

NOTICE
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2016 IL App (5th) 130435-U

NO. 5-13-0435

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Jackson County.
)	
v.)	No. 12-CF-623
)	
MICHAEL L. BROWN,)	Honorable
)	William G. Schwartz,
Defendant-Appellant.)	Judge, presiding.

PRESIDING JUSTICE SCHWARM delivered the judgment of the court.
Justices Welch and Moore concurred in the judgment.

ORDER

¶ 1 *Held:* When imposing sentence on the defendant's conviction for unlawful possession of a weapon by a felon, the trial court did not improperly consider factors inherent in the offense.

¶ 2 **BACKGROUND**

¶ 3 On Friday, October 19, 2012, Edward Ray and Matt Rives travelled from Carlinville to Carbondale to visit Matt's younger brother, Josh Rives, an undergraduate student at Southern Illinois University. At approximately 3 a.m. on Saturday, October 20, 2012, as the three were walking back to Josh's house after a night of heavy drinking, they encountered Justin Wooley, Shaquille Brown, and the defendant, Michael L. Brown,

who had all been drinking as well. Words were exchanged; a scuffle ensued, and Josh ended up getting shot in the back with a 0.22-caliber derringer that was later found at the scene. Josh was transported by ambulance to Carbondale Memorial Hospital before being airlifted to St. Louis University Hospital, where he spent the next two weeks recovering.

¶ 4 On October 22, 2012, the State filed an information charging the defendant with one count (count I) of aggravated battery with a firearm (720 ILCS 5/12-3.05(e)(1) (West 2012)), a Class X felony with a sentencing range of 6 to 30 years (720 ILCS 5/12-3.05(h); 730 ILCS 5/5-4.5-25(a) (West 2012)), and one count (count II) of unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2012)), a Class 3 felony with a sentencing range of 2 to 10 years (720 ILCS 5/24-1.1(e) (West 2012)). On October 24, 2012, the defendant told a detective that he had purchased the derringer a week before the shooting "for protection," but he also stated that he had "left it in the custody of Shaquille and Justin" after buying it. The defendant further claimed that he had been asleep at his cousin's apartment when Josh was shot.

¶ 5 In May 2013, the case proceeded to a jury trial, where Shaquille and Justin both indicated that neither had a gun on the night in question and that the defendant had shot Josh with the derringer. Ray, who was admittedly intoxicated that night, also identified the defendant as the shooter. The parties stipulated that the defendant had previously been convicted of a felony offense.

¶ 6 During closing arguments, asserting that Shaquille and Justin were motivated by self-interest to falsely implicate the defendant and that Ray's identification testimony was

"simply not clear," defense counsel maintained that either Shaquille or Justin had shot Josh and that the State had failed to prove the defendant's guilt beyond a reasonable doubt. The jury ultimately convicted the defendant on count II of the State's information and acquitted him on count I. The jury thus determined that the defendant had a prior felony conviction and had knowingly possessed a firearm. See 720 ILCS 5/24-1.1(a) (West 2012); *People v. Adams*, 388 Ill. App. 3d 762, 766 (2009).

¶ 7 In July 2013, the cause proceeded to a sentencing hearing, where the State urged the trial court to impose the maximum available sentence of 10 years. The State specifically argued that the following statutory factors in aggravation were applicable: the defendant's conduct had caused serious harm, the defendant had a history of prior delinquency and criminal activity, and the sentence was necessary to deter others from committing the same offense. See 730 ILCS 5/5-5-3.2(a)(1), (3), (7) (West 2012).

¶ 8 With respect to the harm that had resulted from the defendant's conduct, the State observed that while "the potential for great bodily harm is certainly present whenever a handgun is involved," in the present case, someone had been shot and seriously injured. The State further observed that the defendant's presentence investigation report (PSI) included a written statement by the defendant, in which he acknowledged that "none of this would have happened" had he not had a gun.

¶ 9 With respect to deterrence, the State explained that over the past several years, Carbondale had experienced a dramatic increase in gun violence. The State argued that a lengthy sentence was thus needed to deter others from contributing to the "proliferation of guns and shootings" in the city.

¶ 10 Regarding the defendant's prior criminal history, the State noted that he had numerous juvenile adjudications and had been committed to the Illinois Department of Corrections, Juvenile Division, in 1998. The State further noted that as an adult, the defendant had violated the law numerous times "virtually every year" until 2004, when he was sentenced to serve an eight-year term of imprisonment in Tennessee. The State acknowledged that many of the defendant's prior convictions were for ordinance violations and minor traffic offenses, but it emphasized that his criminal history included "more serious offenses" as well.

¶ 11 The State argued that after serving his prison time in Tennessee, the defendant could have chosen to change his ways, but instead, he had continued to reoffend. "Apparently," the State asserted, the defendant "did not get the message," and his recent act of "carrying a loaded weapon" had resulted in someone "being shot in the back." The State maintained that a strong sentence was thus warranted under the circumstances. The State also pointed out that the defendant would be eligible to receive day-for-day credit while serving his sentence and that he would also receive credit for the 257 days that he had already spent incarcerated in the Jackson County jail.

¶ 12 We note that the defendant was 31 years old at the time of sentencing and that the PSI, which the trial court stated it had reviewed prior to the sentencing hearing, indicates that he had previously been convicted or adjudicated on dozens of various charges, including aggravated assault, aggravated robbery, aggravated unlawful failure to obey an order to stop, battery, burglary, criminal impersonation, and evading arrest. The defendant's criminal history also includes numerous convictions for theft and driving with

a revoked or suspended license. The PSI further indicates that with few exceptions, the defendant was sentenced to terms of probation or conditional discharge on his jail-eligible offenses with little or no time actually served. In addition to the defendant's written statement, the PSI also contains a statement written by his fiancée.

¶ 13 In response to the State's arguments, defense counsel asked the trial court to impose the minimum two-year sentence. Counsel maintained that the following statutory factors in mitigation were present: the defendant's conduct had neither caused nor threatened serious physical harm to another, the defendant's criminal conduct had resulted from circumstances that were unlikely to recur, and the defendant's character and attitude indicate that was he unlikely to commit another crime. See 730 ILCS 5/5-5-3.1(a)(1), (8), (9) (West 2012).

¶ 14 When arguing that the defendant's conduct had neither caused nor threatened serious physical harm, defense counsel reminded the court that the defendant had been found not guilty on count I of the State's information. Counsel thus noted that "as found by the jury," the defendant's conduct had not "directly" harmed the victim.

¶ 15 With respect to the other cited factors, counsel referenced the statements written by the defendant and his fiancée, both of which indicate that the defendant was committed to changing his life for the better. Counsel noted that the defendant's statement also contained expressions of remorse and assurances that "nothing like this will happen again."

¶ 16 Stating that the defendant's mother had been "murdered in front of him" when he was young and that he had "no father to speak of," counsel argued that the defendant's

troubled childhood had not provided him with a "background designed for success." Counsel argued that the court should afford the defendant the opportunity to prove himself. Counsel did not dispute that the defendant had a significant criminal history but emphasized that he had never previously been charged with unlawful possession of a weapon by a felon. Counsel further noted that "by definition, of course, every person convicted of [that] charge has a prior felony." Counsel asked the court to "take a chance" on the defendant and sentence him to the minimum term of two years.

¶ 17 At the conclusion of the parties' arguments, the trial court stated the following:

"Nothing that the criminal justice system has done thus far has seemed to get through to you, Mr. Brown, and now you are a convicted felon walking around with a firearm and risking the lives and welfare of persons in the community.

No, [defense counsel], I'm not taking a chance on Mr. Brown. I'm going to protect society from him for a period of ten years, which is the sentence I'm imposing on him, to the Illinois Department of Corrections. It's going to be a day-for-day sentence, meaning he'll serve five years in the Illinois Department of Corrections, less 257 days ***."

¶ 18 The defendant subsequently filed a motion to reconsider sentence, which the trial court denied without a hearing. In August 2013, the defendant filed a timely notice of appeal.

¶ 19

DISCUSSION

¶ 20 The defendant argues that he is entitled to a new sentencing hearing because by stating that he was "a convicted felon walking around with a firearm and risking the lives

and welfare of persons in the community," the trial court improperly considered the elements of count II when imposing sentence on his conviction. Insisting that the trial court considered the relevant factors that were presented for its consideration and did not base the defendant's sentence on factors that were inherent in the offense, the State counters that the defendant's argument fails when the court's words are considered in context. We agree with the State.

¶ 21 It is well established that a factor inherent in the offense should not be considered as an aggravating factor at sentencing. *People v. Dowding*, 388 Ill. App. 3d 936, 942 (2009). "The reasoning behind this prohibition is that it is assumed that the legislature, in determining the appropriate range of punishment for a criminal offense, necessarily took into account the factors inherent in the offense." *People v. Gonzalez*, 151 Ill. 2d 79, 84 (1992). At the same time, however, "[a] judge is not required to refrain from any mention of factors that constitute elements of an offense." *People v. Jones*, 299 Ill. App. 3d 739, 746 (1998). "The judge may consider the nature and circumstances of the offense, and mere reference to the existence of such a factor is not reversible error." *Id.*; see also *People v. Valadovinos*, 2014 IL App (1st) 130076, ¶ 55 ("Although elements inherent in the offense are off-limits as aggravating factors, the sentencing judge cannot be expected to ignore factors relevant to a sentencing decision.").

¶ 22 It is also well established that the trial court is presumed to know the law and apply it properly. *People v. Phillips*, 392 Ill. App. 3d 243, 265 (2009). We thus presume that the trial court considered all relevant mitigating and aggravating factors and based its sentencing determination on proper legal reasoning. *People v. Halerewicz*, 2013 IL App

(4th) 120388, ¶ 43; *Dowding*, 388 Ill. App. 3d at 942-43. We accordingly review the trial court's sentencing determination with great deference, and "[t]he burden is on the defendant to affirmatively establish that the sentence was based on improper considerations." *Dowding*, 388 Ill. App. 3d at 943. "In determining whether the trial court based the sentence on proper aggravating and mitigating factors, a court of review should consider the record as a whole, rather than focusing on a few words or statements by the trial court." *Id.*

¶ 23 Here, we cannot conclude that the trial court's bare statement that the defendant was "a convicted felon walking around with a firearm and risking the lives and welfare of persons in the community" indicates that the court improperly considered the elements of count II as aggravating factors when imposing sentence on the defendant's conviction. Considered in context, the comment was part of the court's general observations regarding the defendant's rehabilitative potential and the nature and circumstances of his criminal conduct in the present case. The defendant is no stranger to the criminal justice system, and his act of unlawfully possessing a firearm ultimately resulted in a shooting that caused serious bodily harm to the victim. The trial court was certainly not required to ignore these facts. See *People v. Canizalez-Cardena*, 2012 IL App (4th) 110720, ¶ 23 ("A defendant's unwillingness to learn from his mistakes or to respect laws enacted for the protection of the public's safety is a proper factor for the trial court to consider in sentencing."); *People v. Cagle*, 277 Ill. App. 3d 29, 31 (1996) (noting that "the commission of an offense can include varying degrees of harm or threatened harm and those varying degrees may be an aggravating factor").

¶ 24 We also note that the cases the defendant primarily relies on in support of his argument on appeal are readily distinguishable from the present case in that they all involved instances where the State specifically asked the trial court to consider a factor inherent in the offense and/or the court specifically stated or indicated that it had done so. See *People v. Martin*, 119 Ill. 2d 453, 456-61 (1988); *People v. Conover*, 84 Ill. 2d 400, 402-05 (1981); *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶¶ 3-4, 12, 14; *Dowding*, 388 Ill. App. 3d at 941-44; *People v. Flanery*, 229 Ill. App. 3d 497, 502 (1992). Here, neither of these events occurred. In fact, the parties seemingly presumed that the trial court was obviously not going to consider the defendant's status as a felon or his mere possession of a firearm as factors in aggravation.

¶ 25 As indicated, observing that although "the potential for great bodily harm is certainly present whenever a handgun is involved," the State pointed out that in the present case, someone had actually been shot and seriously injured. When subsequently emphasizing that the defendant had never previously been charged with unlawful possession of a weapon by a felon, defense counsel added that "by definition, of course, every person convicted of [that] charge has a prior felony." We lastly note that the court's comments and observations were clearly made in response to the parties' arguments.

¶ 26 When maintaining that the defendant should receive a 10-year sentence, the State asserted that upon his release from prison, the defendant could have chosen to change his ways. "Apparently," however, "he did not get the message," and his possession of a firearm had resulted in someone "being shot in the back." Defense counsel, on the other hand, asked the trial court to "take a chance" and sentence the defendant to the minimum

term of two years, arguing that he had expressed a sincere commitment to change. Stating that "[n]othing that the criminal justice system ha[d] done thus far ha[d] seemed to get through to [the defendant]" and that it was "not taking a chance," it is apparent that after factoring in the amount of time that the defendant would actually be required to serve, the court believed that the maximum available sentence was needed to "protect society." It is further apparent that the court found that the defendant's claimed redemption was questionable at best. See *People v. Thurmond*, 317 Ill. App. 3d 1133, 1143 (2000).

¶ 27 Considering the record as a whole, the defendant has failed to meet his burden of establishing that the trial court considered improper factors when imposing sentence in the present case. We find that the comment at issue was a general observation regarding the nature and circumstances of the offense and that the court properly based its sentencing determination on the aggravating factors that were argued at the hearing.

¶ 28 CONCLUSION

¶ 29 For the foregoing reasons, the trial court's judgment is hereby affirmed.

¶ 30 Affirmed.