

FOURTH DIVISION
December 15, 2011

No. 1-10-2626

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 JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 09 CR 11997
)	
BRYAN SAWYER,)	Honorable
)	Nicholas R. Ford,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE LAVIN delivered the judgment of the court.
Justices Pucinski and Sterba concurred in the judgment.

ORDER

¶ 1 *HELD:* Defendant was proven guilty beyond a reasonable doubt of the offense of armed habitual criminal when a gun was observed on the center console of the truck that he was driving and two handguns were later thrown from that truck. The trial court did not abuse its discretion in sentencing defendant where it considered the statutory factors in mitigation and aggravation before imposing a sentence of 18 years for the Class X offense of armed habitual criminal.

¶ 2 After a jury trial, defendant Bryan Sawyer was convicted of being an armed habitual criminal and of aggravated fleeing or attempting to elude a police officer. He was sentenced to 18 years in prison for the armed habitual criminal conviction and to a concurrent extended term of 6 years for the aggravated fleeing conviction. On appeal, defendant contends that he was not

proven guilty beyond a reasonable doubt of being an armed habitual criminal because the State failed to establish that he possessed a firearm. He further contends that his sentence for the offense of armed habitual criminal is excessive because the trial court considered his criminal history in aggravation when that history is a factor of the offense and ignored evidence in mitigation. We affirm.

¶ 3 Defendant was arrested in June 2009, after a high speed chase that culminated in a collision between the truck defendant was driving and a squad car.

¶ 4 The matter proceeded to a jury trial. After jury selection, the trial court reminded defendant that if he did not attend trial, the proceedings would continue and he could be convicted and sentenced *in absentia*. Defendant indicated that he understood. The next day when defendant failed to appear, the trial commenced without him.

¶ 5 Officer Robert Roth testified that he and his partner were on patrol when they observed a blue Trailblazer run a stop sign. After observing the truck drive over a sidewalk and onto another street, the officers curbed the vehicle.

¶ 6 Roth then approached the passenger side of the vehicle. Although the truck's windows were tinted, he was able to determine that there were two people inside, a driver and a passenger. As he approached, Roth saw a "shiny" object on the top of the center console which he believed was a gun. At the same time, the driver of the vehicle "took off." Roth returned to the squad car and the officers attempted to pursue the truck as it proceeded to an expressway on-ramp. Roth gave a description of the truck over the radio and indicated that its passengers were probably armed. As the car turned toward the expressway, Roth lost sight of it.

¶ 7 Sergeant Jeff Truhlar testified that he followed the truck onto the expressway. Truhlar estimated that his vehicle was traveling 70 miles per hour as it chased the truck. Upon entering the expressway, the truck merged into the far left lane. Truhlar then observed a dark object

thrown out of the driver's side of the truck. The object sparked as it skidded along the shoulder of the road. Truhlar believed that the object was a gun and relayed this information over the radio. A few seconds later, another object came out of the driver's side of the truck. Truhlar also identified this object as a gun and transmitted that information. He continued to pursue the truck, but when it exited the expressway another squad car took up "primary pursuit." Ultimately, Truhlar caught up with the truck after the collision and assisted in detaining the two passengers.

¶ 8 Officer Timothy Lange testified he and his partner Officer Jankowski drove to the expressway median where the objects thrown from the truck had landed. Lange subsequently found a nine millimeter handgun. Officer Jankowski testified that he recovered a nine millimeter semiautomatic handgun.

¶ 9 Officer Jason Edwards testified that as the truck passed him, he activated his squad car's lights and dash mounted video camera. Edwards followed the truck until the collision. After he saw defendant exit the driver's side of the truck, he chased defendant on foot and ultimately took defendant into custody. Defendant was the only person Edwards saw exit the truck.

¶ 10 At the close of the State's case, the parties stipulated that defendant had two qualifying felony offenses for the charge of armed habitual criminal. After the defense rested, the court asked the State to explain whether defendant had been located. The State indicated that defendant had not been located either at his last known address or in police custody. Ultimately, the jury convicted defendant of being an armed habitual criminal and of aggravated fleeing and attempting to elude a peace officer.

¶ 11 Defendant was subsequently taken into custody and was present at the sentencing hearing. There, the State highlighted that defendant's criminal background made him eligible for Class X sentencing and that he belonged to a gang. The State also characterized defendant's

actions in the instant case as exhibiting a "wanton disregard" for the safety of others. The defense responded that defendant had been raised in a bad neighborhood, had no relationship with his father, and was involved in his children's lives.

¶ 12 In rendering sentence, the court indicated that it had considered, *inter alia*, the presentence investigation, evidence in mitigation and aggravation, the statutory factors in aggravation and mitigation, and the circumstances of the case. The court then noted the "dangerous circumstances" created by the high speed chase in the instant case as well as defendant's lack of a meaningful employment history and that he was raised by a single mother. Ultimately, as this was "an extremely serious case," the court sentenced defendant to 18 years in prison for the armed habitual criminal conviction and to a concurrent extended term of six years in prison for the aggravated fleeing conviction. The court stated that the sentence was a reflection of the "dearth" of mitigation in the case, the seriousness of defendant's criminal history, and the court's understanding of the facts of the instant case.

¶ 13 On appeal, defendant contends that the State failed to establish his constructive possession of a handgun beyond a reasonable doubt when no evidence indicated that he knew there were guns in the truck.

¶ 14 In assessing the sufficiency of the evidence, the relevant inquiry is whether, considering the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). This court does not retry the defendant or substitute its judgment for that of the trier of fact with regard to the credibility of witnesses, the weight to be given to each witness's testimony, and the reasonable inferences to be drawn from the evidence. *Ross*, 229 Ill. 2d at 272; see also *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006) (it is the responsibility of the trier of fact to determine the credibility of witnesses, to resolve inconsistencies in the evidence, and to

make reasonable inferences from the testimony). A conviction will be reversed only when the evidence was so unreasonable, improbable, or unsatisfactory that reasonable doubt remains as to whether the defendant was guilty. *Ross*, 229 Ill. 2d at 272.

¶ 15 A defendant commits the offense of armed habitual criminal when he "receives, sells, possesses, or transfers any firearm" after having been convicted of a least two triggering offenses. See 720 ILCS 5/24-1.7(a) (West 2008). A defendant's possession of contraband may be actual or constructive. To establish guilt on a theory of constructive possession of a firearm, the State must prove that defendant had knowledge of the presence of the weapon and exercised immediate and exclusive control over the area when the weapon was found. *People v. Ross*, 407 Ill. App. 3d 931, 935 (2011). A trier of fact is entitled to rely on reasonable inferences of knowledge and possession. *Ross*, 407 Ill. App. 3d at 935.

¶ 16 At trial, it was undisputed that defendant was the driver of the truck and that two guns were thrown out of the truck during the chase. Additionally, Roth testified that he saw a shiny object on the center console of the truck that he believed was a gun. The reasonable inference from Roth's testimony was that defendant, the driver of the truck, could see the gun on the truck's center console. *Ross*, 407 Ill. App. 3d at 935. Defendant's conduct also supports the inference that he knew there were handguns in the truck. The evidence at trial established that the truck had been curbed when defendant drove off and then led police on a chase along the expressway. When the chase ended, defendant was the only person to run away. A defendant's knowledge may be established by evidence of his actions, declarations or conduct through which it can be inferred that he knew contraband was in the location where it was found. See *Ross*, 407 Ill. App. 3d at 936.

¶ 17 Here, defendant was the driver of a truck in which a police officer saw a gun on the center console and from which two guns were thrown. Defendant's actions after the collision, in

that he exited the truck and ran away, provide a reasonable inference of flight to avoid police custody and further support an inference that defendant possessed the guns. *Ross*, 407 Ill. App. 3d at 936-37. Viewing the evidence in the record in the light most favorable to the State, this court cannot say that no rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *Ross*, 229 Ill. 2d at 272.

¶ 18 Defendant, however, contends that the evidence was insufficient because Roth only thought that the shiny object he saw on the console "may" have been a gun. He further argues that the object must have been innocuous because it remained on the console after the truck was curbed when an actual gun would have been hidden.

¶ 19 Initially, this court declines defendant's invitation to speculate as to why the gun remained on the console as Roth approached. Roth testified that as he walked up to the truck, he saw a shiny object on the center console that he believed was a gun. It was for the jury, as the trier of fact, to determine the credibility of each witness and the weight to be given to his testimony. See *Ross*, 229 Ill. 2d at 272. Clearly, the jury found Roth credible, as evidenced by the verdict, this court will not substitute our judgement for that of the jury on this issue. *Ross*, 229 Ill. 2d at 272.

¶ 20 This court rejects defendant's contention that the State failed to establish that he constructively possessed a gun because he did not have exclusive control over the area from which the guns were recovered, *i.e.*, the expressway median. Proof that a defendant had control over the place where contraband was located is not a prerequisite for conviction. *People v. Adams*, 161 Ill. 2d 333, 345 (1994). Constructive possession may exist when a defendant is no longer in physical control of contraband, provided that he had physical control of the contraband with the intention to exercise control on his own behalf, he has not abandoned the contraband, and no other person has obtained control of it. *Adams*, 161 Ill. 2d at 345. A defendant's decision

to hide or dispose of contraband does not constitute abandonment. *People v. Menniweather*, 301 Ill. App. 3d 574, 579 (1998). In the case at bar, the dispositive issue is not whether defendant had control of the median, but whether defendant ever had possession of the guns themselves. Here, a gun was observed on the center console of the truck that defendant was driving and two guns were subsequently recovered from the expressway median after being thrown from the driver's side of that truck. Defendant's constructive possession of the guns was not defeated by the fact that they were thrown out of the truck while he was fleeing from the police.

¶ 21 Defendant finally offers several "innocent" explanations for his actions that he argues are not inconsistent with the evidence presented at trial, including that a passenger could have reached up and placed the gun on the console as Roth approached, that the guns were hidden in the passengers' clothing, that his criminal background caused him to panic when he discovered the guns, and that a passenger must have thrown the guns out of the truck because both of his hands were on the steering wheel. Defendant finally argues that if he had known that the guns were in the car, he would not have committed a traffic violation.

¶ 22 Although defendant offers several explanations for his actions, a trier of fact is not required to accept any possible explanation compatible with a defendant's innocence and elevate it to the status of reasonable doubt (*People v. Siguenza-Brito*, 235 Ill. 2d 213, 229 (2009)), or to accept a defendant's version of events from competing versions of events (*People v. Villarreal*, 198 Ill. 2d 209, 231 (2001)). In any event, it is not for this court to retry defendant. *Ross*, 229 Ill. 2d at 272.

¶ 23 This court is unpersuaded by defendant's reliance on *People v. Bailey*, 333 Ill. App. 3d 888 (2002), and *People v. Hampton*, 358 Ill. App. 3d 1029 (2005) as in both of those cases the guns at issue were hidden. See *Bailey*, 333 Ill. App. 3d at 892 (gun was found under the seat in a car in which the defendant was a passenger); *Hampton*, 358 Ill. App. 3d at 1032-33 (gun was

discovered in a sock in the glove box of a car the defendant was driving and there was no evidence that he had regular control of the car). In the instant case on the other hand, Roth testified that he saw an object which he believed was a handgun on the center console of the truck defendant was driving and two guns were subsequently thrown out of the driver's side of that truck.

¶ 24 This court will reverse a defendant's conviction only when the evidence at trial was so unreasonable or unsatisfactory that reasonable doubt remains as to defendant's guilt. *Ross*, 229 Ill. 2d at 272. This is not one of those cases. Accordingly, we affirm defendant's conviction for the offense of armed habitual criminal.

¶ 25 Defendant next contends that his sentences are excessive. He argues that the State's discussion of his criminal history at sentencing was an impermissible "double enhancement" because his criminal history had already been used to make him eligible for the offense of armed habitual criminal. Defendant further argues that the trial court's failure to "admonish" the State regarding certain allegedly improper arguments in aggravation leads to the assumption that the trial court improperly relied on these factors. Defendant finally contends that the trial court failed to consider certain mitigating evidence including his lack of parental guidance, devotion to his children, and potential for rehabilitation.

¶ 26 A trial court has broad discretion in determining the appropriate sentence for a particular defendant and its determination will not be disturbed absent an abuse of that discretion. *People v. Patterson*, 217 Ill. 2d 407, 448 (2005). A sentence within the applicable statutory range will not be considered excessive unless it varies greatly from the spirit of the law or is manifestly disproportionate to the nature of the offense. *People v. Brazziel*, 406 Ill. App. 3d 412, 433-34 (2010). When balancing the retributive and rehabilitative aspects of a sentence, a court must consider all factors in aggravation and mitigation including, but not limited to, a defendant's age,

habits, credibility, criminal history, character, education, and environment, as well as the nature and circumstances of the crime and the defendant's actions in the commission of that crime.

People v. Raymond, 404 Ill. App. 3d 1028, 1069 (2010). It is presumed that the trial court properly considered all mitigating factors before it; it is the defendant's burden to affirmatively show the opposite. *Brazziel*, 406 Ill. App. 3d at 434. A reviewing court will not substitute its judgment for that of the trial court merely because it may have analyzed the sentencing factors differently. *People v. Streit*, 142 Ill. 2d 13, 19 (1991).

¶ 27 Initially, this court notes that although defendant contends that his sentences are excessive, his arguments on appeal focus on the 18-year sentence imposed for his conviction for the offense of armed habitual criminal.

¶ 28 The offense of armed habitual criminal is a Class X felony with a sentencing range of between 6 and 30 years in prison. See 720 ILCS 5/24-1.7(b) (West 2008); 730 ILCS 5/5-8-1(a)(3) (West 2008).

¶ 29 The record reveals that in sentencing defendant the court indicated that it had considered the presentence investigation, the statutory factors in aggravation and mitigation, the arguments made by the parties, and the circumstances of the case. The court then noted that the chase in the instant case had created "dangerous circumstances" on a major highway. Although defendant had been raised by a single mother, the court characterized this as "an extremely serious" case and, ultimately, sentenced defendant to 18 years in prison for the offense of armed habitual criminal. This court cannot say that a prison sentence of 18 years was an abuse of discretion when a gun was observed on the center console of the truck that defendant was driving and two handguns were subsequently thrown from that truck during a high speed chase on the expressway. See *Patterson*, 217 Ill. 2d at 448 (a trial court has broad discretion in sentencing).

¶ 30 Defendant, however, contends that his sentence was improperly "double enhanced" when

the trial court considered his criminal history when imposing sentence because his criminal history had already been considered in his conviction for the offense of armed habitual criminal.

¶ 31 A "double enhancement" occurs when either a single factor is used both as an element of an offense and as a basis for imposing a harsher sentence than might otherwise have been imposed, or the same factor is used twice to elevate the severity of the offense itself. *People v. Guevara*, 216 Ill. 2d 533, 545 (2005). Although a factor inherent in an offense should not also be considered as a factor in aggravation at sentencing (*People v. Conover*, 84 Ill. 2d 400, 404 (1981)), the sentence imposed upon a defendant is based upon the circumstances of each case, *i.e.*, the nature and circumstances of the offense committed by that defendant and the nature and circumstances of each element of that offense (*People v. Saldivar*, 113 Ill. 2d 256, 268-69 (1986)).

¶ 32 This court rejects defendant's contention that he suffered a "double enhancement" when the trial court considered his criminal history when imposing sentence for his conviction for being an armed habitual criminal. A defendant's history of prior criminal activity is a statutory aggravating factor that may be considered as a reason to impose a longer prison term. 730 ILCS 5/5-5-3.2(a)(3) (West 2008); see also *People v. Thomas*, 171 Ill. 2d 207, 227-28 (1996) (while the fact of a defendant's prior convictions determines his eligibility for a Class X sentence, "it is the *nature and circumstances* of these prior convictions" along with other factors in aggravation and mitigation that determine the exact length of a particular defendant's sentence (emphasis in original)).

¶ 33 In sentencing defendant, the court stated that it had considered factors in mitigation and aggravation, as well as defendant's criminal history and the fact that this was an extremely serious offense. A trial court must consider the nature and circumstances of the crime as well as a defendant's character and criminal background when making its sentencing determination

(*Raymond*, 404 Ill. App. 3d at 1069), and, here, the trial court considered not only defendant's criminal history, but also the circumstances of the offense and defendant's actions in committing the offense (*Saldivar*, 113 Ill. 2d at 268-69).

¶ 34 Defendant next contends that the trial court's failure to admonish the State regarding its allegedly improper arguments in aggravation creates the assumption that the trial court overemphasized these factors at sentencing. He also contends that the trial court failed to adequately consider certain mitigating factors including his upbringing in a rough neighborhood, his devotion to his children, and his potential for rehabilitation.

¶ 35 The trial court is presumed to consider only competent evidence at sentencing (*People v. Ayala*, 386 Ill. App. 3d 912, 920 (2008)), and to base its sentencing determination on proper legal reasoning (*People v. Donath*, 357 Ill. App. 3d 57, 72 (2005)). While a defendant's potential for rehabilitation must be considered, the trial court is not required to give more weight to a defendant's chance of rehabilitation than to the nature of the crime (*People v. Evans*, 373 Ill. App. 3d 948, 968 (2007)), or to explain the value the court has assigned to each factor in mitigation and aggravation (*Brazziel*, 406 Ill. App. 3d at 434). It is presumed that the court properly considered the mitigating factors presented and the defendant's potential for rehabilitation; it is the defendant's burden to show otherwise. *Brazziel*, 406 Ill. App. 3d at 434.

¶ 36 Here, defendant relies on no authority for the proposition that this court must assume that the trial court overemphasized the State's allegedly improper argument and points to nothing in the record to overcome the presumption that the trial court only considered competent evidence when sentencing him. See *People v. Kolzow*, 301 Ill. App. 3d 1, 8 (1998) (assumption that the trial court considered only competent evidence will be overcome only if the record "affirmatively demonstrates" otherwise). With regard to mitigation, the trial court is not required to explain the value it assigned to each factor in mitigation and aggravation, it is

presumed that the court properly considered the mitigating factors and the defendant's potential for rehabilitation; it is the defendant's burden to show otherwise. *Brazziel*, 406 Ill. App. 3d at 434. Defendant has failed to make such a showing when he points to nothing in the record to indicate that the trial court did not consider the evidence presented in mitigation and the trial court specifically mentioned the "dearth" of evidence in mitigation. See *Brazziel*, 406 Ill. App. 3d at 434.

¶ 37 Here, defendant's sentence is not excessive when the trial court imposed a term in the middle of the applicable statutory range after properly considering factors in mitigation and aggravation. *Brazziel*, 406 Ill. App. 3d at 433-34. The court did not abuse its discretion when sentencing defendant (*Patterson*, 217 Ill. 2d at 448), and, accordingly, its judgment is affirmed.

¶ 38 For the reasons stated above, we affirm the judgment of the circuit court of Cook County.

¶ 39 Affirmed.