FIFTH DIVISION
January 11, 2013

No. 1-11-0074

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. 08 CR 15348
	)	
STEVEN CULLARS,	)	Honorable
	)	Mary Margaret Brosnahan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE TAYLOR delivered the judgment of the court.
Presiding Justice McBride and Justice Palmer concurred in the judgment.

O R D E R

¶ 1 *Held*: Judgment entered on defendant's convictions of first degree murder and kidnapping affirmed over his challenge to the sufficiency of the evidence on the kidnapping charge, and claim that the sentence entered on his murder conviction should be vacated because the trial court considered an improper aggravating factor in sentencing.

¶ 2 Following a jury trial, defendant Steven Cullars was found guilty of first degree murder and kidnapping, then sentenced to consecutive, respective terms of 45 and 6 years' imprisonment. On appeal, defendant contends that the State failed to prove him guilty of kidnapping beyond a reasonable doubt where it did not establish the element of secret confinement. He also contends

that his murder sentence should be vacated and his cause remanded for resentencing because the trial court improperly considered an aggravating factor inherent in the offense of first degree murder.

¶ 3 The record shows that on July 20, 2008, defendant met his ex-girlfriend Kimberly Foucher near 79th Street and Stony Island Avenue in Chicago, and agreed to return some items to her. He then drove Foucher to the garage behind his mother's house at 5120 South Damen Avenue, beat her unconscious with his fists, strangled her with a belt, and stomped on her throat. Having thus killed her, defendant exited the garage and twice purchased alcohol from a liquor store across the street, then called his friend Earl Parks, a Chicago police detective, to tell him what he had done and request that the detective arrest him.

¶ 4 As pertinent to this appeal, Richard Ross, defendant's uncle, testified that on July 20, 2008, he owned the house at 5120 South Damen Avenue, in Chicago, where Patricia Ross, his sister and defendant's mother, resided. On cross-examination, Ross stated that this property had a garage where defendant was allowed to store things, and on redirect, he identified photographs of the house and the garage behind it. On recross, Ross stated that there were vacant lots to the north and south of the house, that the garage was "free standing" and not visible in the photograph of the house because it is located behind it, and that the photograph of the garage was taken from the north-south alley behind Damen Avenue. He also stated that the garage has an overhead door facing the alley and a service door facing the house.

¶ 5 Chicago police detective Earl Parks testified that he has known defendant for about 17 years, considers him a friend, and hires him to do "[h]andyman-type work" on real estate that he owns, including his own home. On July 20, 2008, defendant was scheduled to remodel Detective Parks' basement bathroom while he worked off-duty security for a Chicago White Sox game.

Before he left, he paid defendant in part and left his Saturn station wagon with him for getting any necessary parts.

¶ 6 Shortly after 5 p.m., Detective Parks received a voice mail message from defendant stating "that he had just killed Kim and that he wanted – he wasn't playing, he was serious and for me to call him right back." Detective Parks then spoke with defendant by phone, and defendant told him that he had killed Foucher and wanted to turn himself in, but only to him. Detective Parks responded that he was not on duty, but that he would come over with other detectives who were so engaged. He then called Area 2 headquarters, and drove to a location about a block away from 5120 South Damen Avenue where he was instructed to wait for Area 1 detectives.

¶ 7 When they arrived, Detective Parks walked up the alley with two of them while two others approached the garage from the front of the house. He observed that the garage door was raised "about three and a half feet," that his vehicle was inside the garage, and on the ground near the passenger side of his vehicle, he saw the body of a black female with a towel over her face, whom he later learned was Foucher. Detective Parks yelled for defendant to come out, and he emerged from a nearby area and walked towards him, "saying that I can't believe I killed her."

¶ 8 Chicago police sergeant Jessica Jones testified that on July 20, 2008, she and Detective Tim Nolan conducted a videotaped interview of defendant at Area 1 detective division. During the interview, which was published to the jury and entered into evidence,[1] defendant stated that he had been thinking of murder for days, and that he "lured," "deceived," and "tricked" Foucher into getting in his car near 79th Street and Stony Island Avenue by telling her that he would return some pictures to her. He then drove her to the garage at 5120 South Damen Avenue, and,

[1] A transcript of the videotaped interview was not provided with the record, and the following is a summary of defendant's statements.

when she exited the passenger's side of the car, he beat her unconscious with his fists, strangled her with his hand, then with his belt, until she stopped breathing. Afterwards, he went to the store across the street and bought a 22 ounce beer, returned to the garage, closed the door, and called Detective Parks.

¶ 9 Defendant testified that he is a 47-year-old divorcee with four children, and that he had previously been in a year-long, "on and off again" relationship with Foucher. On July 20, 2008, defendant and Foucher attended church, and, after services, he dropped her off at a McDonald's before going to Detective Parks' house to work on his basement. After working for a few hours, he called Foucher, and the two arranged to meet near 79th Street. Defendant drove towards 79th Street and Stony Island Avenue and eventually found Foucher as she was buying two cigarettes from "a guy." He pulled up, got out of the car, and told Foucher to watch the car while he went to buy a beer. When he came back, the two spoke about defendant writing her a letter of recommendation and returning a box of her mother's obituaries which were in his garage. Defendant agreed to return the obituaries to Foucher, who was "frustrated," and they headed to defendant's mother's house at 5120 South Damen Avenue.

¶ 10 When they arrived there, defendant raised the door of the garage and noticed that someone had been inside because the drawers of a dresser containing Foucher's clothes and videos were open, clothes were hanging out, a green container had been moved, and papers were strewn about. He returned to the car, backed it into the garage, and the two of them got out. As they headed to the back of the garage, Foucher's "mouth dropped open" because the items belonged to her mother. Defendant testified that the service door to the garage was closed when they arrived, and that the doorway was secured with a gate and padlock.

¶ 11 As defendant and Foucher cleaned up her mother's things, Foucher was "angry" and "shouting out to [him] that it was [his] fault that her mother's things were thrown about," and

when he had his back turned for a moment, she came at him with a knife. Defendant disarmed her by hitting her in the face three times, then got behind her, and choked her first with his arm, then with his belt. He "couldn't stop" and was "overcome with rage, uncontrollably." Foucher tried grabbing for the belt and sighed a few times, and defendant eventually let her fall to the ground, at which point he took his foot and "let it down heavy on her throat and hollered, 'Why, why would you do this, why.' " He then left the garage, "closed the door," and went to the liquor store across the street to buy a 22 ounce beer, which he drank "so fast that it just felt it wasn't enough." He "didn't want to remember what had just taken place," so he returned to the liquor store and bought another 22 ounce beer and a half-pint of cognac.

¶ 12 Defendant subsequently walked back to the garage, raised the door, and stood over Foucher's body. He explained that Foucher was breathing before he left, and he had thought that "maybe if I buy the drinks, then maybe we could discuss it still." When he returned, however, he saw blood in her mouth and did not see any sign of her breathing. He threw a blanket over her because he did not want to see her in that condition, and called friends and family to tell them what he had done. Defendant denied that he had lured Foucher into his car for the purpose of killing her.

¶ 13 In rebuttal, the State entered into evidence a certified statement of defendant's previous conviction for residential burglary. Following deliberations, the jury returned verdicts finding defendant guilty of first degree murder and kidnapping.

¶ 14 At sentencing, the State called three witnesses in aggravation and argued, *inter alia*, that defendant "[o]bviously" caused serious harm, that he "has been in and out of the Illinois Department of Corrections for 30 years," and that he was on parole when he committed the murder in question. In mitigation, defense counsel argued that defendant has "worth" because he expresses regret and remorse after committing crimes, and noted that defendant suffers from

bipolar disorder, had a troubled childhood, obtained his GED nonetheless, and practiced a trade. In allocution, defendant expressed remorse for his actions.

¶ 15 In announcing sentence, the trial court noted that it had considered the testimony at trial, the State's witnesses in aggravation, the arguments in aggravation and mitigation, and defendant's statement in allocution. The court then discussed the applicability of each of the statutory factors in mitigation and aggravation. In doing so, the court found that none of the statutory factors in mitigation applied, but noted that it would consider defendant's mental health history. The court also found that serious harm "does apply in aggravation," as did defendant's "significant" prior criminal history, which the court detailed. Ultimately, the court found defendant's killing of Foucher to be "horrific" and "very senseless" in that he "so personally, so up close, just [] choke[d] the life right out of her," and that "the last thoughts in her mind were the thoughts that [defendant], this person that she had trusted and in one point in time that she cared about, that she went to this location with, that [he was] taking her life from her." The court then sentenced defendant to consecutive, respective terms of 45 and 6 years' imprisonment for first degree murder and kidnapping.

¶ 16 In this appeal from that judgment, defendant has not challenged the sufficiency of the evidence to sustain his murder conviction, but contends that the State failed to prove him guilty of kidnapping beyond a reasonable doubt because it failed to establish the element of secret confinement. He specifically claims that the element of secret confinement was not established where the charged confinement occurred in an open garage adjacent to a public alley where anyone could have observed Foucher. The State responds that it proved defendant guilty of kidnapping beyond a reasonable doubt where the evidence established that defendant lured and deceived the victim into getting in his car and brought her to an isolated garage with the intent secretly to confine her against her will.

¶ 17 Where, as here, defendant challenges the sufficiency of the evidence to sustain his conviction, the question for the reviewing court is 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. Campbell*, 146 Ill. 2d 363, 374 (1992). It is the responsibility of the trier of fact to determine the credibility of the witnesses and the weight to be given their testimony, to resolve any inconsistencies and conflicts in the evidence, and to draw reasonable inferences therefrom. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). A reviewing court will not overturn the decision of the trier of fact unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt. *Campbell*, 146 Ill. 2d at 375.

¶ 18 In this case, defendant was charged with kidnapping in that he "KNOWINGLY BY DECEIT OR ENTICEMENT INDUCED KIMBERLY FOUCHER TO GO FROM ONE PLACE TO ANOTHER WITH THE INTENT SECRETLY TO CONFINE HER AGAINST HER WILL." 720 ILCS 5/10-1(a)(3) (West 2008). The supreme court has defined the term "secret" as concealed, hidden, or not made public, and the term "confinement" as the act of imprisoning or restraining someone. *People v. Gonzalez*, 239 Ill. 2d 471, 479 (2011).

¶ 19 Viewed in the light most favorable to the prosecution, the record shows that on July 20, 2008, defendant drove to the area of 79th Street and Stony Island Avenue, and "lured" and "deceived" Foucher into getting into his car by telling her that he would return some items that belonged to her. He then drove her to his mother's house at 5120 South Damen Avenue and parked in a stand-alone garage in the rear, which was concealed from the street by the house, situated between two vacant lots, and accessed via the north-south alley behind Damen Avenue. The service door to the garage, which faced the house, was pulled shut when they arrived, and the doorway was secured with a gate and padlock.

¶ 20 After defendant backed into the garage, Foucher exited the passenger side of the car, and defendant beat her unconscious with his fists, strangled her until she stopped breathing, and stomped on her throat. He then left the garage, closed the door, and purchased alcohol across the street. When he returned, he raised the door, covered Foucher's body, closed the door, and called Detective Parks to come and arrest him. When Detective Parks subsequently arrived on the scene with Area 1 detectives, the garage door was raised "about three and a half feet," and Foucher's lifeless body was on the floor of the garage next to the passenger side of the vehicle.

¶ 21 The record also shows that defendant, in his own words, had been thinking of murder for days before the incident, and that he used deception to get Foucher to enter his car, then drove her to the garage behind his mother's house. Although defendant testified that she became angry at the condition of her mother's effects, and came at him with a knife, the jury obviously rejected this scenario, and found in light of the totality of the evidence, that he lured her there with the intent secretly to confine her against her will. 720 ILCS 5/10-1(a)(3) (West 2008). We find nothing so unreasonable, improbable, or unsatisfactory about that conclusion as to justify a reasonable doubt of defendant's guilt (*Campbell*, 146 Ill. 2d at 375), and thus conclude that the evidence was sufficient to allow the jury to find that defendant was proved guilty of kidnapping, as charged, beyond a reasonable doubt.

¶ 22 Defendant takes issue with this conclusion and claims that the State failed to establish the element of "secret confinement" because the garage door was open. We note that, contrary to defendant's claim, the record contains no definitive testimony as to whether the overhead garage door was open or closed at the time he attacked Foucher; but, in any event, we find his argument misplaced.

¶ 23 Throughout his brief, defendant argues that the State has failed to prove the "essential element of 'secret confinement' " as if he was convicted under subsection (a)(1) of the kidnapping

statute, where one knowingly and "secretly confines" another against her will. 720 ILCS 5/10-1(a)(1) (West 2008). The record shows, however, that defendant was charged and convicted under subsection (a)(3) of the statute in that he acted with the "intent secretly to confine" another against her will. 720 ILCS 5/10-1(a)(3) (West 2008). The difference and distinction between secret confinement and intent to secretly confine was set forth in *People v. Banks*, 344 Ill. App. 3d 590, 594 (2003), and, as here, the evidence was found sufficient to prove defendant guilty beyond a reasonable doubt of the latter. We find no meaningful distinction in this case and conclude that a reasonable jury could find from the evidence presented that defendant deceitfully lured Foucher into his car, and drove her to the garage with the intent secretly to confine her against her will, thus proving him guilty of kidnapping under subsection (a)(3), as charged, beyond a reasonable doubt.

¶ 24 In reaching this conclusion, we have considered *People v. Lamkey*, 240 Ill. App. 3d 435 (1992) and *People v. Sykes*, 161 Ill. App. 3d 623 (1987), cited by defendant, and find them to be distinguishable from the case at bar. In *Lamkey*, 240 Ill. App. 3d at 438-39, a prosecution for aggravated criminal sexual assault and aggravated kidnapping, defendant challenged his aggravated kidnapping conviction asserting that the State failed to prove that a secret confinement occurred. This court agreed that the State failed to prove this element where the incident "occurred in the vestibule of a building located only a couple of steps away from one of the busiest thoroughfares in Chicago," the victim was able to see cars driving and people walking by on the sidewalk, and defendant remained within public view without attempting to move the victim into a more concealed location. *Lamkey*, 240 Ill. App. 3d at 439. Although this court also concluded that "the State failed to prove that defendant intended to secretly confine the defendant [*sic*]," the element of "intent secretly to confine" was never addressed in the analysis. *Lamkey*, 240 Ill. App. 3d at 440. As such, it is inapposite to the case at bar where the issue is whether the

State established the substantively different element of "intent secretly to confine." *Banks*, 344 Ill. App. 3d at 593-94.

¶ 25 Defendant's reliance on *Sykes* is similarly misplaced. In that case, defendant was charged and convicted of aggravated kidnapping predicated on subsection (a)(1) of the kidnapping statute (*Sykes*, 161 Ill. App. 3d at 628), which, as discussed above, requires a different level of proof than subsection (a)(3) at issue in this case. Accordingly, we affirm defendant's conviction of kidnapping.

¶ 26 Defendant next contends that the trial court improperly considered an aggravating factor at sentencing which is inherent in the offense of first degree murder. Although defendant acknowledges that he failed to properly preserve this issue for review (*People v. Reed*, 177 Ill. 2d 389, 394 (1997)), he nonetheless contends that it may be reviewed for plain error.

¶ 27 To obtain relief under the plain error rule, defendant must show that a clear or obvious error occurred, and that the evidence at the sentencing hearing was closely balanced, or the error was so serious as to deny him a fair sentencing hearing. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). Under both prongs, defendant bears the burden of persuasion; and, if he fails to meet that burden, his procedural default will be honored. *Hillier*, 237 Ill. 2d at 545.

¶ 28 Defendant claims that the trial court improperly considered the serious harm to the victim as an aggravating factor at sentencing because such harm is inherent in the offense of first degree murder. He also claims that the record does not show that the weight placed on that factor was insignificant, and that his sentence should be vacated and the cause remanded for a new sentencing hearing. The State responds that the court properly considered the statutory factors in aggravation and mitigation, including the seriousness of the offense.

¶ 29 The record shows that the trial court, in arriving at defendant's sentence, considered the testimony at trial, the State's witnesses in aggravation, both parties' arguments in aggravation and

mitigation, and defendant's statement in allocution. The court then discussed the applicability of each of the statutory factors in aggravation and mitigation over the span of 11 pages of the record, and in the course of doing so, noted that the factor of serious harm "does apply in aggravation."

¶ 30 It is well settled that a factor implicit in the offense for which defendant was convicted cannot also be used as an aggravating factor in determining his sentence. *People v. Freeman*, 404 Ill. App. 3d 978, 995 (2010). Since serious harm is clearly implicit in the offense of first degree murder, the trial court erred in stating that it was an applicable factor in aggravation.

¶ 31 Having found error, we determine whether defendant met his burden of demonstrating plain error. *Hillier*, 237 Ill. 2d at 549. The improper consideration of an aggravating factor at sentencing does not always call for automatic reversal. *People v. Luna*, 409 Ill. App. 3d 45, 51 (2011). Only if the reviewing court cannot determine the weight given to an improperly considered factor must the cause be remanded for resentencing. *Luna*, 409 Ill. App. 3d at 51, citing *People v. Gilliam*, 172 Ill. 2d 484, 521 (1996). Where it can be determined from the record that the weight placed on the improper factor was so insignificant that it did not lead to a greater sentence, remandment is not required. *Luna*, 409 Ill. App. 3d at 51, citing *Gilliam*, 172 Ill. 2d at 521.

¶ 32 Here, the trial court engaged in an extensive discussion of the applicability of *each* of the statutory factors in aggravation and mitigation. The court found a lack of mitigation other than defendant's mental health history, and, in aggravation, that defendant had a "significant" criminal history. The court also recounted the "horrific" circumstances of the killing by one the victim had trusted and cared for at one time. Within this meticulous construct, the trial court made a single brief remark that the factor of serious harm applied in aggravation, but elaborated on it no further. Given the trial court's minimal reference to the serious harm to Foucher implied in the

offense, and its larger focus on the circumstances of the offense, defendant's "significant" prior criminal history, which included another crime involving physical violence to women, and the lack of mitigation, we cannot say that the court's consideration of the improper factor led it to impose a harsher sentence than would otherwise have been imposed. *Luna*, 409 Ill. App. 3d at 51.

¶ 33 The 45-year sentence was near the midpoint of the applicable sentencing range (730 ILCS 5/5-8-1(a)(1)(a) (West 2008)), and, after considering the totality of the court's sentencing deliberation (*People v. Estrella*, 170 Ill. App. 3d 292, 298 (1988)), we find that the single remark did not rise to the level of plain, or reversible error. In this respect, *People v. Joe*, 207 Ill. App. 3d 1079, 1086 (1991), cited by defendant, is readily distinguishable where multiple improper factors were considered by the court requiring remandment. Accordingly, we find that defendant has failed to meet his burden of establishing a clear or obvious error in sentencing, and honor the procedural default of his sentencing claim. *Hillier*, 237 Ill. 2d at 545.

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

¶ 35 Affirmed.