2016 IL App (1st) 131505-U

THIRD DIVISION
August 3, 2016

No. 1-13-1505

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 14553
	)	
JOAN GARCIA,	)	Honorable
	)	Paula M. Daleo,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Mason and Justice Pucinski concurred in the judgment.

O R D E R

¶ 1 *Held:* The evidence at trial established, beyond a reasonable doubt, that the offense was accompanied by exceptionally brutal and heinous behavior indicative of wanton cruelty when defendant ran over the victim at a high rate of speed and then backed up and drove away. The trial court did not improperly consider a pending charge in aggravation at sentencing because the record, as a whole, revealed the court asked about the pending charge to clarify whether its copy of the presentence investigation report was correct.

¶ 2 Following a bench trial, defendant Joan Garcia was found guilty of first degree murder, and sentenced to 40 years in prison. On appeal, defendant contends that the cause should be

remanded for resentencing because the trial court improperly found that his actions were exceptionally brutal and heinous indicative of wanton cruelty, and considered a pending charge in aggravation. We affirm.

¶ 3 Defendant's arrest and prosecution arose out of a July 8, 2009, incident during which the victim, Isais Delacruz, was run over by a van. The victim later died.

¶ 4 At trial, tow truck driver Wulfrano Garcia testified that he was sitting in his truck at the intersection of Roosevelt and Cicero when he saw a blue Chevy Astro van. The driver was making signs with his hands and his face was outside the van. The hand movements were directed at the victim, who was walking. At trial, Garcia identified defendant as the driver of the van. When the victim ran across the street, defendant backed up the van, made a u-turn, and pulled into a parking lot. The light changed and Garcia turned. As he drove by the entrance to the parking lot, he saw the van come "flying" out. When the van passed Garcia, he made eye contact with defendant. Garcia then pulled into the parking lot and turned on his "high beams." He saw a person on the ground in the rear corner of the parking lot. Garcia backed up and began to chase the van.

¶ 5 At one point during the chase, the van's back "sliding door" opened and a "guy" pointed a "chrome thing" at him, so he slowed down. Eventually, a police car pulled in between the van and Garcia's tow truck. Ultimately, the van stopped and defendant exited from the driver's side.

¶ 6 Julian Andrade testified that he and his son, Carlos, were sitting in a car at the intersection of Roosevelt and Cicero when he saw a vehicle make a u-turn and a man cross a street. The man was "sort of like running" and the van "went chasing after" him.

¶ 7 Carlos Andrade also testified that he saw a man run across a street and a van go "after the kid that was running." The van was traveling at a "high speed." Although it appeared that the man was hit by the van, Carlos only saw the man's arms "flapping." The man then fell forward. Carlos testified that it looked like the van "went over a speed bump." He did not see brake lights and did not see anyone exit the van. During cross-examination, Carlos acknowledged that he could not see inside the van and did not know how many people were inside. He did not know if the van's brake lights were in working order.

¶ 8 Delia Alejandre, who lived nearby, testified that she heard tires "screeching," so she went to a window that looked out over an auto parts store parking lot. She saw a blue van reversing and turning around. When she initially saw the van, it was "going really fast." Alejandre then ran to her daughter's bedroom and looked out a window. She saw "something thrown there" so she went outside. When Alejandre and her husband arrived in the parking lot, she saw "a man bleeding, thrown there" so she called 911. She did not see the man in the parking lot get hit by anything and did not see anyone get out of the van. A tow truck was behind the van as it left the parking lot.

¶ 9 Officer Todd Mueller testified that on the evening of July 8, 2009, he was working with fellow officers Joe Lopez and Rocco Pruger. They were in a marked squad car. Shortly after 10 p.m. he saw a Chevy van traveling at a high rate of speed. The van failed to stop at a stop sign and the sliding door on the passenger side of the vehicle was open. Mueller saw a person in the back holding a "black shiny object," and concluded "[p]ossible gun." He "immediately" activated the squad car's "emergency equipment" and pursued the van. The van did not slow down and proceeded to drive through a red light. Eventually, the van stopped and four occupants exited.

Mueller chased, and, ultimately, apprehended the driver. At trial, he identified defendant as the driver. During the chase, a tow truck was behind the squad car; its driver later identified defendant as the driver of the van.

¶ 10 Detective Chris Wojtowicz testified that he responded to "a call for a man down" around the intersection of Cicero and Roosevelt. When he arrived at the scene, he learned that the victim was inside an ambulance. Although Wojtowicz tried to speak to the victim, the victim's medical condition did not "allow him to be able to respond." The victim was unconscious, but still alive. Although Wojtowicz did not attend the post-mortem examination of the victim, his partners did.

¶ 11 The parties stipulated that a medical examiner performed an autopsy on the victim, finding external evidence of injury and eight separate internal indications of injury, as well as three areas of injury revealed by x-ray. The medical examiner concluded that the cause of the victim's death was "multiple injuries *** due to an automobile striking a pedestrian."

¶ 12 Ultimately, the trial court found defendant guilty of first degree murder. The court further found, beyond a reasonable doubt, that defendant's actions were exceptionally brutal and heinous indicative of wanton cruelty in that "this defendant intentionally drove his vehicle, chased this victim down, and drove at a high rate of speed at the victim."

¶ 13 At sentencing, the parties made arguments in mitigation and aggravation. The State argued that defendant's actions were brutal, heinous and indicative of wanton cruelty because the victim was "essentially *** skinned alive" by the "two ton" van that defendant drove over him. The defense argued that defendant came from a supportive, church-going family, was only 25 years old and did not have a "significant" criminal history. Counsel noted that defendant only had one prior felony conviction for theft. Defendant's mother told the court that defendant was a

"good kid" and asked the court to sentence him so that he could "see his children." Although she expressed sympathy for the victim's mother, she said that the "people who came here to justify this are not telling the truth."

¶ 14 The trial court stated that it had considered the presentence investigation report (PSI), and that defendant had a pending case regarding the possession of a "tool" in a penal institution. The State responded that that case had been arraigned the previous day. The court then asked whether "that case has not been disposed of yet," and the State answered no. The court noted that defendant's criminal background dated back to 2006, that defendant was a former member of the LaRaza Gang, and that a number of defendant's previous offenses were for "offenses of words and gestures" to which defendant entered guilty pleas. The trial court asked for "clarification" because defense counsel stated that defendant's only background was a "theft case," but the PSI contained the "pending case and other things." Defense counsel acknowledged that "significant, obviously, is a word that is open to interpretation." However, counsel argued that defendant's criminal history contained only misdemeanors for which supervision was given and no history of violence or violent behavior. The court stated that it wanted clarification for the record because it did not know if the PSI in its possession was different from counsel's copy.

¶ 15 The trial court then reiterated that it had found the facts of the case to be exceptionally brutal and heinous indicative of wanton cruelty because the victim was walking on the street, "some kind of exchange" occurred, and then, "for no apparent reason," defendant "chased down" and ran over the victim with a vehicle. The court sentenced defendant to 40 years in prison for an act that was "unexplainable" to the court. In so doing, the court took into consideration that defendant's criminal background began in 2006 and was "for the most part, non-violent."

¶ 16 On appeal, defendant does not challenge his conviction for first degree murder; rather, he challenges his sentence. Defendant first contends that this cause must be remanded for resentencing because the trial court improperly found that defendant's actions were exceptionally brutal and heinous indicative of wanton cruelty. Although defendant acknowledges that he was not sentenced to an extended-term sentence, he argues that the cause must be remanded for resentencing because "the trial court wrongly believed" that the applicable sentencing range was between 20 and 100 years in prison. He further argues that the trial court improperly considered in aggravation an indictment for contraband in a penal institution when imposing sentence.

¶ 17 Defendant admits these sentencing issues have been forfeited because he did not object at the sentencing hearing and raise them in a written motion to reconsider sentence. See, *e.g., People v. Enoch*, 122 Ill. 2d 176, 186 (1988). However, defendant asks this court to review his claims pursuant to the plain error doctrine. In the alternative, defendant argues that these alleged errors are reviewable as a claim of ineffective assistance of counsel based upon trial counsel's failure to preserve these issues.

¶ 18 Sentencing errors raised for the first time on appeal are reviewable as plain error if (1) the evidence at the sentencing hearing was closely balanced or (2) the error was sufficiently grave that it deprived the defendant of a fair sentencing hearing. *People v. Ahlers*, 402 Ill. App. 3d 726, 734 (2010). The first step in plain error review is to determine whether any error occurred because absent reversible error there can be no plain error. See *People v. Williams*, 193 Ill. 2d 306, 349 (2000).

¶ 19 Defendant first contends that the State failed to prove, beyond a reasonable doubt, that his actions were exceptionally brutal and heinous indicative of wanton cruelty. He argues that

although the victim's death was caused by a vehicle, "it was indistinguishable from any ordinary murder" and the victim was not tortured, wounded repeatedly or subjected to "unnecessary mental anguish." Defendant concludes that a trial court should reserve findings of exceptionally brutal and heinous behavior to "genuinely exceptional cases."

¶ 20 The applicable sentencing range for first degree murder is between 20 and 60 years in prison. See 730 ILCS 5/5-4.5-20(a)(1) (West 2012). However, if the offense was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty, an extended-term sentence of between 60 and 100 years in prison may be imposed. 730 ILCS 5/5-4.5-20(a)(2) (West 2012).

¶ 21 Other than the fact of a prior conviction, any factual finding that increases a defendant's sentence beyond the statutory nonextended-term maximum, such as the finding of exceptionally brutal and heinous behavior, must be proven beyond a reasonable doubt. See *People v. Swift*, 202 Ill. 2d 378, 392 (2002), citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The finding at issue here is treated as an element of the offense. See *People v. Callahan*, 334 Ill. App. 3d 636, 648-49 (2002) (the appellate court treated the finding that the defendant's behavior was exceptionally brutal and indicative of wanton cruelty as an element of the offense that had to be alleged in the charging instrument and proven to the jury beyond a reasonable doubt). When reviewing a challenge to the sufficiency of the evidence, the relevant question is whether, after viewing 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. Brown*, 2013 IL 114196, ¶ 48.

¶ 22 To qualify for a finding of exceptionally brutal and heinous behavior indicative of wanton cruelty, a defendant's conduct must be both: (1) exceptionally brutal or heinous; and (2) indicative of wanton cruelty. See *People v. Nitz*, 219 Ill. 2d 400, 418 (2006). "Brutal" is defined as cruel and cold-blooded, grossly ruthless, and devoid of mercy or compassion; "heinous" is defined as enormously and flagrantly criminal, hatefully or shockingly evil, or grossly bad; and "wanton cruelty" is defined as consciously seeking to inflict pain and suffering on the victim of the offense. *Id*.

¶ 23 "A single act that causes death or injury may be sufficient to demonstrate the existence of wanton cruelty [citation]; however, the extended-term provision was not intended to convert every offense into an extraordinary offense subject to an extended-term sentence [citation]." *People v. Pugh*, 325 Ill. App. 3d 336, 346 (2001). The trier of fact must consider all of the facts surrounding the incident in question, and each case must be decided on its own facts. *Id*. Some of the factors to consider in determining whether to impose an extended-term sentence are: whether the offense was premeditated; whether the defendant was provoked; the danger created by the act; whether the defendant exhibited remorse; whether the defendant inflicted prolonged pain or torture; whether the defendant shot the victim at close range; and whether the defendant inflicted mental suffering on the victim. *Id*. Although cases in which exceptionally brutal or heinous behavior has been found generally involve prolonged pain, torture, or premeditation, the presence of such conduct is not required for a finding of exceptionally brutal or heinous behavior to be made. *Nitz*, 219 Ill. 2d at 418.

¶ 24 In the case at bar, viewing the evidence in the light most favorable to the State as we must (*Brown*, 2013 IL 114196, ¶ 48), the evidence at trial established that after defendant made

certain hand gestures and the victim ran away, defendant chased the victim down with his van at a high rate of speed and ran the victim over. Specifically, Carlos Andrade testified that as the victim fell forward, the van looked like it "went over a speed bump" and he did not see brake lights. After running the victim over, defendant showed no remorse or concern for the victim, as the evidence at trial established that he simply drove away.

¶ 25 Although defendant argues that there was no torture or "wholly gratuitous violence" in this case and that the victim was only struck once by the van as opposed to multiple times, that type of conduct, as noted above, was not required for a finding of exceptionally brutal and heinous behavior to be made (see *Nitz*, 219 Ill. 2d at 418), and a single act that causes death or injury may be sufficient to demonstrate the existence of wanton cruelty (see *Pugh*, 325 Ill. App. 3d at 346).

¶ 26 Ultimately, in each case, the trier of fact must evaluate all of the facts surrounding the offense when assessing the brutality and heinousness of a crime. *People v. Smith*, 362 Ill. App. 3d 1062, 1089 (2005). Here, defendant drove over the victim at a high rate of speed for no apparent reason and then drove away. The victim did not die instantly; rather, he was alive, but unconscious, when he was placed in an ambulance. Additionally, the autopsy of the victim revealed not only external injuries, but eight separate internal indications of injury as well as three other areas of injury that were detected by x-ray. Based upon all of the facts surrounding the victim's death (see *Pugh*, 325 Ill. App. 3d at 346), we cannot conclude that no rational trier of fact could have found that the murder of the victim in this case was accompanied by exceptionally brutal and heinous behavior indicative of wanton cruelty (see *Brown*, 2013 IL 114196, ¶ 48). Accordingly, we affirm the trial court's finding that the first degree murder in this

case was accompanied by exceptionally brutal and heinous behavior indicative of wanton cruelty. See *Id.*; *Callahan*, 334 Ill. App. 3d at 649.

¶ 27 Defendant next contends that the trial court improperly considered a pending charge as an aggravating factor when imposing sentence.

¶ 28 A sentence within statutory limits is reviewed on an abuse of discretion standard, so that this court may alter a sentence only when it varies greatly from the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. *People v. Snyder*, 2011 IL 111382, ¶ 36. So long as the trial court does not consider improper aggravating factors or ignore pertinent mitigating factors, it has wide latitude in sentencing a defendant to any term within the applicable range. *People v. Jones*, 2014 IL App (1st) 120927, ¶ 56. Although a trial court may rely on evidence of a defendant's other criminal activity if the court finds that evidence to be relevant and accurate, even if that activity did not result in a conviction, the court may not rely on "bare arrests or pending charges" as evidence in aggravation. *People v. Minter*, 2015 IL App (1st) 120958, ¶ 148.

¶ 29 The trial court is presumed to know the law and apply it properly. *People v. Phillips*, 392 Ill. App. 3d 243, 265 (2009). A reviewing court presumes that the trial court based its sentencing determination on proper legal reasoning. *People v. Dowding*, 388 Ill. App. 3d 936, 942-43 (2009). We therefore review the trial court's sentencing determination with great deference, and "[t]he burden is on the defendant to affirmatively establish that the sentence was based on improper considerations." *Id.* at 943. "In determining whether the trial court based the sentence on proper aggravating and mitigating factors, a court of review should consider the record as a whole, rather than focusing on a few words or statements by the trial court." *Id*.

¶ 30 Although defendant is correct that the trial court mentioned his pending charge for possession of contraband in a penal institution several times during sentencing, considering the record as a whole, we cannot agree with defendant's conclusion that the court improperly considered his pending charge in aggravation when imposing sentence.

¶ 31 Here, the record reveals that at sentencing the defense argued, *inter alia,* that defendant did not have a "significant" criminal history and highlighted that defendant had one prior felony conviction for theft. The trial court then stated that it had considered the PSI, noted that a case regarding the possession of a "tool" in a penal institution was pending and asked the State whether that case had been "disposed of yet." The court next noted that defendant's criminal background began in 2006, that he was a former gang member, and that a number of his previous offenses were for "offenses of words and gestures." The trial court then asked defense counsel for "clarification" because counsel asserted that defendant's only background was a "theft case," but the PSI contained a "pending case and other things." Counsel replied that "significant, obviously, is a word that is open to interpretation," but that defendant's criminal history contained misdemeanors and was nonviolent. The trial court explained that it wanted clarification for the record because it did not know if the PSI in the court's possession was different from defense counsel's copy.

¶ 32 Considered in context, the trial court's references to the pending charge reflect the court's attempt to determine if the copy of the PSI that it received was accurate considering defense counsel's statement that defendant did not have a "significant" criminal background. The court specifically asked defense counsel to clarify her statement because the court's copy of the PSI revealed "the pending case and other things" and the court thought that counsel might be relying

on a different report. Looking at the record as a whole, defendant has not established that his 40-year sentence was based upon the trial court's improper consideration of the pending charge when the record indicates that the trial court only mentioned it because the court questioned the accuracy of the PSI in light of counsel's assertion regarding defendant's criminal background. See *Dowding*, 388 Ill. App. 3d at 943. Therefore, defendant's argument must fail.

¶ 33 Because we find no error, there can be no plain error and we must honor defendant's forfeiture of these sentencing issues. *Williams*, 193 Ill. 2d at 349. Moreover, because there was no error, defendant cannot establish that he was prejudiced by his counsel's failure to raise these claims in a motion to reconsider sentence, and, consequently, his claim of ineffective assistance of counsel must fail. See *People v. Bailey*, 364 Ill. App. 3d 404, 408 (2006), citing *Strickland v. Washington*, 466 U. S. 668 (1984) (a defendant establishes ineffective assistance of counsel by showing counsel's representation fell below an objective standard of reasonableness and that the result of the proceeding would have been different but for the complained of error). "An attorney will not be deemed ineffective for a failure to file a futile motion." *People v. Rucker*, 346 Ill. App. 3d 873, 886 (2003).

¶ 34 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 35 Affirmed.