

No. 1-12-1582

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 C6 62043
)	
JOSE FIGUEROA,)	Honorable
)	Frank G. Zelezinski,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Justices Cunningham and Delort concurred in the judgment.

ORDER

¶ 1 *Held:* Judgment affirmed over defendant's contention that his sentence was excessive.

¶ 2 Following a jury trial, defendant Jose Figueroa was convicted of two counts of aggravated battery with a firearm and sentenced to consecutive terms of 13 and 14 years' imprisonment. On appeal, he solely contends that his 13-year sentence was excessive, and that this court should reduce it or remand for resentencing.

¶ 3 Defendant was charged with these offenses in connection with the shooting of his friends, Ruben Cruz and Braulio Nape, whom he had known for several years. The evidence at trial showed that at 11:30 a.m. on November 21, 2009, Cruz, Nape, and defendant went to Nape's trailer where they drank a few beers and worked on Nape's bathroom. At 6:30 p.m., while on their way to defendant's home, defendant asked Nape to take him to the McDonald's at 147th Street and Dixie Highway. There, defendant picked up a woman named Amanda, and they drove to defendant's trailer at 14935 South Talman Avenue in Harvey, Illinois. Defendant and Amanda went inside the trailer while Nape and Cruz waited outside on defendant's porch.

¶ 4 Five minutes later, defendant came outside, and asked for his phone. Cruz patted his shoulder, and told him to "[c]alm down, [Nape] will give you the phone right now." Cruz then told him that he was a "lucky dog," and had a "pretty bitch." Defendant responded by pulling out a gun and shooting Cruz in the groin area, with the bullet exiting through Cruz's right buttocks. Defendant then shot Nape in the right hand he had raised in the air, and that bullet passed through Nape's hand. Cruz was hospitalized for four days, required the use of a cane for two months, and underwent rehabilitation. Nape was treated at the hospital where they disinfected his wound and bandaged it. Nape testified that he can no longer put pressure on his right hand, and does not have the same strength he used to have in his hand.

¶ 5 At sentencing, the State read the victim impact statement provided by Cruz in which he stated that his life has changed forever as a result of this incident, that he can no longer trust people, and is unable to exercise, swim, dance, or laugh. He also stated that the incident has caused a great physical, financial, and emotional burden on his family.

¶ 6 In further aggravation, the State pointed out that defendant was now convicted of two Class X felonies in which he inflicted severe bodily injury and requested that he be sentenced to

consecutive terms. The State further noted that defendant is the "worst type of criminal" in that he shot his own friends.

¶ 7 In mitigation, defendant argued that the gunshot wound to Cruz was not life threatening, and he "ambulated well," and that Nape's injury was significant, but was not severe bodily injury for purposes of consecutive sentencing. Defendant noted that he has no criminal background, and was gainfully employed as a laborer until this incident. Defendant thus requested that the sentences run concurrently with the minimum sentence of 6 years' imprisonment for the offense against Nape, and 8 to 10 years' imprisonment for the offense against Cruz.

¶ 8 At the close of argument, the court "consider[ed] all factors in aggravation and in mitigation," and sentenced defendant to consecutive prison terms of 13 years for the aggravated battery with a firearm against Nape, and 14 years for the offense against Cruz. The court specifically noted the mitigating factors of defendant's lack of criminal history and gainful employment in the past, but also noted in aggravation that the victims were unarmed, and did not pose any threat to defendant though they may have made some "wisecrack statements to him." The court observed that defendant could have returned to the trailer and stayed inside, but instead, shot the two unarmed victims. The court also noted that Cruz has lasting problems from being shot in the groin, and that Nape suffered a through and through gunshot wound to his hand. The court found that these were not simply graze wounds, but, rather, serious injuries which subjected defendant to consecutive sentencing.

¶ 9 On appeal, defendant solely contends that his 13-year sentence for aggravated battery with a firearm against Nape was excessive. He maintains that there were four mitigating factors that the trial court failed to adequately credit in light of the constitutional goal of rehabilitation, namely, that he was provoked by the victims, that he was unlikely to repeat the offenses, that he

had no prior criminal history and has held a steady job, and, finally, the heavy financial impact on the State as a result of his incarceration. He thus requests that this court reduce his sentence to give him a meaningful chance of securing work in his trade following release from prison so that he has a fair opportunity to regain useful citizenship.

¶ 10 There is no dispute that, given the injuries inflicted by defendant, he was subject to consecutive sentencing, and that the sentences imposed, and aggregate term of 27 years, fell within the statutory range of 6 to 30 years' imprisonment for the Class X felonies of which he was convicted. 720 ILCS 5/12-3.05(e)(1) (West 2012); 730 ILCS 5/5-4.5-25(a), 5-8-4(d)(1) (West 2012). In addition, the 13-year sentence defendant is contesting as excessive falls within the lower portion of the applicable sentencing range. 730 ILCS 5/5-4.5-25(a) (West 2012). As a result, we may not disturb the sentence imposed absent an abuse of discretion. *People v. Bennett*, 329 Ill. App. 3d 502, 517 (2002).

¶ 11 We initially observe that the trial court has no obligation to assign a value to each factor presented at a sentencing hearing. *People v. Baker*, 241 Ill. App. 3d 495, 499 (1993). To the contrary, it is presumed that the trial court based its sentencing decision on proper legal reasoning and that it considered the mitigation evidence before it. *People v. Garcia*, 296 Ill. App. 3d 769, 781 (1998). Defendant has the burden of affirmatively showing otherwise. *Id.* Defendant has not done so here.

¶ 12 There is no evidence in the record that the court failed to consider the mitigating factors presented (*People v. Burnette*, 325 Ill. App. 3d 792, 808 (2001)); rather, it affirmatively shows that it considered the evidence in mitigation, and specifically cited defendant's gainful employment history as well as his lack of criminal history. That said, the court determined that the aggravating factors, including the attack on unarmed "friends" who were chiding the

defendant and the severity of the injuries inflicted, called for a more lengthy sentence. As to the financial impact of defendant's incarceration, in the absence of evidence to the contrary, we presume that the court considered this factor. *People v. Acevedo*, 275 Ill. App. 3d 420, 426 (1995).

¶ 13 Defendant, however, points to the provocation posed by the victims who stayed on his porch while he was inside with the woman and their remarks regarding her which drove him to violence. We observe that provocation is usually restricted to physical assault, mutual combat, adultery and other situations that are not comparable to this case (*People v. Griffiths*, 112 Ill. App. 3d 322, 330 (1983)), involving mere words. As the court observed, the incident could have been avoided if defendant simply turned around and left. *People v. Romero*, 387 Ill. App. 3d 954, 980 (2008). These were not, as defendant claims, "fighting words," and the cases cited by him to support that contention are unpersuasive, and reflect situations not at issue here, namely, mitigating evidence in sentencing. Clearly, the "wisecrack statements" here neither justified the action taken nor call for a lesser sentence.

¶ 14 Defendant also claims that the court failed to consider that his irrational behavior in this case is unlikely to recur. The evidence presented at trial shows that he overreacted to the comments, and the lack of impulse control displayed in his resort to armed violence highly suggests that he would do so again, and does not militate against the term imposed.

¶ 15 Moreover, the trial court was not required to give greater weight to defendant's rehabilitative potential than to the seriousness of the offense (*People v. Phillips*, 265 Ill. App. 3d 438, 450 (1994)), which involved shooting his unarmed, nonthreatening long-time friend who sustained a residual injury to his hand. Accordingly, we find that the trial court did not abuse its discretion in imposing the 13-year prison sentence on his aggravated battery conviction

involving Nape.

¶ 16 We note in passing, defendant's citations to a literary book, and certain studies and websites in support of his contention that his sentence was excessive. None of this evidence, however, was presented at trial, or subject to cross-examination, and we remind that, on review, the reviewing court must determine the issues before it on the record made in the trial court. *People v. Mehlberg*, 249 Ill. App. 3d 499, 532 (1993). Thus, we will not consider these secondary materials. *People v. Heaton*, 266 Ill. App. 3d 469, 477 (1994).

¶ 17 In light of the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 18 Affirmed.