FIFTH DIVISION
May 9, 2014

No. 1-12-0418

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 14294
	)	
DAMARIO BLAKE,	)	Honorable
	)	Noreen V. Love,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Justice Taylor concurred in the judgment.
Presiding Justice Gordon specially concurred.

O R D E R

¶ 1 *Held*: The trial court did not violate the rule in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) when it imposed a mandatory 25-year firearm enhancement because the trial judge explicitly found that defendant personally discharged a firearm during the commission of the attempted murder.

¶ 2 Following a bench trial, defendant Damario Blake was found guilty of attempted first degree murder pursuant to section 8-4(a) of the Criminal Code of 1961 (the Code) (720 ILCS 5/8-4(a), 9-1(a) (West 2008)), and five counts of aggravated battery, including aggravated

battery with a firearm pursuant to section 12-4.2(a)(1) of the Code (720 ILCS 5/12-4.2(a)(1) (West 2008)) and aggravated battery causing permanent disfigurement pursuant to section 12-4(a) of the Code (720 ILCS 5/12-4(a) (West 2008)). The trial court merged defendant's convictions and sentenced him to 20 years for attempted first degree murder, and a consecutive term of 25 years pursuant to the mandatory firearm enhancement of section 8-4(c)(1)(D) of the Code (720 ILCS 5/8-4(c)(1)(D) (West 2008)), for an aggregate sentence of 45 years. On appeal, defendant contends that the trial court violated the rule in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) when it imposed the 25-year enhancement because the State never submitted, and thus the trial court never found, any of the aggravating factors establishing that defendant personally discharged a firearm during the attempted murder. Therefore, defendant contends the firearm enhancement should be vacated. We affirm.

¶ 3 Prior to trial, the State filed a notice of its intention to seek an extended term pursuant to section 8-4(c)(1)(D) which provides, "an attempt to commit first degree murder during which the person personally discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement, or death to another person is a Class X felony for which 25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court." 720 ILCS 5/8-4(c)(1)(D) (West 2008).

¶ 4 At trial, Lavelle Hampton testified that on the morning of May 12, 2008 around 12:40 a.m. he was walking his dog outside his home at 1442 South 17th Street in Maywood. A maroon car pulled up and his cousin, Byron Johnson, got out of the car and went into the house. There were two other people in the car; Hampton had seen the passenger before and identified him in court as defendant. At some point while Hampton was still outside talking on the phone,

defendant walked up to him and shot him in the face. Hampton went inside his home and told his family that Johnson's friend had shot him. He was taken to a hospital where he was treated and a prosthetic eye was inserted. He identified defendant in both a photo array and a physical lineup.

¶ 5 During an interview with an assistant State's Attorney on July 6, 2008, defendant voluntarily gave a written statement admitting to shooting Hampton in the head. Defendant explained that he had been shot in the summer of 2007, and although he did not see who did it, Hampton was rumored to be the shooter. On the night of the shooting, defendant was riding in the passenger seat of Lou Bassett's car with Johnson riding in the backseat. As Bassett was dropping Johnson off at his home on 17th and Van Buren, he saw Hampton standing in front of the home. Defendant asked Basset to drive to Third and Quincy, where defendant retrieved a gun. Defendant returned, shot Hampton, and ran away. He and Basset then drove to First and Chicago, where defendant threw the gun into a river. Defendant stated that he did not intend to shoot Hampton, but only "meant to scare a kid that I thought shot me."

¶ 6 Following closing arguments, the trial court found that the evidence supported a finding of attempted first degree murder; aggravated battery with a firearm; aggravated battery causing great bodily harm; aggravated battery causing permanent disfigurement; aggravated battery causing permanent disability; and aggravated battery on a public way, based on great bodily harm. The court specifically found that "[defendant] had a gun. The gun was discharged. [Hampton] was shot in the head, the bullet exiting his eye."

¶ 7 Prior to sentencing, defendant filed a post-trial motion, asserting that "none of the necessary enhancement facts and elements were submitted to the trier of fact as aggravating

factors" and thus "proof of a firearm was not proven beyond a reasonable doubt." The trial court commented that the firearm enhancement was proven beyond a reasonable doubt. The trial court stated "I just want to clarify by saying that when the Court made its ruling, that when I found him guilty of the aggravated battery with a firearm, that I found all of the elements [regarding the aggravated battery]." The court then recounted that there was an admission by defendant that he was armed. The court also stated that defendant received notice that the State intended to seek the extended term. The trial court denied the motion. The trial court merged the six counts, and defendant was sentenced to 20 years for attempted first degree murder, plus an additional 25 years for personally discharging a firearm during the commission of the attempted first degree murder.

¶ 8 Defendant contends that the trial court violated *Apprendi* because the State never submitted, and thus the trial court never found, any of the aggravating factors establishing that defendant personally discharged a firearm during the attempted murder. Therefore, defendant argues the firearm enhancement does not apply and the sentence must be vacated.

¶ 9 Defendant's claim of error raises a question of law—whether the trial court complied with statutory procedural requirements. Therefore, our review is *de novo*. *People v. Hopkins*, 201 Ill. 2d 26, 36 (2002).

¶ 10 In *Apprendi,* the Supreme Court held that the Sixth Amendment's jury-trial guarantee requires that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. In response, our state legislature enacted section 111-3(c-5) of the Code of Criminal Procedure of 1963, which provides that "[n]otwithstanding any other

provision of law *** if an alleged fact (other than the fact of a prior conviction) is not an element of an offense but is sought to be used to increase the range of penalties for the offense beyond the statutory maximum that could otherwise be imposed for the offense, the alleged fact must be included in the charging instrument or otherwise provided to the defendant through a written notification before trial, submitted to a trier of fact *as an aggravating factor*, and proved beyond a reasonable doubt." (Emphasis added.) 725 ILCS 5/111–3(c–5) (West 2008).

¶ 11 Despite defendant's contentions to the contrary, it is clear that the facts which increased defendant's sentence were in fact proven beyond a reasonable doubt and submitted to the trial court, as trier of fact. The evidence at trial overwhelmingly established that defendant personally discharged a firearm causing permanent disability and disfigurement to the victim. Here, defendant admitted to shooting Hampton in a voluntary, written statement. Hampton was shot in the head, and the bullet exited through his eye. Hampton was taken to the hospital, where he eventually received a prosthetic eye. Hampton later identified defendant as the individual that shot him in the head in a photo array, a physical lineup, and at trial. Therefore, we find that the State did not fail to prove the facts supporting the sentencing enhancement beyond a reasonable doubt.

¶ 12 Furthermore, it cannot be disputed that defendant was given adequate notice that the State intended to prove the sentencing enhancement and submit it to the trier of fact. The State's written notice to that effect is contained in the record and defendant identifies no impropriety regarding its contents or the procedures used to provide notice to defendant.

¶ 13 Finally, it is abundantly clear, that *during sentencing*, the State argued that the enhancement should apply and the trial court found that the State had proven the requisite facts

beyond a reasonable doubt. The trial court explicitly found that defendant "had a gun" and shot Hampton "in the head, the bullet exiting his eye." Therefore, we must reject defendant's unsupported claim that the trial court "never" found the relevant facts beyond a reasonable doubt.

¶ 14 Accordingly, the only remaining issues are whether the State properly waited until sentencing to "submit" the question to the trial court as trier of fact, and whether the trial court could properly make the determination during sentencing.

¶ 15 Initially, we note that defendant never attempts to define the word "submit" in his arguments. Instead, defendant merely repeatedly states that the State failed to "submit" the question to the trier of fact. *Black's Law Dictionary* defines "submit" as "to end the presentation of further evidence in (a case) and tender a legal position for decision." *Black's Law Dictionary* 1562 (9th ed. 2009). *Merriam-Webster* defines "submit" as "to give (a document, proposal, piece of writing, etc.) to someone so that it can be considered or approved." *Merriam-Webster's Collegiate Dictionary* 1173 (10th ed. 1998). If we consider both the legal and everyday usage of the word, the State was required to present the facts establishing the sentencing enhancement to the court for a finding on the merits, and we find that this was done. The State waited until the sentencing stage to argue that the sentencing enhancement should apply, and despite protest from defendant, the court agreed. We find that regardless of when the State formally "submitted" the enhancement, the judge found that the enhancement applied before formally sentencing defendant. The language of *Apprendi* does not mandate that the State present, and the judge make a finding, at a specific point during proceedings. Thus, we find no *Apprendi* violation simply because the argument that the sentencing enhancement applied was submitted by the State, and accepted by the court, during the sentencing stage.

¶ 16 Nevertheless, defendant contends that the trial court's explicit finding that defendant used a gun in the commission of the offense was not sufficient to satisfy the procedural requirements of *Apprendi*. Defendant argues that *People v. Edgecombe*, 2011 IL App (1st) 092690 is dispositive. In *Edgecombe,* a jury found defendant guilty of the first degree murder of Jerome Anderson, attempted first degree murder of Antwon Walker, and aggravated battery with a firearm of Antwon Walker. The State submitted an instruction to the jury asking whether the defendant was subject to a 25-year enhancement for the first degree murder, but did not submit an instruction with respect to the attempted murder. The jury found that during the commission of the first degree murder, defendant personally discharged a firearm. During the appeal of a dismissed post conviction petition, the State asked the court to find that defendant was subject to an additional sentencing enhancement for also personally discharging a firearm during the attempted murder of Walker, even though it failed to submit that fact to the jury. The State argued that defendant's sentence was void and the enhancement still applied because the jury had already found that the defendant personally discharged a firearm toward Walker when it found him guilty of aggravated battery with a firearm. The court rejected the State's argument and held that although the fact that the defendant personally discharged a firearm was presented to the jury when the jury was asked to consider whether the defendant committed aggravated battery with a firearm, that same fact could not be used to increase the defendant's sentence for attempted first degree murder. *Edgecombe,* 2011 IL App (1st) 092690 ¶ 22. The court explained that section 111–3(c–5) of the Code required the fact to be separately submitted to the jury as an aggravating factor in order for it to apply to the attempted first degree murder charge. *Id*. at ¶ 25.

¶ 17 The instant case is distinguishable. A jury was not called upon to make any determinations of fact. The trial judge was responsible for fact finding at both trial and sentencing. Our supreme court has recognized that *Apprendi* "does not proscribe all judicial fact finding at sentencing, even though it may result in an increase in defendant's punishment." *People v. Carney*, 196 Ill. 2d 518, 526 (2001). In a jury trial, both the method of submission, (i.e., the presentations of a jury instruction and verdict form), and the timing of the submission, (i.e., during deliberations) are fixed, and therefore the submission of facts which increase a defendant's sentence must be submitted prior to sentencing. However, because the method and timing of submission are not similarly fixed in a bench trial, *Edgecombe* has limited value in this case. As stated above, the State's decision to submit the facts establishing the sentencing enhancement during sentencing is not an *Apprendi* violation, as the trial court still had ample time to consider the facts and make a proper determination as to whether the enhancement had been proven beyond a reasonable doubt.

¶ 18 For the foregoing reasons, we affirm the judgment of the Circuit court of Cook County.

¶ 19 Affirmed.

¶ 20 Presiding Justice Gordon, specially concurring:

¶ 21 In the case at bar, the trial court *was* the factfinder, since this was a bench trial and not a jury trial. As a result, the factfinder *did* make the factual finding required by *Apprendi*. Since a judge is presumed to know and follow the law, we presume that the judge made this factual finding based on the proper legal standard, which was beyond a reasonable doubt. *People v. Blair*, 215 Ill. 2d 427, 449 (2005) (reviewing courts "presume that the trial judge knows and follows the law unless the record demonstrates otherwise"). Thus, the record supports the conclusion that the factfinder made the factual finding required for the enhanced sentence and made the finding beyond a reasonable doubt, thereby satisfying *Apprendi*.