2015 IL App (1st) 132470-U

SIXTH DIVISION
July 24, 2015

No. 1-13-2470

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. 12 CR 17612
	)	
CHAUNCY STOCKDALE,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

O R D E R

¶ 1 *Held*: We affirmed defendant's conviction for aggravated robbery and residential burglary over his claims that the uncharged offense of aggravated robbery is not a lesser-included offense of the charged offense of armed robbery and that his sentence is excessive.

¶ 2 Following a bench trial, defendant Chauncy Stockdale was found guilty of aggravated robbery and residential burglary and sentenced to concurrent terms of nine years' imprisonment. On appeal, defendant argues the trial court improperly convicted him of aggravated robbery, an uncharged offense, where that offense was not a lesser-included offense of the charged offense, armed robbery with a firearm. Defendant also argues that, given the mitigating evidence, the trial court abused its discretion in sentencing him to nine years' imprisonment.

¶ 3 The record shows that defendant was charged by indictment with home invasion, armed robbery, and residential burglary in connection with an event which occurred on February 22, 2012, at 2652 West Thorndale Avenue in Chicago. Specifically, and as pertinent to this appeal, defendant was accused of committing armed robbery in that he "knowingly took property *** from the person or presence of Darnell Wilson, by the use of force or by threatening the imminent use of force and *** carried on or about his person or was otherwise armed with a firearm."

¶ 4 At trial, Darnell Wilson testified that on the night of February 21, 2012, he was staying at the apartment of his brother, Shannon White, located at 2652 West Thorndale Avenue in Chicago. The following morning, Mr. Wilson was alone in the apartment when he was awakened by someone kicking in the apartment's front door. The front door burst open and three men came into the apartment. The first man held a gun which looked like a semiautomatic pistol. The man pointed the gun into Mr. Wilson's face and ordered him to get on the floor. Mr. Wilson pleaded with the gunman to not shoot him and told the men to take whatever they wanted. The gunman told Mr. Wilson to "shut up and get the **** on the floor." Mr. Wilson, who was standing against the wall, slid down to the floor. The gunman briefly looked toward his co-offenders and Mr. Wilson shoved him "as far and as fast as [he] could," and then ran into the bathroom. The gunman tired to prevent him from closing the bathroom door, but Mr. Wilson eventually "pound[ed]" the door closed. The gunman shouted through the bathroom door: "If you don't come out of that bathroom, I'm going to shoot through the door." Mr. Wilson recognized the gunman's voice; the other two men "never spoke" during the incident. In response, Mr. Wilson told the men to "take whatever you see and leave." Mr. Wilson testified

that he was sure that, on the date of the incident, and at a later date, he told the police what the gunman had said.

¶ 5 Mr. Wilson "hopped out of the [bathroom] window, [and] ran to the corner" to search for the offenders' vehicle. When he did not see their vehicle on the street, he went to the alley, where he observed a parked vehicle. Mr. Wilson saw three men exit the gangway of his brother's building and enter the parked vehicle. The men drove away and Mr. Wilson returned to the apartment to call the police and his brother.

¶ 6 Although he did not live with his brother on a regular basis, Mr. Wilson kept various personal items at his brother's apartment such as a television, a PlayStation 3 and games, various electronics, and money. Mr. Wilson observed that his PlayStation 3, games, and accessories, as well as an envelope containing his rent money, were missing.

¶ 7 When he returned to the apartment, Mr. Wilson saw blood on the walls which had not been there prior to the break-in. He testified that the blood was not his and that he was not bleeding at the time of the break-in.

¶ 8 On cross-examination, Mr. Wilson testified that he never told law enforcement officials prior to trial that he believed the gun was a semiautomatic. He acknowledged telling an investigator for the defense that, while he was certain about the color of the gun, he was not certain the gun was real and had not asked the offenders if the gun was real. Finally, Mr. Wilson acknowledged that he was unable to identify anyone from a photo array shown to him by detectives on August 9, 2012.

¶ 9 Shannon White testified that on February 22, 2012, he was living at the Thorndale Avenue apartment with his girlfriend. His brother, Mr. Wilson, would stay overnight on occasion and would frequently visit. The night before the break-in, Mr. White, his girlfriend,

Mr. Wilson and his girlfriend, and Mr. Wilson's child were at the apartment. Around 8 a.m., on the date of the break-in, everyone but Mr. Wilson left the apartment. Mr. White locked the door to the apartment. Only Mr. White, Mr. Wilson, and Mr. Wilson's girlfriend had a key to the apartment. Prior to leaving the apartment, it was "clean" and "normal" and Mr. Wilson was asleep on the couch.

¶ 10 Around 9 a.m., he received a call from Mr. Wilson about the break-in and returned home. Mr. White observed that the apartment was completely ransacked and there was blood on the bathroom door. There were several items missing from the apartment, including two PlayStation 3's and two laptops.

¶ 11 Chicago police evidence technician, Roy Kawasaki, investigated the scene. Upon entering the apartment building, Officer Kawasaki observed that the glass window of the building's vestibule door had been broken and there were blood drops on the floor and the doorknob. Officer Kawasaki observed that the entrance door to the apartment had been kicked in, the apartment had been ransacked, and there were blood smears on the walls and doors. The officer collected blood swabs from the foyer doorknob and floor, the master bedroom door, and the bathroom door. The blood swabs were then sealed, placed into evidence bags, and labeled under inventory number 12544917.

¶ 12 The parties stipulated that Illinois State Police forensic analyst Bill Cheng would testify that the blood swabs from inventory number 12544917 tested positive for the presence of blood. The parties also stipulated that Illinois State Police forensic analyst Pauline Gordon would testify that she conducted a DNA analysis of the blood swabs from inventory number 12544917 and that those samples provided a DNA profile which was consistent with a profile in the National

DNA Database associated with defendant. Based on that information, Chicago police officer Jamie Toczek arrested defendant on August 28, 2012.

¶ 13 The parties further stipulated Henry Walsh, an investigator for the office of the Cook County State's Attorney, would state that he collected a buccal swab from defendant on October 10, 2012, and submitted it under inventory number 12737632 to the Illinois State Police Crime Lab for analysis. Ms. Gordon conducted a DNA analysis of the buccal swab from inventory number 12737632 and those samples provided a DNA profile which was consistent with a profile in the National DNA Database associated with defendant.

¶ 14 Following these stipulations, the State rested, and defendant's motion for a directed finding was denied. Defense counsel then presented a stipulation that on August 9, 2012, Mr. Wilson was unable to identify defendant in a photo array which included a photograph of defendant.

¶ 15 Following closing arguments, the trial court found defendant guilty of residential burglary and aggravated robbery. In finding the State did not prove defendant guilty of armed robbery beyond a reasonable doubt, the trial court stated:

> "I have doubts that the State has *** proved each and every element of the offense of armed robbery but I do not have any doubt that the State has proved each and every element of aggravated robbery beyond a reasonable doubt. There will be a finding of guilty as to the lesser charge of aggravated robbery on Count 2."
>
> In acquitting defendant of home invasion, the trial court stated:
>
> "[Mr. Wilson] got on the stand and quite candidly said that, he did say that he didn't know whether that was a gun or not, so I have doubts and I find that the State has not reached a

very, very high burden of proof beyond a reasonable doubt on Count 1, so there will be a finding of not guilty on the home invasion."

Defendant's motion for a new trial was subsequently denied. Defendant's presentencing investigation report (PSI) was made available to the trial court and the parties.

¶ 16 At the sentencing hearing, the State informed the trial court that defendant had two prior convictions for theft—a 2008 Ohio conviction and a 2009 Texas conviction—where he had been sentenced to six months' incarceration for each conviction. In asking for a 12-year term, the State pointed out that defendant's PSI indicated defendant had no history of family abuse, criminality, or gang affiliation which may have mitigated his actions.

¶ 17 In mitigation, defense counsel informed the trial court that defendant has a strong family support system and, in fact, that his father was present at the sentencing hearing and had regularly attended the court dates. Defense counsel also pointed out that defendant had worked at FedEx and as a handyman, and that he had no history of violence. Defense counsel asked that the minimum sentence be imposed, or one that the court deemed reasonable.

¶ 18 In allocution, defendant explained that, at the time of the offense, his marriage was troubled, he smoked marijuana, and did things he normally would not have done, but he was attempting to get his life on track. While he was incarcerated, he had time to reflect on his life and worked on improving his coping skills so that when he was released from prison he could return to society and take care of his child. Defendant expressed remorse for the grief and inconvenience he may have caused the victims and the community because he had not been "a standup citizen."

¶ 19 In announcing defendant's sentence, the trial court stated that it had reviewed the evidence, the statutory factors in aggravation and mitigation, and the non-statutory factors in

mitigation. The trial court also stated it had considered a lengthier sentence, but was impressed by defendant's statements in allocution which demonstrated he had compassion for the victims and that he was aware of and took responsibility for his actions. The trial court then sentenced defendant to concurrent nine-year terms on both counts.

¶ 20 On appeal, defendant does not challenge the sufficiency of the evidence to sustain his convictions, but argues that the trial court improperly convicted him of the uncharged offense of aggravated robbery, as it was not a lesser-included offense of the charged offense of armed robbery with a firearm. Defendant also argues that the trial court abused its discretion in sentencing him to nine years' imprisonment given the mitigating factors presented.

¶ 21 Generally, a defendant cannot be convicted of an offense that has never been charged. *People v. Baldwin*, 199 Ill. 2d 1, 6 (2002) (citing *People v. Jones*, 149 Ill. 2d 288, 292 (1992)). "A defendant may, however, be convicted of an uncharged offense if it is a lesser-included offense of a crime expressly charged in the charging instrument [citation], and the evidence adduced at trial rationally supports a conviction on the lesser-included offense and an acquittal on the greater offense [citation]." *People v. Kolton*, 219 Ill. 2d 353, 360 (2006). A lesser-included offense "[i]s established by proof of the same or less than all of the facts or a less culpable mental state (or both), than that which is required to establish the commission of the offense charged, or *** [c]onsists of an attempt to commit the offense charged or an offense included therein." 720 ILCS 5/2-9(a)(b) (West 2012).

¶ 22 Under the charging-instrument approach adopted by our supreme court, a lesser-included offense does not need to be a necessary part of a greater offense, but the facts alleged in the charging instrument must contain a "broad foundation," or "main outline" of the lesser offense. *People v. Kennebrew*, 2013 IL 113998, ¶ 30. If an element is not explicitly alleged in the

charging instrument, it must be reasonably inferred from the allegations contained therein. *Id.* (citing *People v. Miller*, 238 Ill. 2d 161, 166-67 (2010)).

¶ 23 In this case, defendant had been charged with armed robbery with a firearm where he committed a robbery while carrying or, otherwise, had been armed with a firearm. 720 ILCS 5/18-2(a)(2) (West 2000). The charge alleged defendant:

> "KNOWINGLY TOOK PROPERTY, TO WIT: PLAYSTATION GAMING SYSTEMS, LAPTOP COMPUTERS, VIDEO GAMES AND UNITED STATES CURRENCY, FROM THE PERSON OR PRESENCE OF DARNELL WILSON, BY THE USE OF FORCE OR BY THREATENING THE IMMINENT USE OF FORCE AND [DEFENDANT] CARRIED ON OR ABOUT HIS PERSON OR WAS OTHERWISE ARMED WITH A FIREARM, IN VIOLATION OF [720 ILCS 5/18(a)(2)]."

Defendant, however, was convicted of aggravated robbery, which requires proof that a robbery was committed, while he indicated verbally or through his actions toward the victim that he was armed with a firearm, or other dangerous weapon, even if it was later determined he was not armed with a firearm, or other dangerous weapon. See 720 ILCS 5/18-1(b) (West 2012).

¶ 24 Defendant contends that aggravated robbery is not a lesser-included offense of armed robbery because his indictment does not allege that he *indicated* to Mr. Wilson that he was armed with a firearm, nor is that element reasonably inferable from the indictment. In support of his argument, defendant relies on *People v. Kelley*, 328 Ill. App. 3d 227 (2002).

¶ 25 In *Kelley*, this court held in that case that aggravated robbery was not a lesser-included offense of armed robbery because the charging instrument did not allege that the gun was ever displayed to the victims or that the defendant indicated to the victims that he had a gun. In *Kelley*, the indictment stated that the defendant committed a robbery "by use of force or by

threatening the imminent use of force while armed with a dangerous weapon, to wit: a gun." *Id.* at 230-31. In finding that the charging instrument failed to sufficiently allege the elements of aggravated robbery, this court cited *People v. Jones*, 293 Ill. App. 3d 119 (1997), which relied on our supreme court's decision in *People v. Novak*, 163 Ill. 2d 93 (1994), finding that the missing element, *i.e.*, that the defendant displayed the gun to the victim or implied his possession of a gun, could not be inferred from the remaining allegations of the indictment. *Kelley*, 328 Ill. App. 3d at 231-32.

¶ 26 The State responds that neither *Jones* nor *Kelley* applies here and points out that *Kelley* was decided on a prior version of the armed robbery statute. Here, defendant was charged under the statute as amended. See 720 ILCS 5/18-2(a)(2) (West 2000). In addition, the reviewing court in *Kelley* never considered whether the unstated allegations could have been reasonably inferred from the language of the indictment. We agree.

¶ 27 In *Kolton*, our supreme court held that its decision in *Novak* could no longer be sustained, finding:

> "It is now well settled that, under the charging instrument approach, an offense may be deemed a lesser-included offense even though every element of the lesser offense is not explicitly contained in the indictment, as long as the missing element can be reasonably inferred." *Kolton*, 219 Ill. 2d at 364.

Thus, defendant's reliance on *Kelley* is misplaced as that court did not consider whether the elements of aggravated robbery could be reasonably inferred from the charging instrument. *Kelley*, 328 Ill. App. 3d at 232.

¶ 28 By contrast, in this case, we find it was reasonably inferred from the language of the indictment that defendant, in exacting the crime by force or threat of force while armed with a

firearm, indicated to Mr. Wilson, either verbally or by his actions, that he was presently armed with a firearm (*Kolton*, 219 Ill. 2d at 364), and was, therefore, properly convicted of the lesser-included offense of aggravated robbery.

¶ 29 Defendant next contends that his sentence is excessive given the mitigating factors presented: his age, his education, his employment, his family history, a minimal non-violent criminal background, no history of imprisonment, and an expression of remorse at the sentencing hearing.

¶ 30 The imposition of a sentence within the applicable statutory range is a decision committed to the sentencing court. *People v. Barney*, 111 Ill. App. 3d 669, 679 (1982). A reviewing court will not disturb that sentence absent an abuse of discretion. *People v. Cabrera*, 116 Ill. 2d 474, 494 (1987). A reasoned judgment as to a proper sentence must be based upon the particular facts of each case. *People v. Smith*, 258 Ill. App. 3d 1003, 1028 (1994). A sentence which falls within the prescribed statutory range will not be disturbed unless it is greatly at variance with the purpose and spirit of the law, or is manifestly disproportionate to the offense. *Cabrera*, 116 Ill. 2d at 493-94.

¶ 31 In this case, defendant was convicted of two Class 1 felonies—aggravated robbery and residential burglary— each carrying a sentencing range of 4 to 15 years' imprisonment—(730 ILCS 5/5-4.5-30 (West 2012)), thus, the nine-year sentences imposed by the trial court fell within the prescribed range.

¶ 32 Before announcing its sentencing decision, the trial court stated that it had reviewed the statutory factors in aggravation and mitigation, the non-statutory factors in mitigation, defendant's statement in allocution, and the evidence in the case. Ultimately, the trial court

determined that defendant's actions necessitated a sentence of nine years' imprisonment based on the information contained in the PSI, and the factors in aggravation and mitigation.

¶ 33 Defendant has called to the attention of this court the same mitigating factors which he asked the trial court to consider during the sentencing hearing. It is not our function to reweigh these same factors or independently conclude that defendant's sentence was excessive. *People v. Burke*, 164 Ill. App. 3d 889, 902 (1987). In addition, the trial court stated that it had considered a greater sentence, but was impressed by defendant's statements in allocution which demonstrated that he had compassion for the victims, and took responsibility for his actions, thus showing the trial court had considered defendant's rehabilitative potential. *People v. Shumate*, 94 Ill. App. 3d 478, 485 (1981).

¶ 34 Under these circumstances, we find no abuse of discretion in the sentence imposed and, therefore have no basis for disturbing that decision on appeal. *Cabrera*, 116 Ill. 2d at 493-94.

¶ 35 Accordingly, we affirm the judgment of the circuit court.

¶ 36 Affirmed.