2019 IL App (2d) 160440-U
No. 2-16-0440
Order filed January 24, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ERIC M. MILLER, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 15-CF-1826 Honorable John J. Kinsella, Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Schostok and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion in sentencing defendant to seven years' imprisonment for aggravated robbery and residential burglary: sentences three years above the minimum were justified by the seriousness of the offenses and defendant's criminal history, the mitigating factors that defendant relied on were not necessarily mitigating, and nothing rebutted the presumption that the court considered the financial impact of incarceration.

¶ 2 Defendant, Eric M. Miller, appeals from concurrent sentences of seven years' imprisonment imposed upon his nonnegotiated guilty plea to one count of aggravated robbery (robbery while indicating that one is armed with a firearm), a Class 1 felony (720 ILCS 5/18-1(b)(1), (c) (West 2014)) and one count of residential burglary (720 ILCS 5/19-3(a) (West

2014)). He argues that the court failed to treat rehabilitation as an objective and that his sentence was too harsh in light of his mental illness, his substance abuse problems, and his youth. We deem that the sentences were commensurate with the seriousness of the offenses, and we thus affirm.

¶ 3 I. BACKGROUND

¶ 4 A grand jury indicted defendant on one count of aggravated robbery, two counts of residential burglary, and two counts of criminal trespass to a residence (720 ILCS 5/19-4(a)(2), (b)(2) (West 2014)). All counts related to defendant's September 3, 2015, burglary of a Glen Ellyn apartment in which Christopher Taliferro and Marisa Martinez were present. Defendant agreed to enter a guilty plea to one count of aggravated robbery and one count of residential burglary in exchange for the State's dropping the other charges. The parties had no agreement on sentencing.

¶ 5 The State set out a factual basis for the plea. Taliferro and Martinez would have testified that they knew defendant "from the neighborhood." On September 3, 2015, they were in Taliferro's apartment. They heard a knock, and defendant and his codefendants, Darren Collum and LaFedricks Henderson, "barged into the apartment." They were armed with a "BB gun" - this was later described as a "pellet gun." They took a "level board" (also sometimes called a "hoverboard") from the apartment. Defendant admitted to planning the burglary with Collum and Henderson, to helping to push the door open, and to going into the apartment. The court accepted defendant's plea.

¶ 6 According to the presentence investigation report, defendant's school records from 2007 indicated that he had diagnoses of Attention Deficit Hyperactivity Disorder (ADHD), depression, and "mood disorder." (Defendant was 21 years old when the report was produced.) The same

records noted that he had " 'sever[e] anger,' " a conclusion that defendant endorsed. The report described defendant as having started to drink alcohol at age 12 and as having become a regular drinker by age 16. Although he reported "cravings for alcohol," he also said that he was not sure whether he had an alcohol problem. Defendant reported daily use of marijuana starting at age 16.

¶ 7 At defendant's sentencing hearing, Officer Jim Monson of the Glen Ellyn police testified about the circumstances of the offenses in this case. Taliferro and Martinez told him that they had just returned to the apartment when they heard a knock on the door; this was at about 9:30 p.m. Taliferro, looking through the peephole, recognized the person at the door as defendant, whom he had seen in the building lobby. As Taliferro started to open the door, he saw a masked person holding a gun standing off to the side. Both Taliferro and Martinez believed that the gun was real. Taliferro tried to shut the door, but three men, two of them masked and wearing sunglasses, forced their way in. Martinez started screaming, and the armed intruder, who had been standing to the side, told her, " 'Stop screaming. I don't want to have to hurt you.' " Taliferro and Martinez also recalled that an intruder said, " '[S]hut up or I'm going to shoot you.' " Although one of the two men in masks was holding the gun at the start of the incident, Taliferro said that defendant held the gun for part of the time that the intruders were in the apartment. In the end, the intruders took the hoverboard and left.

¶ 8 Monson described defendant's interrogation. Defendant said that he had encountered two men he did not know who asked him to knock on the victims' door and ask to buy marijuana; the idea was that Taliferro would recognize defendant and open the door to him so that the other two could force their way in. He agreed to the scheme. He claimed that he followed the other two in only because he wanted to see if Taliferro had any marijuana. However, he also said that he

believed that the two were entering the apartment to beat up Taliferro. He told Monson that the pair had used a gun with an orange tip.

¶ 9 Monson further testified that other officers, while investigating an unrelated lead, had recovered a "very realistic" black plastic pellet gun from the hotel room where Collum's girlfriend lived. The pellet gun was designed to look like a firearm; for instance, it was marked "Smith & Wesson."

¶ 10 Officer Andrew Blaylock of the Downers Grove police testified that he had investigated an aggravated battery case involving defendant. The loss-prevention officer at a Marshall's store saw two female subjects in the process of stealing items from the store. The loss-prevention officer tried to stop the subjects outside the store, but was "punched in the neck and knocked out" by a male subject. The loss-prevention officer identified defendant in a photo lineup, and Blaylock confirmed the identification using surveillance tapes from the store. The case stemming from the incident was still in progress when the sentencing hearing in this case took place.

¶ 11 Other officers testified to other incidents in which defendant had been involved. These included a retail theft that led to a foot chase, an incident in which defendant spat in a squad car, and an incident in which defendant, as a high school student, became disruptive and belligerent after being accused of stealing a donut. Defendant had been expelled from Wheaton North High School for "behavioral issues" and had been sent to an alternative school. He trespassed at Wheaton North several times after that, including when the building was closed. He had shoved a teacher out of a classroom doorway when the teacher would not let him leave. While in jail, he had also "decked" another inmate who was a witness against him in another case.

¶ 12 The State argued that defendant's history showed that he was unable to conduct himself within the law and had a tendency toward violence. It noted that the incident in which defendant knocked out the loss-prevention officer occurred only three months before the burglary that resulted in the charges here. It argued that, although defendant had a history of alcohol-related arrests, nothing suggested that this incident or the other had any relation to alcohol. It drew attention to the incident in which defendant decked the inmate who was a witness against him. The State asked that defendant receive sentences of 10 years' imprisonment.

¶ 13 Defense counsel argued that defendant allowed himself to be caught up in crimes that others planned. She noted that the aggravated battery case was unresolved and emphasized that defendant had no felony convictions.

¶ 14 The court sentenced defendant to concurrent terms of seven years' imprisonment. It noted that, despite his lack of felony convictions, defendant had substance abuse problems and an extensive history of police contacts:

> "The defendant has a longstanding history of delinquency ***.
>
> [Defendant] *** question[s] *** whether he has an alcohol problem. Let me assure you[, defendant,] you have an alcohol problem. Anybody arrested six times for drinking, most [when] he was underage and who indicates he started drinking when he was 12, has an alcohol problem.
>
> The defendant, also, has a longstanding drug abuse problem, indicating that he started consuming Cannabis at age 12 [and] continued to the present time on a daily basis.
>
> Let me advise you, sir, that, at least in my opinion, 35 years in this business, people that smoke Cannabis for nine, ten years every day, it affects their brain. Their

> brain does not function as God intended it to function. And yours won't be fully developed for a few more years. Science tells us that. But you've probably done enough damage to that brain, just from the combination of alcohol and Cannabis, that it's going to be difficult for you to ever make up for the damage you've done."

¶ 15 The court further concluded that the use of a pellet gun that strongly resembled a firearm made the case particularly serious:

> "And [the victims], *** they didn't know that was a pellet gun. And it doesn't look like a pellet gun, the evidence would suggest, with the picture of the weapon that was used. And if someone pointed that at me, my first thought was, I'm going to meet my maker. So it's a very aggravated case, very aggravated situation, very aggravated criminal history."

¶ 16 Defendant moved for reconsideration of his sentences, focusing on his youth and lack of prior felony convictions. The court denied the motion:

> "The sentence was reasonable in light of the defendant's criminal history and it is, while not terribly serious offenses—I think I counted 13 prior arrests, retail theft, disorderly conduct, possession of alcohol, retail theft, possession of alcohol, retail theft, possession of alcohol, criminal damage, possession of alcohol, retail theft, trespass to vehicle, criminal damage to property. So he has a history of delinquency. The sentence will stand[.]"

Defendant filed a timely notice of appeal.

¶ 17 II. ANALYSIS

¶ 18 On appeal, defendant argues that his sentences were too harsh in light of his mental illness and substance abuse problems—which he suggests are treatable—and his youth. He

contends that there is "significant mitigating evidence that shows that [his] sentence is excessive." The State responds that the court acted within its discretion in balancing aggravating and mitigating factors. It argues that the court correctly emphasized the aggravated nature of the offenses—including the gun's strong resemblance to a firearm and the intruders' threats to kill the victims—and the aggravating factors in defendant's record—including his long history of delinquency and his complete lack of employment. It further contends that the court clearly considered defendant's age. In reply, defendant suggests that the State has exaggerated the seriousness of the incident in that no injuries occurred and that the gun was "not real." He also suggests that the State and the court exaggerated the seriousness of his criminal history and asserts that, although the court *considered* his rehabilitative potential, it failed to treat rehabilitation as an objective.

¶ 19 We affirm. We deem that defendant's argument is, at heart, that the court failed to balance sentencing factors properly. Our review of sentences that fall within the statutory range permits us to reverse or modify such sentences only when they constitute an abuse of the trial court's discretion. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). As a general matter, we may not reduce a sentence that is within the statutory range "unless it is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense" (*People v. Horta*, 2016 IL App (2d) 140714, ¶ 40), with the "seriousness of the offense [being] the most important sentencing factor" (*People v. Watt*, 2013 IL App (2d) 120183, ¶ 50). To be sure, a sentence can constitute an abuse of discretion if the trial court ignored relevant mitigating factors or considered improper factors in aggravation. *People v. Roberts*, 338 Ill. App. 3d 245, 251 (2003). Here, however, defendant does not argue that the court considered improper

aggravating factors, nor does he persuade us that the court ignored relevant mitigating factors. The general rule thus applies.

¶ 20 Here, the court's assessment properly focused on the seriousness of the offenses. We see no disproportion between the sentences and the offenses, which the court correctly assessed as "very aggravated." To be sure, defendant is correct that mitigating factors existed—the court mentioned defendant's youth and his mental health issues—but the seriousness of the offenses meant that sentences above the minimum were not an abuse of the court's discretion.

¶ 21 The offenses here were particularly serious instances of their kind. The evidence suggested that—from the victims' perspective—the crimes here were effectively indistinguishable from home invasion with a firearm, a Class X felony with an enhanced sentence (720 ILCS 5/19-6(a)(3), (c) (West 2014)). The intruders entered a dwelling place knowing that one or more persons was present, they were armed with what appeared to be a firearm, and they threatened imminent force against the occupants. Although the victims here were actually at no risk of being shot by a firearm, they did not know that. Further, a pellet gun can itself be a dangerous weapon. *Cf. People v. Ross*, 229 Ill. 2d 255, 276-77 (2008) (the State could not show that a pellet gun was a dangerous weapon when "[t]here was no evidence that the gun was loaded, *** that it was brandished as a bludgeon, [or] *** regarding its weight or composition").

¶ 22 Defendant argues that, although the offenses were serious, they were not serious enough to justify sentences three years above the minimum. He notes that the offenses did not produce any injuries and that the weapon was "not real." Although we accept defendant's point that more serious forms of these offenses exist, the existence of such more serious offenses does not

suggest that these still-serious offenses required sentences closer to the minimum, especially in light of defendant's substantial criminal history.

¶ 23 Defendant argues that the court "impos[ed] a sentence that did not give enough weight to the mitigating evidence," particularly his history of alcohol and marijuana abuse and his mental illness:

> "[Defendant's behavioral incidents and misdemeanor convictions] demonstrate a young man who began battling mental illness and substance abuse early in adolescence, with those conditions worsening over the years and contributing to [his] poor decisions to commit a variety of misdemeanors. That background has led to more recent behavior, such as the offenses in the instant case and the batteries discussed at sentencing, that is serious and deserving of punishment. However, that punishment here was too harsh given the difficulties [defendant] faced as a teenager."

Quoting the United States Supreme Court's opinion in *Zant v. Stephens*, 462 U.S. 862, 885 (1983), he argues that "a defendant's mental illness generally 'should militate in favor of a lesser penalty,' because it tends to diminish the defendant's level of personal culpability for his conduct." This is unpersuasive on the facts here. Our supreme court has "repeatedly held that information about a defendant's mental or psychological impairments is not inherently mitigating." (Internal quotation marks omitted.) *People v. Ballard*, 206 Ill. 2d 151, 190 (2002). The *Ballard* court noted that it can be "either mitigating or aggravating depending, of course, on whether the individual hearing the evidence finds that it evokes compassion or demonstrates possible future dangerousness." (Internal quotation marks omitted.) *Ballard*, 206 Ill. 2d at 190. Here, based on the limited information available, the court reasonably discounted the effect of defendant's conditions. Although "mental illness" in some general sense may tend to diminish

personal culpability, it is not clear how defendant's mood disorders diminished his culpability for these offenses. Similarly, although defendant's ADHD may explain some of his struggles in school, we cannot see it as diminishing his culpability here. Moreover, although courts may properly treat substance abuse as a nonstatutory mitigating factor (*e.g.*, *People v. Smith*, 214 Ill. App. 3d 327, 339-40 (1991)), we find nothing to suggest that a court must give some minimum weight in mitigation to a defendant's substance abuse. We specifically distinguish *People v. Treadway*, 138 Ill. App. 3d 899, 905 (1985), a case cited by defendant, in which we reduced the sentence of a defendant whose offenses were "perpetrated in a fleeting moment of intoxicated rage upon a stranger." In *Treadway*, among other differences, the defendant's substance abuse had a clear link to his commission of the offense, so that the defendant's intoxication directly reduced his culpability. Here, by contrast, the court specifically noted that no evidence suggested a direct link between defendant's substance abuse and his offenses. We thus conclude that the court did not abuse its discretion in the weight it gave to mitigating factors.

¶ 24 Finally, defendant argues, "[T]he record does not contain any evidence that the trial court gave meaningful consideration to the financial impact of [defendant's] incarceration." However, he fails to explain how he overcomes what he "acknowledges *** is a presumption that the trial court considered the financial impact statement before sentencing a defendant." He asserts that "the judge's failure to mention the cost of incarceration, despite the fact that it will cost Illinois taxpayers approximately $83,608 to incarcerate [defendant] if he receives day-for-day credit against his seven-year sentence, seemingly rebuts that presumption." This is not how such presumptions function. "[*A*]*bsent evidence to the contrary*, the trial court is presumed to have performed its obligations and considered the financial impact statement before sentencing a defendant." (Emphasis added.) *People v. Sauseda*, 2016 IL App (1st) 140134, ¶ 22. Here, there

is no evidence to the contrary. Therefore, the court had discretion to impose a sentence three years above the minimum for each of defendant's convictions. We thus affirm both of those sentences.

¶ 25 III. CONCLUSION

¶ 26 The judgment of the circuit court of Du Page County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 27 Affirmed.