defendant refused to participate. When the trial court undertook to readmonish defendant, beginning by inquiring into his education, defendant stated "we done already went through that." The trial court stated that it needed to be sure that defendant knew what he was doing, and replied that "[w]e're going to go over it again because [the court] is not satisfied." The trial court stated "I'm not trying to force you to do anything. You want to go on your own, I have to be able to be sure that you know what you're doing because if you don't and you're found guilty, the first thing you're going to say is that 'I didn't know what I was doing, I

need a new trial.'" When the trial court tried to admonish defendant again about the ramifications of representing himself, defendant said, "Well, I'm not going to answer, I plead the Fifth, man." The record in the case makes clear that defendant knew and understood his right to counsel and voluntarily chose to forego that right.

¶ 34 Defendant was fifty years old, completed some college, and had seven prior felony convictions—a significant familiarity with the criminal justice system. See *People v. Redd*, 173 Ill. 2d 1, 22 (1996) (a defendant's extensive experience with the court system is one indication that he knows what proceeding without counsel means and that the waiver is knowing and voluntary). Reversal for imperfect admonitions for waiver of counsel is not required when the omission "does not prejudice defendant because either: (1) the absence of a detail from the admonishments did not impede defendant from giving a knowing and intelligent waiver or (2) defendant possessed a degree of knowledge or sophistication that excused the lack of admonition." *People v. Pike*, 2016 IL App (1st) 122626, ¶ 112, *appeal denied*, No. 120864 (Ill. Sept. 27, 2017). Defendant fails to show prejudice. His knowledge and his experience with the court system establish that he knew what being represented by an attorney entails, knew he had the right to one, and instead voluntarily chose to defend the case on his own.

¶ 35 As stated above, a defendant's knowing and voluntary election to represent himself must be honored. *Haynes*, 174 Ill. 2d at 235. Defendant took significant time in making the decision to represent himself. It was an ever-present concern in the case as defendant expressed from the beginning stages of the case that he wanted to represent himself and then went back and forth between wanting an attorney and wanting to represent himself. It was a process that played out over more than a year. The State saw defendant's actions as a stratagem, and the record supports that possibility. But regardless, it is clear that defendant wanted to pursue his own defense and

that he knew what he was doing. The situation in this case closely mirrors that in *People v. Ware*, 407 Ill. App. 3d 315, 341-48 (2011) in which we found that the defendant was not entitled to a new trial. The same result is appropriate here. Defendant's waiver of counsel was knowing and voluntary, the trial court's admonishments were sufficient, and any deficiency in the admonishments did not prejudice defendant's rights.

¶ 36 III. Sentencing

¶ 37 Defendant was charged with home invasion and aggravated battery. The jury could not reach a conclusion on the aggravated battery charge, but found defendant guilty of home invasion. Home invasion is a Class X felony (720 ILCS 5/19-6(c) (West 2016)) that carries a sentence of 6 to 30 years' imprisonment (730 ILCS 5/5-4.5-25(a) (West 2016)). The State sought to subject defendant to extended-term sentencing which can be applied when a defendant commits a felony against a person 60 years of age or older. See 730 ILCS 5/5-5-3.2(a)(8) (West 2016); 730 ILCS 5/5-5-3.2(b)(3)(ii) (West 2016). The trial court sentenced defendant to the maximum 30 years in prison for home invasion and added 10 years to the prison sentence due to the victim's advanced age. Defendant argues that his 40-year prison sentence is excessive. He also argues that the trial court considered various improper aggravating factors in arriving at a sentencing decision.

¶ 38 The Illinois Constitution requires a trial court to balance the seriousness of the offense and the objective of returning the offender to useful citizenship. Ill. Const. (1970) art. I, § 11; *People v. Wilson*, 2012 IL App (1st) 101038, ¶ 61. In doing so, the trial court must consider a number of aggravating and mitigating factors. 730 ILCS 5/5-5-3.2 (West 2016); 730 ILCS 5/5-5-3.1 (West 2016). Although the trial court is vested with wide discretion in sentencing, such discretion is not without limitation. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). The sentence

imposed by a trial judge must be fair-minded and equitable. *People v. Gooch*, 2014 IL App (5th) 120161, ¶ 8. A sentence within the statutory sentencing range constitutes an abuse of discretion if the sentence is greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense. *Stacey*, 193 Ill. 2d at 210.

¶ 39 Defendant was 50 years old at the time of sentencing and was sentenced to the maximum 30 years in prison on the home invasion conviction plus 10 years. The trial court abused its discretion in sentencing defendant to 40 years in prison—a sentence that runs to the point at which defendant would be 90 years old. Under the circumstances, the record does not support a conclusion that defendant was qualified for the most serious sentence that could be imposed on him for this offense under Class X sentencing plus 10 years.

¶ 40 At the sentencing hearing, the State presented the victim impact statement of Voss. The State then highlighted the details of the case to show the seriousness of the offense: that defendant was Voss's neighbor, that he knew she was old, and knew she was vulnerable. The State brought out defendant's criminal history by noting that he had seven prior felony convictions and a pending felony case for aggravated battery against a correctional officer that he allegedly committed while incarcerated in this case. The State also drew attention to defendant's conduct during the pendency of this case, explaining that defendant had been disrespectful and volatile. The State concluded that, defendant "has proved himself to be dangerous is the bottom line." The State asked that the court sentence defendant to "a very significant period of time in the penitentiary."

¶ 41 In mitigation, defense counsel asked the court to impose a sentence "that would allow [defendant] to address the issues that the jury has spoken to and come back and hopefully be a productive member of society." Defendant pointed out that he has a family. He is engaged to be

married. He has children and grandchildren. And he was 50 years old at the time of sentencing. Defense counsel concluded by reiterating his request that defendant be given a sentence "that would allow my client to again return to be a productive member of society."

¶ 42 In arriving at a sentence, the trial court discussed defendant's "current case pending at 26th Street for an aggravated battery to a police officer, two counts" and defendant's prior criminal history as "matters in aggravation which is very significant." The trial court found defendant's criminal history to be "very extensive" and stated that it was a "very weighing factor" for the court. The trial court explained that defendant took advantage of Voss's advanced age and the fact that her niece had just passed away. The trial court found defendant to have been "very disrespectful to th[e] court" and noted that defendant "showed right now no remorse for what he's done."

¶ 43 After a thorough review of the record, we conclude that the sentence imposed here is manifestly disproportionate to the nature of the offense and cannot stand. As the jury could not reach a conclusion on the aggravated battery charge, we are left with a finding of guilty for home invasion. It is true that Voss was harmed during the course of the offense, but not so severely that she required medical attention. It is likewise true that defendant has a criminal history. He committed a burglary 25 years ago and had six convictions for drugs between 1994 and 2007. But he has no convictions for crimes of violence. Defendant was also uncooperative during the case and disrespectful to the court. But none of the above justifies a 40-year sentence. While the crime was no doubt a terrible one, it was not heinous in the sense that it was deserving of the most severe sentence that can be imposed for a Class X felony plus an additional 10 years.

¶ 44 The trial court expressly considered improper criteria in formulating defendant's sentence. The trial court improperly relied on a pending charge against defendant and explained

that it was one of "the matters" in aggravation that it found to be "very significant." "Bare arrests and pending charges may not be utilized in aggravation of a sentence." *People v. Johnson*, 347 Ill. App. 3d 570, 575 (2004). The pending charge against defendant was not substantiated in any way at sentencing and should not have influenced the sentence. See *People v. Wallace*, 145 Ill. App. 3d 247, 256 (1986) (remanding for resentencing when the trial judge considered a defendant's mere arrest in an unrelated incident as an aggravating factor). The trial court emphasized defendant's disrespect for the court and his uncooperativeness as factors used in formulating his sentence. The trial judge also considered defendant's lack of remorse as evidenced by his failure to allocute. It is clear that the trial judge had a negative view of defendant personally, finding that he lacked any redeeming qualities. Even if those matters could be properly considered in fashioning a sentence, those considerations should not take predominance over considering the nature of the offense and the objective of restoring the offender to useful citizenship. See Ill. Const. (1970) art. I, § 11. The trial court did not discuss the constitutionally-mandated consideration of restoring the offender to useful citizenship, and, in fact, the sentence it imposed essentially precludes defendant from returning to be a productive member of society ever again.

¶ 45 The record does not justify such a lengthy sentence. While defendant could of course be released before serving the full 40 years of his sentence in prison and being incarcerated until he reaches the age of 90, the nature of the offense and the other circumstances presented in the case do not warrant such a lengthy sentence.

¶ 46 The observations made above should not be construed as a downplaying of the seriousness of the offense. Home invasion is a serious offense that strikes at the heart of the principle that members of society should feel safest in their own homes. The victim here was 98

years old and defendant capitalized on that fact in seizing on the opportunity to commit a crime against her. Defendant's conduct during the case was surely deserving of reproach, but sentencing defendant to prison for a period of 40 years under the circumstances presented is at variance with the spirit and purpose of the law. A strong sentence was called for, but the maximum sentence plus 10 years was not. Accordingly, we find defendant is entitled to resentencing. See *People v. Goodman*, 98 Ill. App. 3d 743, 753 (1981).

¶ 47 Illinois Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994) gives a reviewing court, in its discretion, the power to reassign a matter to a new judge on remand. *People v. Tally*, 2014 IL App (5th) 120349, ¶ 43. We exercise that discretion here.

¶ 48 At sentencing, the trial judge expressed his negative views about defendant personally, stating his personal belief that defendant lacked redeeming qualities. The trial judge relied on improper considerations to impose a heavy sentence on defendant, believing it to be necessary to make an example of defendant and deter others. The record does not indicate that the trial judge considered crafting a sentence that might return defendant to useful citizenship. At the sentencing hearing and at other points in the proceedings, the trial judge made his disdain for defendant clear on the record, and he then went on to sentence defendant to the maximum sentence for a Class X felony plus 10 years. In order to remove any appearance of personal bias and to ensure the fairness and impartiality of further proceedings, we find that the subsequent proceedings should be conducted in front of a new judge. See *People v. Vance*, 76 Ill. 2d 171, 181-82 (1979) ("a showing of animosity, hostility, ill will, or distrust towards [a] defendant" may necessitate the transfer of the case to another judge).

¶ 49 CONCLUSION

¶ 50 Accordingly, we affirm defendant's conviction. We vacate his sentence and remand the

matter for a new sentencing hearing. The case is remanded to the presiding judge of the sixth municipal district with instructions to assign the case to a different judge for resentencing.

¶ 51 Conviction affirmed. Sentence vacated. Remanded for resentencing.