

No. 1-12-2921

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Cook County.
Plaintiff-Appellee,)	
)	
v.)	No. 10 CR 17781
)	
BREON THOMPSON,)	
)	Honorable Vincent M. Gaughan,
Defendant-Appellant.)	Judge Presiding

PRESIDING JUSTICE SIMON delivered the judgment of the court.
Justices Pierce and Liu concurred in the judgment.

ORDER

Held: Defendant's right to fair and impartial trial was not violated by State's closing argument and alleged prosecutorial misconduct. Relevant Illinois case law is clear that the exclusive jurisdiction and automatic transfer statutes of the Juvenile Court Act (705 ILCS 405/5-120, 5-130 (West 2010)) do not violate the eight amendment or substantive or procedural due process. Defendant's sentence of 30 years' imprisonment for first degree murder and a consecutive 25 years' imprisonment for the firearm enhancement did not constitute abuse of discretion where trial court considered defendant's age and other factors before imposing sentence for actions that resulted in death of a 15 year old innocent victim.

¶ 1 Following a jury trial, defendant Breon Thompson was convicted of first degree murder and personally discharging a firearm that proximately caused the death of another person. The trial judge sentenced defendant to 30 years' imprisonment for the first degree murder conviction with a

No. 1-12-2921

consecutive term of 25 years' imprisonment for the firearm enhancement. Defendant appeals his conviction and sentence.

¶ 2 Defendant argues that his conviction must be reversed and the matter remanded for a new trial because his right to a fair and impartial trial was violated by prosecutorial misconduct.

Defendant also argues that the exclusive jurisdiction and automatic transfer provisions of the Juvenile Court Act (705 ILCS 405/5-120, 5-130 (West 2010)) (Act) are unconstitutional and his 55-year sentence was excessive given his age and minimal criminal history. For the following reasons, we affirm the judgment of the circuit court.

¶ 3

I. BACKGROUND

¶ 4 The testimony adduced at trial was that on August 28, 2010, Darryl McKinney was shot and killed while attending a block party in front of 956 North Harding Avenue, Chicago, Illinois. Vanessa McKinney, the victim's mother, testified that on the day of the shooting the victim was 15 years old. The victim asked Vanessa to drive him to the block party so he could spend a couple hours there. Vanessa dropped the victim off near the intersection of West Augusta Boulevard and North Harding Avenue for him to attend the block party with his girlfriend, Stasia Chatfield. Vanessa then drove home but when she reached her house her other son ran up to her and told her that the victim had been shot and she drove back to the party and was eventually taken to the hospital by the police.

¶ 5 Ashley Smith testified that she was Stasia's sister and they lived at 956 North Harding Avenue. On August 28, 2010, Ashley was in front of their home enjoying the block party with the victim, Stasia, her parents and her brother, James Chatfield. Ashley explained that her house was located on the southeast corner with a vacant lot between the house and the corner. For the block

No. 1-12-2921

party, there were no vehicles parked on either side of North Harding Avenue but there were vehicles parked at the intersection of West Augusta Boulevard to block traffic for the party.

¶ 6 At approximately 8:30 p.m., it was still light out and there were street lights on. Ashley was dancing in the street with children while her father played music. The victim, Stasia, and others were hanging out in front of their house when Ashley heard a gunshot. She turned to look north toward West Augusta Boulevard and, through the windows of the cars blocking the street, saw a man with a black shirt, black pants, and short dreadlocks standing in the intersection. Ashley turned around and lied down on top of the children she was with.

¶ 7 Ashley then saw a tall man in a white shirt and black shorts running south down North Harding Avenue and past Ashley with nothing in his hands. Ashley then heard a second shot and the man in all black ran by her and down the street with a black gun in his hand. Ashley saw both men's faces and did not know the first man but identified the second man as defendant. After the men ran by, Ashley saw the victim stand, start to fall, and then hold on to a gate while holding the side of his body. The victim laid down on the sidewalk in front of her house and Ashley and her mother performed CPR and applied pressure to the victim's wound before the ambulance arrived and transported him to the hospital.

¶ 8 On September 5, 2010, a detective came to her house and Ashley viewed two photo arrays of six color photographs each. Ashley identified the man with the white shirt and black shorts in one array and defendant in the second array. Ashley identified defendant as the gunman and circled each picture and signed the photo arrays. About one week later, Ashley went to the police station to view a lineup and identified defendant as the gunman who ran past her.

No. 1-12-2921

¶ 9 Ashley testified that on August 30, 2011, a female investigator came to her home and identified herself as Kimyatta Taylor and told her that she had been hired by the defense in this case. Taylor asked Ashley to look at photographs, but Ashley could not identify the defendant because the photographs were blurry and black and white and it was impossible to discern the faces of the individuals pictured. Ashley spoke about the shooting, the lineup she viewed, and that she identified the gunman. Ashley denied telling Taylor that she was not sure who she identified in the lineup.

¶ 10 Christopher Davis testified that he lived in the neighborhood for about 25 years and knew both defendant and the man in the white shirt and black shorts, Kevin Collins, from the neighborhood. On the day of the shooting, Davis was driving northbound on North Pulaski Road facing West Augusta Boulevard when he heard 2-3 gunshots at approximately 8:00-8:30 p.m. Davis turned east onto Augusta where he saw defendant and Collins about 50-75 feet away running down the street toward West Springfield Avenue. Davis testified that it was still light out and he saw that Collins was dressed in a white shirt and black pants and defendant was dressed in all black and fumbling with something under his shirt that appeared to be a gun. Davis testified that he had been arrested on September 5, 2010, on gun and drug charges, but did not receive any type of deal after he told the police that he had information about the shooting, identified defendant and Collins in photo arrays, and gave a statement to the officers.

¶ 11 Joe Thibault, a firearms expert for the Illinois State Police Science Center, testified that he examined a cartridge casing recovered from the scene and a fired bullet recovered during the autopsy of defendant. Thibault testified that the bullet was a .38-caliber, 9 millimeter class bullet and the discharged cartridge was a 9 millimeter Lugar cartridge. Thibault testified that he

No. 1-12-2921

compared the evidence with evidence from Davis's criminal case and concluded that the bullet that killed defendant was not fired from the gun recovered from Davis. The parties stipulated that the medical examiner would testify that the cause of death of the victim was a gunshot wound to the chest and the manner of death was homicide.

¶ 12 Chatfield testified that he lived with his parents, three sisters, and two brothers at 956 North Harding Avenue at the time of the shooting and was at the block party with his family. Chatfield testified that the victim was dating his sister Stasia and was sitting in a chair outside their house at approximately 8:30 p.m. Chatfield heard a gunshot at about this time and looked to his left to see a man wearing a white t-shirt and black pants running towards and then past him. After he heard a second gunshot, Chatfield saw a man dressed in all black with a gun in his hand run past him and his family. Chatfield testified that he was able to see the face of each man and identified defendant as the man with the gun. Chatfield testified that he then saw that the victim was lying on the ground bleeding. Chatfield's father called 911 and an ambulance arrived to take the victim to the hospital.

¶ 13 Chatfield testified that on September 5, 2010, two police detectives came to his house and showed him two photo arrays. Chatfield identified both men from the day of the shooting. On September 8, 2010, Chatfield identified defendant as the shooter in a lineup at the police station.

¶ 14 On August 2, 2011, two women came to speak with Chatfield at his home but did not identify that they worked for the defense and Chatfield assumed that they were detectives. Chatfield testified that the women showed him two photo arrays that were black and white and blurry and not at all like the photo arrays the police officers showed him. Chatfield wrote "this is the shooter" by a photograph of Collins and "this is not the shooter" by the photograph of defendant because the women asked him to do so.

¶ 15 Following denial of defendant's motion for directed verdict, the parties rested their cases and presented closing argument. The jury deliberated and returned a guilty verdict against defendant on first degree murder and the firearm enhancement. The parties presented evidence in aggravation and mitigation and the trial court reviewed the presentence investigation report of defendant. The trial court sentenced defendant to 30 years' imprisonment on the first degree murder conviction and a consecutive 25 years' imprisonment for the firearm enhancement. On appeal, defendant argues that: (1) his right to a fair and impartial trial was violated by prosecutorial misconduct; (2) the automatic transfer statute is unconstitutional; and (3) the trial court erred in sentencing defendant to 55 years' imprisonment.

¶ 16 II. ANALYSIS

¶ 17 A. Prosecutorial Misconduct

¶ 18 Defendant first argues that his right to a fair and impartial trial was violated by prosecutorial misconduct. Defendant acknowledges that trial counsel did not object to the State's comments during closing argument, but asserts that this issue should be considered under the plain-error doctrine. The plain-error doctrine allows a reviewing court to review an unpreserved error when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). Under the first prong, the defendant must show that the evidence at trial was so closely balanced that the error alone “threatened to tip the scales of justice against him.” *Id.* at 187. For the second prong, the defendant must prove that the error was so serious that it affected the fairness of the trial and questions the integrity of the judicial process. *Id.* The first step in conducting plain-error review is to determine whether error occurred at all. *People v. Walker*, 232 Ill. 2d 113,

No. 1-12-2921

124 (2009).

¶ 19 It is well-settled that prosecutors enjoy wide latitude in closing arguments and that the scope of permissible argument rests within the sound discretion of the trial court. Absent a clear abuse of discretion, the court's determination of the propriety of the argument will stand. *People v. Williams*, 192 Ill. 2d 548, 573 (2000). Any improper comments or remarks made by a prosecutor in closing argument are not reversible error unless they are a material factor in the conviction or cause substantial prejudice to the accused. *People v. Sutton*, 316 Ill. App. 3d 874, 893 (2000). In reviewing allegations of prosecutorial misconduct, the court must consider the arguments of both the prosecutor and the defense in their entirety and place the allegations of improper comments in context. *People v. Evans*, 209 Ill. 2d 194, 225-26 (2004).

¶ 20 The prosecution has the right to comment on the evidence presented at trial and draw all reasonable inferences deducible therefrom. *People v. Simms*, 192 Ill. 2d 348, 396 (2000). The prosecution may also respond to comments made by defense counsel. *People v. Abadia*, 328 Ill. App. 3d 669, 678-79 (2001). Regulation of remarks by counsel is best left to the trial court's discretion, which may cure such errors by giving proper jury instructions on the law, informing the jury that counsel's arguments are not evidence and are to be disregarded if not supported by the evidence at trial, or by granting an objection and admonishing the jury to disregard comments. *Simms*, 192 Ill. 2d at 396.

¶ 21 Defendant argues that the State's pervasive pattern of prosecutorial misconduct throughout closing argument violated his right to a fair and impartial trial either on the prejudicial effect of each instance of misconduct or based on the cumulative effect of the repeated misconduct. Defendant argues that the prosecutor misstated the evidence presented by Ashley and Chatfield,

No. 1-12-2921

unfairly bolstering their testimony and eyewitness identifications. Defendant also argues that the State argued facts that were not in evidence and misstated the law regarding intent to kill. We consider each argument in turn.

¶ 22 First, defendant asserts that the State exaggerated Ashley's opportunity to view defendant, exaggerating the opportunity and time she saw defendant holding a gun, thereby adding false weight to her identification of defendant as the shooter. Specifically, Ashley testified that she heard the first gunshot, turned to see defendant in all black standing in the intersection, turned back to lay on top of the children she was with, saw the man with a white shirt and black pants begin running toward her, then heard a second gunshot and saw defendant run down the street with a gun in his hands. In closing, the State argued that after Ashley heard the first shot, "she looked directly to that corner that was north of her and she saw the defendant standing there with a gun in his hand. She told you that after the second shot, she saw the defendant running with that gun in his hand." Defendant notes that conspicuously absent from Ashley's testimony is any statement that she saw a gun in defendant's hand when she first saw him and did not see any weapon until after the second gunshot when she saw defendant running.

¶ 23 Defendant argues that this false story improperly added weight to Ashley's testimony and eyewitness identification. We agree with the State that this was not impermissible commentary. It is a reasonable inference deducible from Ashley's testimony that defendant was holding a gun. Ashley testified that she saw defendant after the first gunshot, saw the second man running away without a handgun, heard a second gunshot and immediately saw defendant running away with a handgun in his hand. Furthermore, the jury heard the evidence at trial and was properly instructed that counsel's argument was not evidence.

No. 1-12-2921

¶ 24 Defendant next argues that the State improperly discussed Chatfield's opportunity to view the gunman. Chatfield testified that when he heard the first gunshot, he turned to his left and saw the man in a white t-shirt and black pants running toward him and then after the second gunshot he saw the man dressed in all black run by with a gun in his hand. During closing argument, the prosecutor stated "[r]emember what James Chatfield told you? He said he is literally standing on the same side of the street as the shooter. That he is looking right there at this corner. There it is. That as soon as the the [sic] second shot rang out, the defendant came within inches of him running right past him with that gun in his hand."

¶ 25 Defendant contends that this painted the false image that Chatfield actually viewed the shooting when his testimony clearly did not present this. We agree with the State that defendant has too broadly interpreted the State's closing remarks. The prosecutor never stated that Chatfield saw anyone fire a weapon, but that he was on the same side of the street as the shooter, looking in that direction and, after the second shot rang out, he saw defendant run toward and past him with a gun in his hand. This is consistent with Chatfield's testimony and does not constitute prosecutorial misconduct.

¶ 26 Defendant asserts that the State committed further misconduct when it argued facts not in evidence that served to inflame the jury's passion and prejudice against defendant by stating the bullet that hit the victim killed him instantly. There was no testimony that the victim died instantly, in fact there was testimony that he was seen clinging to a gate and Ashley and her mother attempted to treat the victim before the paramedics came and he was taken to the hospital via ambulance. The prosecutor argued that the bullet hit "almost every major organ in his body" and "[t]hat bullet killed him instantly." While this was in error, it cannot be said that this so inflamed

No. 1-12-2921

the jury when the actual evidence demonstrated that the victim suffered as he staggered and struggled to stand only to fall bleeding to the sidewalk and receive CPR by Ashley and her mother while they administered pressure on his bleeding wounds.

¶ 27 Defendant also maintains the State argued facts that were not in evidence in rebuttal, while also shifting the burden to defendant. Responding to defendant's argument that there was a failure to produce physical evidence, the prosecutor argued "[f]ingerprints, DNA, who controls that? He controls that. Because he ran with the gun. He got rid of the gun. Where do you think the fingerprints and DNA are? On the gun, not here. It's his witness -- his crime scene. He controlled it. He took that evidence with him because he didn't want to get caught." Defendant argues that this was not based on any evidence presented and improperly shifted the burden to defendant to prove that he was innocent by producing physical evidence. *People v. Yonker*, 256 Ill. App. 3d 795, 799 (1993).

¶ 28 The State responds that these comments were invited by defendant's closing argument that no physical evidence was presented to connect him to the crime and the argument that no testimony was provided that fingerprint analysis was conducted on the recovered shell casing. The State misrepresents a quotation from defendant's closing argument to assert that a general proposition was presented by defendant that there was a failure to produce evidence. Following this, the State contends it was proper to argue in rebuttal that defendant was in control of the physical evidence and that he "got rid of [it]." However, defense counsel simply commented that there was no explanation why there was no fingerprint analysis testimony concerning the physical evidence that was found and presented. Defendant's claim of a "failure to produce evidence" related to the argument that the State did not provide testimony about the angle the bullet traveled

No. 1-12-2921

and how the victim was injured to show the bullet originated from where defendant was seen.

¶ 29 The prosecutor appeared to directly respond to defense counsel's argument that no fingerprint or DNA evidence was presented for the recovered physical evidence. However, she took defendant's closing argument further than the record indicates and addressed additional areas, intimating that defendant hid evidence and was the only person that could provide that physical proof. Defendant contends that this discussion of the handgun and defendant's control of the evidence was uninvited and implicitly shifted the burden of proof to defendant.

¶ 30 To the extent the State's rebuttal argument was improper and implicitly shifted the burden, we do not find that this was plain error requiring reversal. These comments by the State were not so inflammatory that defendant did not receive a fair trial or call into question the integrity of the judicial process. Again, the State's comments were initially in response to defense counsel's argument and, though overstepping the invited response, the State did not explicitly place the burden on defendant such that the comments were so inflammatory or flagrant to deny a fair trial. See *People v. Euell*, 2012 IL App (2d) 101130, ¶¶ 20-23. Furthermore, the trial court properly instructed the jury on the burden of proof and to follow the evidence presented at trial that clearly pointed to defendant.

¶ 31 Finally, with respect to defendant's prosecutorial misconduct claim, he argues that the State misstated the law regarding intent to kill by arguing, "The intent to kill, the moment the defendant went to the corner of Augusta and Harding with a gun, that's intent to kill. The moment he pulled out that gun and pointed it, that's intent to kill. The moment that he put his finger on that trigger, that is intent to kill. The moment he pulled the trigger, that's intent to kill. The moment he shot off that first shot, that's intent to kill. The moment he shot off the second shot, that was intent to kill."

No. 1-12-2921

Defendant asserts that the State created the incorrect presumption that any of these listed actions was sufficient to satisfy the element of intent.

¶ 32 We disagree. This was argument by the prosecutor and it was a means of arguing that defendant's criminal actions evidenced his intent to kill. Moreover, for this and each alleged act of misconduct, the trial court properly instructed the jury on the law and that the parties' arguments were not evidence and to be disregarded if unsupported by the evidence at trial. Accordingly, we cannot say that, under the plain error analysis, the alleged prosecutorial misconduct was so serious that it affected the fairness of the trial and questions the integrity of the judicial process.

¶ 33 B. Constitutionality of Exclusive Jurisdiction and Automatic Transfer

¶ 34 Defendant contends that the exclusive jurisdiction (705 ILCS 405/5-120 (West 2010)) and automatic transfer (705 ILCS 405/5-130 (West 2010)) statutes violate the eighth amendment and substantive and procedural due process. U.S. Const. amend V, VII, XIV; Ill. Const. 1970, art. I §§ 2, 11. Defendant notes that the law concerning the treatment and sentencing of juveniles under the age of 18 has changed significantly in recent years, even leading to the amendment of the exclusive jurisdiction statute. As defendant notes, that 2013 amendment only applies prospectively and is not applicable to defendant. Therefore, defendant argues that the statutes automatically subject juveniles to adult prosecution and sentencing without any consideration of their youth and its attendant characteristics thereby violating the eighth amendment prohibition of the infliction of cruel and unusual punishment as well as substantive and procedural due process.

¶ 35 Defendant maintains that a recent line of United States Supreme Court cases supports his argument. *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455 (2012); *J.D.B. v. North Carolina*, ___ U.S. ___, 131 S. Ct. 2394 (2011); *Graham v. Florida*, 560 U.S. 48 (2010); *Roper v. Simmons*, 543

No. 1-12-2921

U.S. 551 (2005). Defendant argues that these cases hold that children are constitutionally different from adults because of the fundamental differences between juvenile and adult minds that make juveniles less culpable for the same offense and require additional protections. These cases also found that this reduced culpability caused by both the neurological and psychological development of juveniles also leads to higher likelihood of rehabilitation and the same strong punishment proscribed for adults should not be uniformly applied to juveniles as cruel and unusual punishment. Defendant adds that the statutes also violate due process as they would not pass the rational basis test because the fundamental differences between adults and juveniles do not support transferring juveniles to adult court without any hearing.

¶ 36 Recently, our supreme court held that the automatic transfer statute does not violate due process or the eighth amendment. *People v. Patterson*, 2014 IL 115102, ¶¶ 89-111. In fact, the Illinois Supreme Court and this court have consistently held that the automatic transfer statute does not violate the right to either procedural or substantive due process. *People v. Patterson*, 2014 IL 115102, ¶¶ 89-111; *People v. J.S.*, 103 Ill.2d 395, 402-05 (1984); *People v. Davis*, 2014 IL 115595; *People v. Salas*, 2011 IL App (1st) 091880, at ¶ 75-76, 78-79. Furthermore, Illinois courts have followed the same analysis in rejecting claims that the exclusive jurisdiction statute violates the eighth amendment and due process. *People v. Harmon*, 2013 IL App (2d) 120439, ¶¶ 50-62. This is so because the exclusive jurisdiction and automatic transfer statutes are not punitive sentencing statutes but are forum statutes, providing only procedural mechanisms for determining where a defendant's case is to be tried. *Id.*; see also *People v. Jackson*, 2012 IL App (1st) 100398 at ¶ 24; *People v. Pacheco*, 2013 IL App (4th) 110409, ¶ 55.

¶ 37 As addressed in *Patterson* and *Harmon*, defendant's reliance on *Roper*, *Graham*, and

Miller, is misplaced for both of his arguments because those courts limited application to eighth amendment claims in the context of the "most severe of all criminal penalties," the death penalty and life without parole, and do not affect our court's prior holdings on the constitutionality of the automatic transfer and exclusive jurisdiction statutes. *Patterson* at ¶ 110; *Harmon* at ¶¶ 54-55, 59, 62. Accordingly, we see no reason to deviate from these cases and, based on this existing precedent, we reject defendant's arguments that the exclusive jurisdiction and automatic transfer provisions are unconstitutional.

¶ 38 C. Sentencing

¶ 39 Defendant contends that the trial court abused its discretion in sentencing him as a juvenile to 55 years' imprisonment, essentially a life sentence. Generally, a reviewing court may only disturb a sentence that falls within the statutory range for the offense of which the defendant has been convicted if the trial court has abused its discretion. *People v. Jones*, 168 Ill. 2d 367, 373-74 (1995). The State asserts that this court has held that the abuse of discretion standard applies in cases such as this because the trial court is in the best position to determine the circumstances of the case and weigh the credibility of the witnesses. *People v. Burdine*, 362 Ill. App. 3d 19, 26 (2005). Unless the sentence is grossly disproportionate to the nature of the offense committed, the sentence should be affirmed. *People v. Phillips*, 265 Ill. App. 3d 438, 449 (1994).

¶ 40 Defendant asserts that this deference is not unfettered and notes this court has not shied away from reversing a sentence where factors have not been considered, even where the sentence imposed lies within the statutory guidelines. *People v. Steffens*, 131 Ill. App. 3d 141, 151-53 (1985). Citing again to the recent opinions of the United States Supreme Court in *Roper* and *Graham*, defendant points to the inherent differences in juvenile brains as opposed to adult brains

No. 1-12-2921

and asserts this requires a new sentence that might allow for his rehabilitation. Nevertheless, where the factors have been considered, it is within the trial court's discretion to determine what significance is given to each aggravating and mitigating factor. *People v. Saldivar*, 113 Ill. 2d 256, 272 (1986).

¶ 41 Defendant has failed to prove the trial court abused its discretion in determining a sentence in this case. First, defendant's sentence of 30 years' imprisonment for first degree murder and 25 years' imprisonment for the firearm enhancement fall well within the range of sentences by statute of between 20 and 60 years for first degree murder (730 ILCS 5/5-8-1(1)(a) (West 2010)) and the minimum of 25 years' for the enhancement (730 ILCS 5/5-4.5-20(a) (West 2010)). These sentences were imposed consecutively by the trial court as mandated by statute. 730 ILCS 5-8-4(d) (West 2010). Therefore, the sentences are presumptively not excessive under *Givens*. The court considered the evidence in aggravation and mitigation, including defendant's age, and determined that defendant's actions of firing a gun into a crowd at a block party, striking and killing the 15 year-old victim, warranted a sentence slightly above the minimum. This reasoning was not an abuse of discretion and the sentence imposed is affirmed.

¶ 42 CONCLUSION

¶ 43 Accordingly, we affirm the judgment of the Circuit Court of Cook County.

¶ 44 Affirmed.