2012 IL App (1st) 102779-U

THIRD DIVISION
August 15, 2012

No. 1-10-2779

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	APPEAL FROM THE
	)	CIRCUIT COURT
Plaintiff-Appellee,	)	OF COOK COUNTY.
	)	
v.	)	
	)	No. 09 CR 14627
	)	
MARIO NOWAK, also known as Mariusz Nowak,	)	HONORABLE
	)	WILLIAM WISE,
Defendant-Appellant.	)	JUDGE PRESIDING.

PRESIDING JUSTICE STEELE delivered the judgment of the court.
Justices Neville and Murphy concurred in the judgment.

O R D E R

¶ 1 *Held*: The State proved defendant guilty beyond a reasonable doubt of two counts of first degree murder: knowing-murder and felony-murder based on mob action. After considering evidence in aggravation and mitigation, the trial court properly sentenced defendant to 45 years' imprisonment. The judgment of the circuit court is affirmed.

¶ 2 Following a bench trial in the circuit court of Cook County, defendant Mario Nowak was convicted of two counts of first degree murder: knowing-murder (720 ILCS 5/9-1(a)(2) (West 2008)), and felony-murder (720 ILCS 5/9-1(a)(3) (West 2008)). He was sentenced to 45 years'

imprisonment. On appeal, the defendant challenges the sufficiency of the evidence and contends that the sentence is excessive. We affirm.

¶ 3 BACKGROUND

¶ 4 The record discloses the following facts. Defendant was sentenced to 45 years' imprisonment following a bench trial where he was convicted of two counts of first degree murder: knowing-murder and felony-murder based on mob action. In his opening statement, defendant admitted his participation in the assault of the victim, 17-year-old Eric Navarro, that led to his death. Defendant testified that he withdrew from the offense prior to the commission of the murder.

¶ 5 Defendant testified that on July 7, 2009, he, along with Oscar Ocampo (Ocampo), Christopher Gerken (Gerken), Arturo Daza (Daza), and Daza's 16-year-old girlfriend, Andrea Cordero (Cordero), were at his birthday party. The party was held at Ocampo's apartment at 58 North Avenue in Northlake, Illinois. The group started drinking around 12:30 p.m., and Ocampo, Gerken and Daza smoked marijuana. Ocampo and defendant discussed the fact that the victim owed Ocampo $15 from a prior marijuana transaction, and that the victim wanted to purchase more, despite the fact that he still owed Ocampo $15. Defendant testified that due to this $15 debt, Ocampo wanted to "knock [the victim] out," and Ocampo asked defendant if he "had his back." Defendant understood the question to mean if defendant would help Ocampo should he and the victim get into a fight. Defendant agreed. He testified that they did not discuss killing the victim.

¶ 6 Around 6 p.m. on the same day, the victim stopped by Ocampo's apartment to purchase

marijuana. The victim and defendant met on a prior occasion approximately three or four years before the date of the party, and defendant considered the victim a "good friend." Inside the apartment, the victim asked Ocampo for the marijuana and paid Ocampo $10. Ocampo asked for the outstanding $15. According to defendant, "[the victim] gave him an excuse, and [Ocampo] was like – gives me the little signal, and I hit him." Defendant hit the victim in the head with his fist. The victim attempted to duck, and started running for the door. Defendant grabbed the victim's shirt and the two began to wrestle until they were outside of the apartment in the hallway. The two tripped over each other in the hallway, with defendant maintaining a grip on the victim's shirt. The victim attempted to rise to his feet and run when Ocampo kicked him in the head, jumped on top of the victim, and started hitting him. Defendant testified "that's when I get up. That's when I hit him some more." Defendant testified he hit the victim approximately six or seven times, and was himself hit once.

¶ 7 Ocampo continued to hit the victim who at this time was lying on his back in the apartment building hallway while defendant stood over him. Defendant and Gerken then took turns hitting the victim, who tried to block the blows with his arms. Defendant noticed the victim's face was swollen, and that his mouth and eyes were bleeding. He asked Gerken whether he thought the victim "had enough." Gerken answered affirmatively; he and defendant then told Ocampo to "calm down." Ocampo continued to beat the victim. After some time, defendant and Gerken pulled Ocampo off of the victim for the first time. Ocampo returned to punching the victim, who continued to try to block the blows. Defendant and Gerken then walked away, telling Ocampo to "chill out." Ocampo continued to kick and punch the victim. Defendant and

Gerken pulled Ocampo off of the victim for a second and then third time.

¶ 8 Ocampo told defendant and Gerken to pull the victim inside the apartment, but he pulled the victim inside without their assistance, hit the victim twice more, and then left the apartment. Defendant then told the victim to get up and get out of the apartment. As the victim slowly got up, Ocampo returned and kicked the victim, who fell back down. At that time, defendant testified he and Gerken left the building. Defendant left from the back door and Gerken exited through the front door. After he left the building, defendant went to his own apartment and began drinking alcohol. He testified there was blood on his shoes. An hour after leaving Ocampo's apartment, defendant threw his shoes in a garbage can located three blocks away from his home so that no one would find the shoes. He did not go across the street to the police station for assistance. Defendant received a telephone call from Cordero informing him the victim was dead that same night. The next morning, defendant claimed Ocampo stopped by his apartment and asked him to steal a car in which they would burn the victim's body. Defendant testified that he agreed to steal the car to use to burn the victim's body, but spent the rest of the day drinking. The following day, Ocampo again asked defendant to steal a car, to which defendant agreed.

¶ 9 Cordero testified for the State that she went to Ocampo's apartment to celebrate defendant's birthday, along with her boyfriend, Daza. She overheard a conversation between defendant and Ocampo where Ocampo stated the victim owed him money. She testified defendant then "insisted that he would beat up [the victim]." She stated the victim arrived at Ocampo's apartment. She sat next to the victim and warned him, asking him to leave the apartment. She then left with Daza for the pawn shop, located about 10 minutes away. When

they returned, Cordero stated she saw Gerken leaving out the front door of the apartment building. She then went upstairs to the apartment with Daza and saw the victim's shoe on the floor. She looked into Ocampo's apartment and saw the victim on the floor "lifeless." She stated she could not see him breathing, he was not speaking or moving "at all," and there were no signs of life. She then observed Ocampo kick the victim in his ribs. She watched Daza and Ocampo move the victim's "lifeless" body into the hallway. She stated Ocampo let the upper portion of the victim's body fall to the floor. His head hit the floor and made a loud thud. Again, she stated she did not see any signs of life in the victim at this point. Cordero went outside to the parking lot and waited for Daza to give her money to go home. She then saw Daza come out the back of the building carrying the victim's body over his shoulder. When Daza returned without the body, he gave Cordero $10, which she used to take the bus to her sister's home. During the bus ride, she called defendant.

¶ 10 Dr. Lawrence Cogan (Cogan), an assistant medical examiner with the Cook County Medical Examiner's office testified as an expert of forensic pathology and stated that he performed an autopsy on the victim. Cogan testified the examination revealed "the body was burnt [and] charred from head to toe. Some areas were burnt to the point where there was cremation of the skeleton." The charring of the body occurred after death, as evidenced by the facts that there was no soot in the trachea bronchi and no evidence of carbon monoxide. Cogan found areas of contusion on the elbows and knees and lacerations of the face. Specifically, Cogan noted the body incurred lacerations of the mouth, a torn upper frenum, and upper and lower lip hemorrhage. There were bite marks on the tongue, associated with significant

hemorrhage. Cogan testified that the bite marks are seen in seizure disorders, but the victim had no history of seizures. He stated "[it is] more likely to be maybe a seizure as a result of asphyxia to the brain." There were signs of hemorrhaging over the left and right side of the victim's head and injury to the covering of the brain extending down along the neck. Cogan testified that this injury was "extensive." He further testified there were hemorrhages deep around the larynx and right lung, as well as sclera hemorrhages and subarachnoid hemorrhage. Cogan explained if the trauma occurred closer to the time of death, there would be less hemorrhaging and that there was "a great deal of hemorrhage associated with [the head] injuries." Over the right scapula posterior, there were discolorations appearing to represent "some type of injuries," and there was also "deep hemorrhage into the muscle around the ribs" in that area. Further, the autopsy report indicated there was an area of hemorrhage over the victim's right, lower back. Cogan testified the evidence showed all of the injuries were sustained prior to death and were consistent with blunt force trauma. Cogan testified that he classified the cause of death as "a result of multiple injuries, and the manner of death as homicide" in his autopsy report. He emphasized in his testimony that the injuries to the victim cannot be separated to determine which injury alone caused the victim's death. He testified the injuries to the victim's head were fairly severe and alone could possibly cause death.

¶ 11 Defendant elected a bench trial and testified on his own behalf. He admitted participating in the assault of the victim, but claimed to withdraw from the beating before the murder. Defendant testified that Ocampo alone killed the victim, when Ocampo "went crazy." Defendant was found guilty of knowing-murder and felony-murder based on mob action. Defendant's

motion to reconsider and for a new trial was subsequently heard and denied. Defendant was sentenced to 45 years' imprisonment. This timely appeal followed.

¶ 12 DISCUSSION

¶ 13 When a court is faced with a challenge to the sufficiency of the evidence, the applicable standard of review requires us to determine whether, after "viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *People v. Moore*, 375 Ill. App. 3d 234, 238 (2007). This standard applies in all cases, regardless of whether the evidence is direct or circumstantial. *Id.* The reviewing court will not substitute its judgment for that of the factfinder on questions involving the weight of the evidence or the credibility of the witness and will not reverse a criminal conviction unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt. *Id*. While great deference is accorded to the findings of a trier of fact, a criminal conviction cannot stand if the evidence is so improbable or unsatisfactory as to give rise to reasonable doubt regarding an essential element of the offense the defendant has been found guilty of committing. *People v. Clinton*, 397 Ill. App. 3d 215, 220 (2009).

¶ 14 First, defendant contends the State failed to prove him guilty of knowing-murder (720 ILCS 5/9-1(a)(2) (West 2008)). He specifically argues that he is not guilty of knowing-murder because there is no evidence that he was practically certain his acts would result in the victim's death. His contention misstates the burden, as the law does not require a defendant to be practically certain. *Id*. The trial court found defendant guilty beyond a reasonable doubt of

first-degree murder under the Illinois Criminal Code (Code) (720 ILCS 5/9–1(a)(2) (West 2008)), which provides in relevant part:

> "[a] person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death * * * he *knows* that such acts *create a strong probability of death or great bodily harm* to that individual or another." (Emphases added.)

The requisite mental state for knowing-murder under section 9-1(a)(2) is knowledge "that such acts create a strong probability of death or great bodily harm to that individual." *People v. Smith*, 372 Ill. App. 3d 762, 768, (2007). As our supreme court stated in *People v. Howery*, 178 Ill. 2d 1, 42-43 (1997):

> "In order to prove murder, it is not necessary to show that the defendant had a specific intent to kill or do great bodily harm or that he knows with certainty that his acts will achieve murderous results. The requisite mental state for murder under section 9--1(a)(2) may be inferred from the facts and circumstances of the evidence. It is sufficient to show that the defendant voluntarily and willfully committed an act, the natural tendency of which was to destroy another's life. A defendant's intent may be implied from the character of the act."

Whether the defendant is guilty of murder because his acts created a strong probability of death is a question for the trier of fact. *Howery*, 178 Ill. 2d at 43. As long as the defendant's acts contributed to the death of the victim, the defendant may be found guilty of murder. *People v. Alvarez-Garcia*, 395 Ill. App. 3d 719, 731 (2009).

¶ 15 After reviewing all of the evidence, we conclude that the State met its burden and proved defendant guilty of knowing-murder beyond a reasonable doubt. Defendant testified that he intended to "knock [the victim] out." The mental state of knowledge is ordinarily proved by circumstantial evidence rather than by direct proof. *People v. Parks*, 403 Ill. App. 3d 451, 457 (2010). "As the trier of fact, the trial court is in the superior position to assess the credibility of witnesses, resolve inconsistencies, determine the weight to assign the testimony, and draw reasonable inferences therefrom." *People v. Vaughn*, 2011 IL App (1st) 092834, ¶24. Here, the State presented sufficient evidence that defendant knowingly engaged in acts that created the strong probability of the victim's death. Defendant testified he hit the victim approximately six times. Defendant admitted to striking the victim with his fists when signaled by Ocampo. He also discarded his shoes three blocks away from his home. Cogan's testimony makes it clear that the victim's injuries were all consistent with a beating by another's hands and feet. The autopsy report indicates that there was hemorrhaging around the victim's left lung due to extensive blunt force trauma on that side of the victim's body, subarachnoid hemorrhaging, and hemorrhaging of the left and right sides of the victim's brain. Defendant testified that when Ocampo was on top of and beating the victim, defendant punched the victim a few more times. Defendant grabbed the victim and hindered his attempt to flee. According to Cordero's testimony, the beating lasted approximately 20 minutes. As Cogan testified, the autopsy revealed the victim's cause of death was due to multiple injuries to his head and body, and not due to any one action. After defendant fled the scene, he ran home and began drinking. He threw his shoes away in a garbage can three blocks from his home. He admitted that he never called 911, and he did not walk

across the street to the police station to seek help. Defendant also admitted that at some point during the beating, the victim no longer made noise. Cordero testified that upon her return from the pawn shop, the victim appeared lifeless. In sum, the evidence was sufficient for a rational trier of fact to find, beyond a reasonable doubt, that defendant and his codefendants acted with intent to kill the victim.

¶ 16 Defendant next contends the State failed to prove him guilty of felony murder beyond a reasonable doubt. He specifically argues the underlying felony of mob action was completed before the end of the aggression which resulted in the victim's death, and that the State failed to prove that he knew his participation in the beating was certain to cause the victim's death.

¶ 17 A person commits first degree murder when he "kills an individual without lawful justification * * * if, in performing the acts which cause the death: he is attempting or committing a forcible felony." 720 ILCS 5/9–1(a)(3) (West 2008). The felony murder statute is intended to limit violence caused by the commission of a forcible felony, subjecting an offender to a first degree murder charge if another person is killed during that felony. *People v. Belk*, 203 Ill. 2d 187, 192 (2003). Predicate felonies underlying a charge of felony murder must have an independent felonious purpose. *People v. Morgan*, 197 Ill. 2d 404, 458 (2001). An individual commits mob action when he and at least one other person, without legal authority, act together with the use of force or violence to disturb the public peace. 720 ILCS 5/25-1(a)(1) (West 2008).

¶ 18 Our supreme court provided a comprehensive analysis of the felony murder doctrine in *People v. Davis*, 213 Ill. 2d 459 (2004). In *Davis*, the defendant was convicted of felony murder predicated upon mob action, based on evidence presented at trial that the defendant joined a

group of 10 or more men and inflicted blows upon the victim, a stranger to their neighborhood, who died as a result of the beating he received. *Id*. Defendant admitted that he struck the victim several times, but stated that " '[he] did not mean for the guy to die.' " *Davis*, 213 Ill. 2d at 467. The defendant challenged his conviction, arguing, in pertinent part, that his conviction for felony murder could not stand. The court noted:

> "[T]o convict defendant of mob action, it was not necessary to prove that defendant struck [the victim], much less performed the act that caused the killing. Unlike *Morgan* (307 Ill. App. 3d 707 (1999)) and *Pelt* (207 Ill. 2d at 434 (2003)), we are able to conclude that the predicate felony underlying the charge of felony murder involved conduct with a felonious purpose other than the conduct which killed [the victim]. Therefore, under the facts of the instant case, mob action was a proper predicate felony for felony murder." *Davis*, 213 Ill. 2d at 474–75.

Accordingly, the court upheld the defendant's felony murder conviction. *Id*.

¶ 19 We first examine whether the predicate offense of mob action was completed before the acts contributing to the victim's death. First, defendant argues where a predicate felony is completed before the killing, the felony-murder rule does not apply. He cites *Moore,* 375 Ill. App. 3d at 236, to support this contention. We disagree. *Moore* is distinguishable from the instant case. In *Moore*, the defendant, Moore was found guilty of felony murder after stealing a car and collided with another vehicle, killing the driver while being pursued by police. *Id*. On appeal, Moore contended that the offense of burglary was completed prior to the police chase and crash; therefore, he was not guilty of felony murder. The court agreed and reversed Moore's

felony murder conviction. *Id*. The court reasoned that the burglary of the car was completed when Moore reached a place of temporary safety, and therefore, the victim's death in a collision with Moore was not predicated by the burglary. *Id*. That is not the case with the facts presented in the record before us. Defendant's participation in the beating of the victim was a direct cause of the victim's death. Mob action does not lend itself to the type of causal dissection the court applied to the offense of burglary in *Moore*. In *Moore*, the court was able to temporally separate the predicate felony of burglary from the death of the motorist while the evidence in this case does not allow that separation. *Id*. Here, the chain of causation shows that the mob beating of the victim and his death cannot entirely be separated. Further, the victim in *Moore* did not suffer any injuries by the end of the burglary that would contribute to his death, as defendant would have this court believe. See *Moore,* 375 Ill. App. 3d at 236. In *People v. Davison,* 236 Ill. 2d 232, 244 (2010), our supreme court determined the offense of mob action properly serves as a predicate forcible felony for first degree felony murder.

¶ 20 Defendant attempts to distinguish *Davison* to support his contention that he is not guilty of felony murder because the mob action was completed before Ocampo committed acts that resulted in the victim's death. Here, just as in *Davison*, the cause of death was from the multiple injuries the victim sustained during both the predicate felony of mob action, and any occurrences that happened after. Cogan made it clear that the victim's death resulted from not just one punch, one kick or one person's actions, but from multiple injuries. He testified that he found 18 different evidences of injury and that the cause of death was due to multiple injuries. Contrary to defendant's assertion, Cogan did not attribute the victim's death to strangulation by Ocampo. If

that were indeed the only cause of death, felony murder predicated on mob action would be inappropriate. However, the evidence here does not support a distinction between this case and *Davison*. Whether or not mob action serves as a proper predicate felony of felony murder is contingent upon the cause of death, not solely the moment in which the predicate felony ends. One may imagine a hypothetical where a felony is committed and death ensues some time later, where that cause of death was completely independent of the felony. That is not the case here. Therefore, we find the jury was entitled to conclude that mob action, in which defendant participated, was a proper predicate to first degree murder.

¶ 21 Where defendant argues he did not know his actions would cause a strong probability of death, this court stated in *Davis* that "the offense of felony murder is unique because it does not require the State to prove the intent to kill, distinguishing it from other forms of first degree murder when the State must prove either an intentional killing or a *knowing killing*." (Emphasis added.) *Davis*, 213 Ill. 2d at 471 (citing 720 ILCS 5/9–1(a)(1), (a)(2) (West 2008)).

¶ 22 Lastly, defendant argues his sentence is excessive, based on his age, lack of criminal history, education, work ethic, and rehabilitative potential. The sentencing court has the opportunity to weigh the defendant's credibility, his demeanor and general character, and his mentality, social environment, habits, and age. *People v. Merrick*, 2012 IL App (3d) 100551, ¶ 31. Consequently, the trial court's sentencing determination will not be reversed absent an abuse of discretion. *Id.* A sentence that falls within the statutory range is not an abuse of discretion unless it is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense. *Id*. It is well established that the sentence imposed

by a trial court is entitled to great deference. When the sentence issued is within the statutory limits, the decision may be disturbed only where the trial court has abused its discretion. *Id*. As long as the trial court " 'does not consider incompetent evidence, improper aggravating factors, or ignore pertinent mitigating factors, it has wide latitude in sentencing a defendant to any term within the statutory range prescribed for the offense.' " *Bosley*, 233 Ill. App. 132, 139 (1992) (quoting *People v. Hernandez*, 204 Ill. App. 3d 732, 740 (1990)). The trial court has no obligation to recite and assign value to each factor presented at a sentencing hearing. *People v. Baker*, 241 Ill. App. 3d 495, 499 (1993). Where mitigating evidence is presented to the trial court during the sentencing hearing, we may presume that the trial court considered it, absent some indication, other than the sentence itself, to the contrary. *People v. Dominguez*, 255 Ill. App. 3d 995, 1004 (1994).

¶ 23 In this case, defendant concedes the minimum sentence for first degree murder shall be a term not less than 20 years but not more than 60 years. 720 ILCS 5/5-8-1(a)(1)(a) (West 2008). The trial court imposed a 45-year sentence. The record shows that the trial judge heard and considered the evidence in aggravation and mitigation. The court stated:

> "[A presentence report] states that basically he had no family and that his father is a person who constantly drank. His father kicked him out of the house when he was young. He turned to drinking and marijuana. He was gainfully employed. He earned about $1,200 per month and he gave $400 to his mother when he was living in the home. ***I do find that there are some mitigating circumstances because of his familial situation. The fact that he was the victim of his father's beatings at times. That there is

> some mitigation in this matter but not a lot. The court is taking into account that mitigation in passing sentence *** upon him."

Accordingly, we find the trial court did not abuse its discretion in sentencing the defendant within the statutory range.

¶ 24 CONCLUSION

¶ 25 For the reasons stated herein, we affirm the judgment of the circuit court of Cook County. We find that the trial court properly found defendant guilty of first degree felony murder and knowing-murder beyond a reasonable doubt based upon the evidence present. Further, we find that the defendant's 45-year sentence was appropriate, and that the trial court properly considered all factors in aggravation and mitigation prior to defendant's sentencing.

¶ 26 Affirmed.