2019 IL App (1st) 170592-U

No. 1-17-0592

September 25, 2019

Third 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. 16 CR 8100
	)	
ROBERT DOWNEY,	)	Honorable
	)	Timothy J. Chambers,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Ellis and Justice Fitzgerald Smith concurred in the judgment.

ORDER

¶ 1 *Held*: Defense counsel was not ineffective at sentencing for failing to argue that defendant committed the offense because of a sudden and intense passion arising from serious provocation. The trial court did not abuse its discretion or fail to consider mitigating factors in sentencing defendant to 11 years in prison for attempt first degree murder.

¶ 2 Following a bench trial, defendant Robert Downey was found guilty of, *inter alia*, the attempt first degree murder of his wife, Tabatha Downey,[1] and sentenced to 11 years in prison. Defendant now appeals, arguing that his trial counsel provided ineffective assistance by failing to request that he be sentenced under section 8-4(c)(1)(E) of the Criminal Code of 2012 (Code) (720 ILCS 5/8-4(c)(1)(E) (West 2016)), which qualifies a defendant for a reduced sentencing range if the defendant proves by a preponderance of the evidence that he committed the attempt murder under a sudden and intense passion resulting from serious provocation. Defendant also contends that, regardless of the applicable sentencing range, the trial court abused its discretion in imposing a sentence disproportionate to the nature of the offense and inapposite to the goal of rehabilitation. We affirm.

¶ 3 Defendant was charged by indictment with attempt first degree murder (720 ILCS 5/8-4(a) (West 2016); 720 ILCS 4/9-1(a)(1) (West 2016)), aggravated domestic battery (720 ILCS 5/12-3.3(a-5) (West 2016)), aggravated battery (720 ILCS 5/12-3.05(a)(5) (West 2016)), and domestic battery (720 ILCS 5/12-3.2(a)(1) (West 2016)), in connection with an incident involving Tabatha at their apartment in the early hours of April 27, 2016. Immediately prior to trial, a private attorney appeared on Tabatha's behalf and informed the court that she wished to invoke her right against self-incrimination. The attorney argued that, if Tabatha were forced to testify, "her answers might incriminate her as a perpetrator of a domestic battery" because she was "the aggressor" on the night of defendant's arrest. After an off-the-record "issues conference" with the attorneys, the court ruled that Tabatha would be required to testify.

[1] Because Tabatha Downey has the same last name as defendant, we will refer to her as Tabatha.

¶ 4 At trial, Chicago police officers Ray Archuleta and Thomas Baker testified that, just after midnight, on April 27, 2016, they and other officers responded to a domestic disturbance call at a high-rise apartment building in the 1100 block of North Dearborn Street. The officers took the elevator to the twelfth floor and found the apartment they were looking for with the door held slightly ajar by a laundry basket and internal lock. They heard a "faint whimpering" coming from inside.

¶ 5 Archuleta testified that he entered the apartment and proceeded to a back room where he heard the whimpering. There, he found defendant lying on top of Tabatha, who was on the ground with her legs spread open and her arms to the side. She was not "moving at all or squirming or fighting." Archuleta attempted to pull defendant off Tabatha, but could not because "[h]e was too heavy." Archuleta was eventually able to get his arms underneath defendant and move him aside. As Archuleta did so, defendant dropped a pillow that had been between his chest and Tabatha's face. Tabatha tried to speak, but her voice was "[v]ery weak," as if "[s]he didn't have any breath in her." Archuleta handcuffed defendant and removed him from the apartment.

¶ 6 Baker testified that he entered the apartment just after Archuleta and came upon defendant as Archuleta was unsuccessfully attempting to pull him off Tabatha. At this time, Tabatha was silent and "laying motionless on the ground." When Archuleta moved defendant aside, defendant dropped a pillow that had been "compressed" between his chest and Tabatha's face. Tabatha "let out a huge gasp," and Baker had to turn her onto her side to help hear breathe. She was disoriented and hyperventilating. Defendant was escorted out of the apartment, and another officer interviewed Tabatha in Baker's presence. Tabatha first stated that defendant told

her, "I'm going to kill you tonight. We're both going to die tonight." Tabatha then explained that she and defendant argued after he accused her of having an affair. The argument turned physical when defendant tackled her and squeezed her neck with his hands. He then pressed a pillow over her face, which deprived her of oxygen and caused her to float "in and out of consciousness" until the police arrived. Baker testified that Tabatha appeared "really shooken up," with teary eyes and a "very blushed" face during the interview. On cross-examination, Baker testified that Tabatha refused medical treatment and that he did not observe any injuries on her body.

¶ 7 Tabatha testified that she fell asleep on the couch after having "some drinks" after work on April 26, 2016. When she awoke shortly after midnight, she noticed that her cell phone was missing. She asked defendant if he had her phone, and he replied that he did not. However, Tabatha observed him walk out of the bedroom with her phone in his hand and place it on the kitchen counter. The couple began to argue. Tabatha checked her phone and saw that defendant had sent text messages to one of her coworkers, telling him to "stay away from [her]" and to "respect our marriage." Tabatha confronted defendant about the messages, and defendant "ended up snatching [her] phone out of [her] hand." Tabatha eventually got her phone back and called 911 to report that she wanted defendant removed from their home because he was intoxicated. She then packed defendant's clothes in a laundry basket, set it by the door, and ordered him to leave. While Tabatha was packing defendant's things, he again took her phone. She attempted to get it back, but he prevented her from doing so by blocking her reach with his body. In an attempt to recover her phone, Tabatha pulled defendant's hair "really, really hard." They both lost their balance and fell to the floor, with defendant on top. Once on the floor, defendant pried Tabatha's hand from his hair and she attempted to strike him. He grabbed her wrists to restrain

her. Tabatha broke free and started "swinging wildly." Defendant grabbed a pillow off the couch and held it in front of her face "like a shield" to block her punches. Tabatha inadvertently "bang[ed]" her head on the floor while struggling with defendant. Tabatha further testified that she was 5 feet, 4 inches tall and that defendant was 5 feet, 11 inches tall. She denied that defendant slammed her head into the floor, choked her, or touched her face with the pillow.

¶ 8 After defendant was arrested and removed from the apartment, Tabatha spoke to some of the responding officers. She recalled telling the police "what we were fighting about," but did not remember anything else that she told them. Later, she spoke to Assistant State's Attorney Elizabeth Brogan and Detective Smith[2] at the police station. After the interview, Brogan memorialized Tabatha's statements in a written document.

¶ 9 The State presented Tabatha with the written statement, which she had signed on each page. When questioned about its contents, Tabatha stated she did not recall what she told Smith and Brogan because "[i]t was so long ago," she "had been up all night," and "had been drinking" on the night of the incident.

¶ 10 On cross-examination, Tabatha testified that she bit defendant in the back after he took her phone for the second time. Afterwards, she pulled his hair so hard that she tore clumps of it from his head. Tabatha further testified that she did not "lie" to the police at the scene, but rather "just didn't correct them" in their belief that defendant had attempted to smother her because she "figured that would make them take him." She also "didn't lie" to Smith and Brogan, but "embellished" and "let them make assumptions" in order to protect herself because Smith told

[2] Smith's first name does not appear in the transcript of proceedings.

her that defendant could "make [her] life miserable" by reporting the incident and jeopardizing her career.

¶ 11 Tabatha acknowledged creating an affidavit in the presence of defense counsel and a private investigator on June 19, 2016. She testified that she did not "feel like" she told the investigator that she "lied" to Brogan. However, if she did say that she "lied," then she "misspoke."

¶ 12 Brogan testified that she arrived at the police station around 5:20 a.m. on April 27, 2016, and interviewed Tabatha in Smith's presence. Afterwards, she interviewed defendant, who appeared "disheveled" and intoxicated, but was not missing any hair. Brogan then spoke to Tabatha again and offered to memorialize her earlier statements in writing. Tabatha chose to have her statement put into writing, and sat next to Brogan while Brogan typed it on a computer. The court admitted the typewritten statement over the defense's objection, and Brogan read it aloud in court.

¶ 13 According to the statement, which is in the record on appeal, Tabatha told Brogan that defendant had a "drinking problem" and would become "angry" and "violent" when drunk. On the night of the incident, Tabatha fell asleep on the couch and awoke to find that her phone was missing. Defendant "pretended that he didn't have it," but Tabatha saw him place it on the kitchen counter. The couple argued after defendant accused Tabatha of cheating on him. As defendant became "more agitated," Tabatha asked him to leave and threatened to call the police. When he refused, she called the police and told them that she wanted defendant out of her apartment.

¶ 14 Tabatha then put defendant's clothes in a laundry basket and set it by the door, inadvertently preventing it from closing. While she did so, defendant grabbed her phone again and refused to return it. Tabatha tried to get it back, but was unable to reach it because defendant was blocking her with his body. As they struggled for control of the phone, defendant fell on top of Tabatha. She attempted to get him off of her by pulling his hair, but he grabbed her wrists to restrain her. He then lifted her head, "bang[ed]" it on the floor two times, and choked her with his hands. Defendant stated, "You're going to die tonight" and "We're both going to die." Defendant then grabbed a pillow from the couch and placed it over Tabatha's face, applying pressure and "suffocating her." Tabatha "felt like she was starting to pass out," and thought that defendant would kill her. However, the police arrived and pulled defendant off her, which allowed her to "gasp for air."

¶ 15 Upon questioning by the court, Brogan testified that Tabatha did not have any difficulty recalling the events of that night and did not appear intoxicated. The statement itself states that Tabatha was not under the influence of alcohol.

¶ 16 On cross-examination, over the State's objection, Brogan read aloud a written summary of her interview with defendant. According to the summary, which is not in the record on appeal, defendant stated that he drank half of a bottle of wine on the night of the incident and locked himself in his bedroom with Tabatha's phone. When she demanded it back, defendant told her he would return it if she gave him his phone. However, Tabatha "attacked him" by pulling his hair. He tried to restrain her, but "never put his hands on her, never choked her, and never strangled her."

¶ 17 The State then entered into evidence a certified copy of defendant's August 2006 conviction for domestic battery, for which he was sentenced to conditional discharge.

¶ 18 After the State rested, defense counsel recalled Tabatha and presented her with the affidavit she created for the defense in June 2016. Over the State's objection, the trial court allowed Tabatha to read the affidavit into evidence. In the affidavit, which is in the record on appeal, Tabatha averred that she "exaggerated" and "lied" to Smith and Brogan because she wanted to "make [her] version of the story convincing enough to just get [defendant] out of the house and get some counseling." She also "felt [she] had no other choice" than to falsely accuse defendant because Smith told her that her "career would be over" if defendant made "a complaint against [her]."

¶ 19 Tabatha further averred that she was the "aggressor" on the night of the incident, as her argument with defendant turned physical when she bit his back while he was preventing her from taking her phone back from him. She grabbed his hair and repeatedly pulled on it as hard as she could. She ripped out some of his hair and was holding clumps of it when the police arrived.

¶ 20 While Tabatha was pulling defendant's hair, they lost their balance and fell to the floor with defendant on top. She began swinging her fists "wildly" at defendant, so he grabbed her wrists to restrain her and eventually pinned her shoulders to the floor. Defendant then grabbed a pillow and "used it as a shield" to block her punches.

¶ 21 After the incident, Tabatha "lied" to Smith and Brogan because she was angry with defendant and knew that the police would remove him from their home if she told them that he choked her and threatened to kill her. She later informed the State's Attorney's Office that she wanted to drop the charges, but they informed her that they would pursue the case anyway. She

obtained an order of protection against defendant because she thought "it would help [him] seek counseling," but she withdrew the order the same day after defendant was not released from custody.

¶ 22 Following closing arguments, the court found defendant guilty on all counts. In so finding, the court noted that "unlike a standard domestic violence case," Archuleta and Baker were present and provided "independent eyewitness testimony" that defendant held a pillow over Tabatha's face while she lay motionless on the ground. The court also noted that neither officer testified that Tabatha was holding handfuls of defendant's hair or that he was bleeding from the scalp as if his hair had just been pulled out. Defendant's motion for a new trial was denied.

¶ 23 The case proceeded to a sentencing hearing, where the court acknowledged receipt of defendant's presentence investigation (PSI) report. In aggravation, the State adduced testimony from four police officers concerning numerous past instances of domestic violence in which defendant was involved.

¶ 24 During the first such incident, police responded to defendant's apartment complex after he called the police on May 5, 2008. When they arrived, defendant was intoxicated and did not remember why he called them. The officers spoke to Elizabeth Bork, defendant's girlfriend at the time, who told them that defendant was under the influence of Vicodin and alcohol. She also stated that defendant was upset because she had just declined his marriage proposal. The couple argued, and defendant threw a potted plant at Bork, striking her in the chest. However, she refused to sign a complaint against defendant "because she was fearful of him" and "thought there would be retaliation."

¶ 25 On November 28, 2011, police responded to a domestic violence call and met with Krystina Sonner, defendant's then girlfriend. They observed red marks around her throat. Sonner told the officers that defendant was intoxicated, and that they had argued about his drinking and unpaid bills. After the argument, he choked her, held a whiskey bottle above his head, and stated "if I hit you with this I would kill you." Sonner also told officers that she and defendant had argued about defendant's drinking on the previous day as well. During this argument, defendant pushed her to the ground. The State entered a photograph showing the "multiple bruises" to her thigh that were a result of the fall. Sonner did not call the police during the first argument because defendant "pulled the phone out of the wall" while she dialed them.

¶ 26 On May 25, 2012, the police responded to a domestic violence call at the same apartment complex. Upon arrival, they met with Sonner, who told them that she had returned home from work to find defendant intoxicated. She attempted to call defendant's mother, but he became upset, grabbed the phone from her hand, and threatened to kill her. Defendant then squeezed Sonner's neck and told her to "get the F out of here." As she left the apartment, defendant threw her cell phone on the ground and threatened to damage her laptop. When Sonner returned to her apartment, her laptop had been "smashed" and defendant was gone. The State introduced photographs depicting the damage to Sonner's property and the small lacerations on her left finger that she sustained when defendant grabbed her cell phone from her hands.

¶ 27 On June 19, 2012, a patrol officer again responded to a domestic disturbance call at defendant's apartment complex. Upon arrival, the officer observed defendant "highly intoxicated" and walking toward Sonner, who was outside on her porch. The officer twice ordered defendant to stop, but he replied "f*** you." As defendant continued to approach

Sonner, the officer grabbed his hand. Defendant pulled away, causing them both to fall to the ground. After a brief struggle, defendant was arrested. The officer then spoke with Sonner, who related that defendant grabbed her wrists and threw her down because she threatened to leave him if he did not stop drinking. Defendant then got on top of Sonner, put his knees against her chest, and threatened to kill her. Defendant subsequently pleaded guilty to battery against the officer, but not domestic battery.

¶ 28 On March 9, 2013, police responded to "an incident between [Sonner] and the defendant who was again intoxicated."[3] The police advised Sonner on how to retrieve her personal property from the apartment, but she told them that they were "wasting [their] breath because I will just be back here tomorrow."

¶ 29 On July 5, 2015, police responded to the same apartment building as in the present case. As an officer approached defendant's apartment, he saw that the door was slightly ajar and heard a man inside say "you want me to throw you over the f***ing balcony?" The officer entered the apartment and saw defendant run from the bedroom to the bathroom. Tabatha was in the bedroom. She explained to police that defendant had been "drinking heavily" and had "smashed" a television, a potted plant, and some furniture. Defendant told the officer to "get the f*** out and send a white officer." Police obtained Tabatha's signature for the complaint and arrested defendant.

[3] Over the defense's objection, the trial court allowed the prosecutor to present this evidence personally "as an Officer of the Court" because the responding officer was unavailable to testify. The prosecutor read the information into evidence from a police report.

¶ 30 The State also entered a certified statement that none of these incidents resulted in a domestic battery conviction, and were instead all dismissed on the State's motion except for defendant's guilty plea for battering the police officer.

¶ 31 In mitigation, defense counsel read several character letters into the record. Two of these letters were written by defendant's parents and recounted that his mental problems and alcohol abuse stemmed from being molested by a priest while in high school. The other letters were written by the owners and employees of a restaurant where defendant was employed, and attested to his good character and work ethic.

¶ 32 According to the PSI report, defendant stated that he was estranged from his parents and had not spoken to his father in several years. Defendant graduated from high school and obtained a culinary degree from Cordon Bleu College of Culinary Arts. He was last employed as a sous-chef from July 2016 until his incarceration in November 2016. He remained married to Tabatha and had a "good relationship" with her and her two children from a previous marriage. Defendant also reported that he was a "recovering alcoholic" who began drinking at age 15. He "had 2 DUI cases several years ago."

¶ 33 After arguments, the court merged the counts into a single count of attempt murder and sentenced defendant to 11 years in prison. In so ruling, the court acknowledged defense counsel's argument that defendant deserved "a second chance," but noted that "there have been other cases" in which defendant, "usually drunk, sometimes drunk with pills," was involved in domestic disturbances. With respect to the present case, the court found that defendant was "smothering" Tabatha, and stated that she "would have been dead" had the police arrived any later. Thus, the court concluded that "[t]here's no question in my mind that this is a Class X

felony, that is was an attempt first degree murder and as such it carries 85 percent sentencing because she was unconscious. He did attempt to kill her." Defendant's motion to reconsider the sentence was denied.

¶ 34 On appeal, defendant first argues that his trial counsel was ineffective for failing to argue that he was eligible for sentencing under section 8-4(c)(1)(E) of the Code (720 ILCS 5/8-4(c)(1)(E) (West 2016)). In particular, defendant argues that counsel could have proven by a preponderance of the evidence that he attempted to murder Tabatha under a sudden and intense passion resulting from serious provocation, and that the trial court would have therefore imposed a lesser sentence. The State responds that defendant's ineffective assistance claim fails because the evidence would not have supported a finding that he acted after serious provocation.

¶ 35 Claims of ineffective assistance of counsel are evaluated under the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a defendant must demonstrate both that his counsel's performance was deficient and that he suffered prejudice as a result. *Id.* at 687. To prove deficiency, the defendant must show that counsel's performance fell below an objective standard of reasonableness as determined by prevailing professional norms. *People v. Cherry*, 2016 IL 118728, ¶ 24. To establish prejudice, a defendant must show that a "reasonable probability" exists that, but for counsel's errors, the proceeding would have ended in a different result. *Id.* A "reasonable probability" is a probability substantial enough to undermine confidence in the outcome of the proceeding. *Strickland*, 466 U.S. at 694. The failure to establish either *Strickland* prong precludes a finding of ineffective assistance of counsel. *Cherry*, 2016 IL 118728, ¶ 24. Accordingly, a reviewing court need not consider the quality of counsel's performance if it concludes that defendant did not suffer prejudice. *Strickland*, 466 U.S. at 697.

Claims of ineffective assistance of counsel are reviewed *de novo*. *People v. Hale*, 2013 IL 113140, ¶ 15.

¶ 36 A defendant convicted of attempt first degree murder is generally subject to a mandatory Class X sentence of 6 to 30 years in prison. 720 ILCS 5/8-4(c)(1) (West 2014). However, section 8-4(c)(1)(E) of the Code provides an exception whereby:

> "if the defendant proves by a preponderance of the evidence at sentencing that, at the time of the attempted murder, he or she was acting under a sudden and intense passion resulting from serious provocation *** and, had the individual the defendant endeavored to kill died, the defendant would have negligently or accidentally caused that death, then the sentence for the attempted murder is the sentence for a Class 1 felony."

¶ 37 Illinois courts recognize only four categories of serious provocation: (1) substantial physical injury or assault, (2) mutual combat, (3) illegal arrest, and (4) adultery with the offender's spouse. *People v. McDonald*, 2016 IL 118882, ¶ 59. Here, defendant argues that the evidence adduced at trial was sufficient to show that he was provoked by both a substantial physical assault and mutual combat with Tabatha.

¶ 38 We find no reasonable probability that the trial court would have found Tabatha committed a substantial physical assault against defendant. The only evidence of an assault against defendant comprised statements from himself and Tabatha, his wife. At trial, Tabatha testified that she bit defendant once in the back, pulled his hair, and attempted to strike him as he lay on top of her. Although this account was consistent with defendant's postarrest statements to Brogan, and with an affidavit Tabatha prepared for the defense approximately two months after the incident, it was contradicted by Tabatha's statements to police and Brogan immediately

following the incident. In her initial statements, Tabatha claimed that defendant was the aggressor, that she only pulled his hair in an attempt to defend herself, and that she did not try to punch defendant. It was the trial judge's role, as trier of fact, to resolve the conflict in the testimony (*People v. Ware*, 2019 IL App (1st) 160989, ¶ 45), and it is clear that he did not believe that Tabatha was the aggressor. Indeed, in finding defendant guilty, the court noted that the evidence belied Tabatha's claims. First, the court observed that police found defendant holding a pillow over Tabatha's face while she lay "lifeless" and "motionless," which contrasted with her testimony that defendant merely used the pillow as a shield from her punches. Second, the court noted that both Archuleta and Baker contradicted Tabatha's claim that she pulled out clumps of defendant's hair, and that neither officer testified that defendant was bleeding from the scalp. Brogan also testified that, although defendant appeared "disheveled" and intoxicated, he was not missing any hair. There was no physical evidence that defendant was injured, and the testimony established that defendant was much larger than Tabatha and was quickly able to subdue her on the floor. Thus, there is no reasonable probability that the trial court would have found that defendant acted in response to a substantial physical assault.

¶ 39 Similarly, trial counsel could not have shown mutual combat between defendant and Tabatha. In the context of serious provocation, mutual combat is a term of art defined as a " 'fight or struggle which both parties enter willingly or where two persons, upon a sudden quarrel and in hot blood, mutually fight upon equal terms.' " *McDonald*, 2016 IL 118882, ¶ 87 (quoting *People v. Austin*, 133 Ill. 2d 118, 125 (1989)). For a defendant to establish mutual combat, "[a] slight provocation is not enough, because the provocation must be proportionate to the manner in which the accused retaliated." *Austin*, 133 Ill. 2d at 126-27. Thus, mutual combat

generally does not exist where a defendant employs deadly force against an unarmed victim. See, *e.g.*, *McDonald*, 2016 IL 118882, ¶ 65 (victim was stabbed after punching the defendant); *Austin*, 133 Ill. 2d at 127 (victim was shot after engaging in a "fairly even fistfight" with the defendant); *People v. Sutton*, 353 Ill. App. 3d 487, 496 (2004) (victim was stabbed after hitting the defendant with a roller skate).

¶ 40 *People v. Lauderdale*, 2012 IL App (1st) 100939, is instructive. In *Lauderdale*, the defendant was convicted of attempt first degree murder after the trial evidence established that he shot the victim after the victim punched him in the jaw during a verbal argument in a parking lot. *Lauderdale*, 2012 IL App (1st) 100939, ¶¶ 6-7. The trial court sentenced the defendant to 31 years' imprisonment for the attempt murder and an additional 25-year enhancement for the personal discharge of a firearm. *Id.* ¶ 18. On appeal, the defendant contended that his trial counsel was ineffective for failing to argue that he was eligible for a Class 1 sentencing range under section 8-4(c)(1)(E) of the Code. *Id.* ¶ 20. This court found that one punch to the defendant's jaw did not constitute a substantial physical assault, and that there was also no mutual combat because the defendant's response was disproportionate to the punch. *Id.* ¶¶ 25, 28-29. Consequently, we rejected defendant's ineffective assistance claim because he was unable to show that he was prejudiced by counsel's performance. *Id.* ¶ 34.

¶ 41 Here, like in *Lauderdale*, it is undisputed that Tabatha was unarmed during the struggle with defendant. Although defendant attempts to distinguish *Lauderdale* on the basis that he did not shoot Tabatha, the evidence demonstrated that defendant employed deadly force nonetheless. Indeed, the court specifically found that defendant would have suffocated Tabatha had the police arrived later than they did. Thus, as in *Lauderdale*, there was no mutual combat in the present

case because the fight was not on equal terms and defendant's response was "out of all proportion" to any of the conflicting accounts of Tabatha's actions. *Id.* ¶ 34.

¶ 42 In short, the evidence did not support a finding that defendant attempted to kill Tabatha because of a sudden and intense passion resulting from serious provocation. Accordingly, defendant cannot show that he was prejudiced by his counsel's failure to make such an argument at sentencing, and defendant's claim of ineffective assistance fails.

¶ 43 Defendant next argues that the trial court abused its discretion in imposing an excessive sentence. In particular, defendant claims that his sentence was disproportionate to the nature of his offense because Tabatha's testimony showed that he was not the aggressor. Defendant also contends that the trial court placed too much weight on the evidence of his previous encounters with the police, and accuses the State of adducing such evidence as a "smear tactic" against him. Lastly, defendant argues that the trial court failed to consider his potential for rehabilitation and that "the court's desire for punishment completely overrode any concern for rehabilitation."

¶ 44 The Illinois Constitution requires that all sentences be imposed according to both the seriousness of the offense and the objective of restoring the offender to useful citizenship. Ill. Const. 1970, art. I, § 11; *People v. Rizzo*, 2016 IL 118599, ¶ 28. The trial court has broad discretionary powers in imposing a sentence, and a reviewing court should exercise its power to reduce a sentence " 'cautiously and sparingly.' " *People v. Alexander*, 239 Ill. 2d 205, 212 (2010) (quoting *People v. O'Neal*, 125 Ill. 2d 291, 300 (1988)). Because the trial court has a superior opportunity to evaluate such factors as the defendant's credibility, demeanor, moral character, mentality, social environment, and age, its sentencing determinations are generally entitled to great deference. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). A reviewing court will

therefore not substitute its own judgment for that of the trial court simply because it would have weighed the factors differently. *Id.* Instead, a sentence is presumed proper when it falls within the statutory guidelines (*People v. Knox*, 2014 IL App (1st) 120349, ¶ 46), and will not be disturbed absent an abuse of the trial court's discretion (*Alexander*, 239 Ill. 2d at 212). A sentence is an abuse of discretion where it is " 'greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense.' " *Id.* (quoting *Stacey*, 193 Ill. 2d at 210).

¶ 45 The trial court is presumed to have considered the defendant's potential for rehabilitation and all mitigating factors in fashioning a sentence, and it is not obligated to recite the weight it assigned to each factor. *People v. Sauseda*, 2016 IL App (1st) 140134, ¶ 19. Moreover, a trial court need not assign greater weight to mitigating factors than to the seriousness of the offense (*People v. Reed*, 2018 IL App (1st) 160609, ¶ 62), because the seriousness of the offense is the most important sentencing factor (*People v. Harmon*, 2015 IL App (1st) 122345, ¶ 123).

¶ 46 Here, the trial court sentenced defendant to 11 years in prison, which was less than half of the statutory maximum of 30 years. Thus, the sentence is presumed proper. *Knox*, 2014 IL App (1st) 120349, ¶ 46. Defendant nevertheless argues that his sentence was manifestly disproportionate to the offense because the evidence showed that Tabatha was the aggressor and did not require medical attention for her injuries. However, as noted, the trial court was not required to believe this self-serving account of the incident. Instead, the trial court credited the testimony of Archuleta, Baker, and Brogan, which established that defendant was intoxicated and attacked Tabatha after arguing about what he perceived to be an inappropriate relationship between her and a coworker. Defendant pinned Tabatha, slammed her head into the floor, and

told her "You're going to die tonight." He then pressed a pillow over her face until she floated "in and out of consciousness," only stopping because the police arrived and forced him away. Based on this evidence, we cannot say that the trial court abused its discretion in imposing a sentence well within, and in fact closer to the minimum of, the statutory range.

¶ 47 We also note that the State adduced testimony at the sentencing hearing to show that the police had responded to defendant's apartments multiple times for domestic violence calls, one of which involved Tabatha. Defendant appeared intoxicated on each occasion, sometimes threatening the victim, choking her, or damaging her property. Although defendant characterizes such evidence as a "smear tactic," he does not argue that the evidence was improperly admitted or that it was error for the trial court to consider it in aggravation. Instead, he observes that none of these incidents resulted in a conviction for domestic battery, and argues that the trial court weighed them too heavily. However, it was the trial court's role to weigh the evidence, and we will not substitute our own judgment. See *Alexander*, 239 Ill. 2d at 213.

¶ 48 Similarly, defendant suggests that the trial court did not give due consideration to his potential for rehabilitation. To the extent defendant argues that the trial court did not consider this factor at all, we note that the court is presumed to have considered it and was under no obligation to discuss it when announcing its ruling. See *People v. Brazziel*, 406 Ill. App. 3d 412, 434 (2010). Instead, defendant bears the burden of affirmatively showing that the court failed to consider his potential for rehabilitation (*id.*), which requires evidence other than the sentence itself (*People v. Vega*, 2018 IL App (1st) 160619, ¶ 69). Defendant has not carried this burden. Indeed, the record shows that defendant's potential for rehabilitation was expressly discussed by the court, as it noted defense counsel's argument that defendant deserved "a second chance," but

stated that "there have been other cases" in which defendant was involved in domestic violence. Additionally, to the extent defendant argues that the court assigned too little weight to the goal of rehabilitation, we again decline to substitute our own judgment for that of the trial court. Moreover, we note that the seriousness of the offense is the most important sentencing factor, and that the trial court was not required to weigh the seriousness of the offense less heavily than the mitigating factors. *Reed*, 2018 IL App (1st) 160609, ¶ 62. As we have explained, the seriousness of this offense alone warranted a substantial sentence. Thus, the trial court did not abuse its discretion in imposing an 11-year sentence for attempt first degree murder.

¶ 49 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 50 Affirmed.