FOURTH DIVISION
March 31, 2016

No. 1-14-0228

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. 11 CR 17148
	)	
SAMUEL ELAM,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice McBride and Justice Cobbs concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant proven guilty of armed robbery where victim testified that defendant and his accomplices took victim's car keys and a paycheck; fact that indictment specified that phone and currency was taken was surplusage. Defendant's 30-year sentence was not excessive in light of nature of offense and defendant's criminal history.

¶ 2 Following a bench trial, the trial court found defendant Samuel Elam guilty of home invasion and armed robbery and sentenced him to two concurrent 30-year prison terms. On appeal, defendant contends that he was not proven guilty of the armed robbery charge beyond a reasonable doubt, because the State failed to prove all material facts of the offense as alleged in

the indictment, which alleged that currency and a cellular phone were taken from the victim, whereas the victim's testimony established his keys and paycheck were actually taken. He further contends that his 30-year sentence is excessive because the trial court did not give the "proper weight" to the mitigation evidence he presented at sentencing. We affirm.

¶ 3 The evidence at trial established that on the evening of September 27, 2011, defendant, codefendants Henry Johnson and Karl Lowery, and several other unidentified men entered 448 West 116th Street, a two-flat apartment building, armed with guns.[1] The armed men rounded up Dante Young, Theresa Harper, and other residents. They also beat and took items from Rubin Bridges.

¶ 4 Dante Young, a resident of the first-floor apartment, testified that he was outside when he was approached by three men and told to get into the house. The men wore masks and had guns. Young went back inside and tried to close the door, but one of the men blocked the door with a pistol, and the men were able to enter the building. One man went upstairs. Another hit Young on the head with a pistol several times and told him to put his nose on the ground. The men forced Young to "strip naked" and get on the floor. Young testified that, when Rubin Bridges—who lived in the second-floor apartment—arrived 30 minutes later, the men beat him as well. Later, at a police station, Young identified defendant in a lineup as being in the house that night. Young did not know defendant, and defendant did not live at the apartment building.

[1] The case against defendant and codefendants proceeded to a severed, simultaneous bench trial. Codefendant Lowery's appeal is pending before this court. See *People v. Lowery*, No. 1-14-0227. Codefendant Johnson's appeal has been decided. See *People v. Johnson*, 2015 IL App (1st) 140229-U.

¶ 5 Theresa Harper, Rubin Bridges' girlfriend, testified that she was in bed in the second-floor apartment when she heard "some commotion." An unidentified heavyset man, wearing a black hoody and holding a gun, kicked down the door of the bedroom and entered. The heavyset man took Harper downstairs and told her to sit in a corner of the foyer. Harper testified that defendant and codefendants Lowry and Morgan were on the first floor armed with guns.

¶ 6 Harper testified that the armed men repeatedly asked her where the "shit [was] at" and who Harper had seen with drugs. The men, including defendant, pulled their bandanas down to talk to her, at which point she saw their faces. When Rubin Bridges returned home, codefendant Lowery pulled him inside, "slammed" Bridges to the floor, and pistol-whipped him.

¶ 7 The next day, September 28, 2011, Harper made a statement to police and identified defendant and codefendants in a lineup. At trial, Harper identified defendant and codefendants as the men with guns who spoke to her on the first floor of the building. The man who kicked in the door was not present in court.

¶ 8 During cross-examination, Harper testified that, while Bridges was on the floor, the men "started going in [Bridges's] pockets, and they took money out of his pockets." They also took Bridges's keys from him. She did not "remember exactly" which man went into Bridges's pockets, but "someone" did.

¶ 9 Rubin Bridges testified that when he came home around 11:30 p.m., his basement neighbor told him not to go inside. When Bridges opened the door, he was "snatched" inside by codefendant Lowery who pointed a gun at his face. Bridges saw Harper in the hallway and Young on the floor. Defendant and codefendant Lowery then beat Bridges with their guns.

¶ 10 Bridges testified that, during the beating, defendant told him to give up his keys and hit him with a gun, so Bridges gave defendant his car keys. The beating continued. Bridges also testified that someone removed his paycheck from his pocket.

¶ 11 Bridges testified that he eventually passed out from the beating but woke when codefendant Lowery sprayed Windex in his face to wake him up. At some point, defendant and codefendant Lowery dragged him upstairs. There, they beat him "some more." Although they asked where "it" was, Bridges denied living "that kind of life." He passed out and regained consciousness as the police arrived. His injuries included internal bleeding and bleeding on the brain.

¶ 12 Later, at a hospital, Bridges spoke to police officers. At trial, Bridges did not recall whether the officers asked him to sign a document before looking at certain photographs, but acknowledged that he looked at the photographs in order to determine if anyone in the photographs was involved in the beating. Bridges did not recognize the "lineup/photo spread advisory form," but recognized his signature on the form and admitted that he was given this document by the police at the same time that he was shown the photographs. At trial, Bridges identified the photographic arrays that he was shown in the hospital.

¶ 13 During cross-examination, Bridges testified that he was hit in the head a "lot" that night and was being medicated for pain at the time he viewed the photographic arrays. He did not identify defendant as one of his attackers because he could not remember. He denied knowing defendant or defendant's father Adonis. Bridges denied telling defendant's parents, at different times, that unless he was given $10,000, he was going to identify defendant in court. But, according to Bridges, Adonis "kept coming around" asking Bridges to "throw it out." Adonis

paid Bridges' $50 cell phone bill. Bridges reported Adonis's attempts to get him "to drop the charges" to the police.

¶ 14 During redirect examination, Bridges testified that he made a statement to a defense investigator in February 2013, which detailed exactly what defendant and codefendant Lowery did. However, two days later, he met with defendant's attorney and said that he could not identify anyone. At trial, Bridges indicated he was approached by "a group of guys" on the street and told to "let it go," *i.e.*, drop the charges and not come to court. Bridges believed that the men were acting on behalf of "all three individuals," that is, defendant and codefendants.

¶ 15 The trial court stated that it would consider this testimony only as it affected Bridges's "interest, bias, motive, [and] credibility" and would not attribute anything that happened "on the street" to defendants "directly." However, "this" testimony was relevant to Bridges's credibility and "to explain in context his testimony and some things he may have said prior" to trial.

¶ 16 Officer Admiral Romero testified that when he and another officer entered the building, they were directed upstairs. There, he saw Bridges, who was "bleeding profusely" from the head. Romero found defendant and codefendant Lowery in a bathroom and arrested them.

¶ 17 Detective Brian Cunningham testified that Young and Harper identified defendant in separate lineups. Cunningham also showed Bridges two photographic arrays at the hospital. Cunningham testified that Bridges identified codefendants Morgan and Lowery, but did not identify defendant.

¶ 18 Adonis Elam, defendant's father, testified that he met Bridges in the fall of 2012. During this meeting, Bridges stated that defendant did not have anything "to do with it," and wanted $25,000 to keep it that way. When Adonis stated that he did not have $25,000, Bridges lowered

his request to $5,000. Adonis said he would see what he could do. The men exchanged phone numbers and met five or six more times. After the first meeting, Bridges asked Adonis to pay his cell phone bill. Adonis paid the bill twice. He also gave Bridges $200 over the course of three meetings. Adonis did not report these demands to anyone, because he was afraid that Bridges would retaliate against defendant.

¶ 19 The trial court found defendant guilty of six counts of home invasion, two counts of residential burglary, and armed robbery.

¶ 20 At sentencing, the trial court merged the residential burglary counts into the home invasion counts. The parties then made arguments in aggravation and mitigation. The State argued that defendant was a "very violent" and active participant in the home invasion. The defense highlighted that defendant had participated in the impact incarceration program ("boot camp") pursuant to a prior conviction for vehicular invasion, and had graduated from high school, attended college, and worked in the family business. Defendant's mother told the court that defendant was raised "well," was educated, and had faith in God. She denied that defendant was a criminal but admitted that he had childhood "friends that were not friends that he should have had." Adonis told the court that defendant was a tradesman, was a supervisor for the family construction business and was needed to help run the business. Defendant asked the court for leniency.

¶ 21 The court stated that the "worst thing" defendant did, even worse than what he did to Bridges, was what he did to his family. The court believed that defendant's parents tried to "steer" him right, but that he had a "bit of a thug *** and a gangster" in him. The court noted that although defendant participated in boot camp, that did not get his "attention." The court stated

that it was not giving defendant the maximum sentence and sentenced defendant to 30 years on each count, to be served concurrently. The court then made a finding that great bodily harm occurred, requiring that defendant serve 85% of his sentence. Defendant appeals.

¶ 22 Defendant's first contention on appeal is that the State failed to prove him guilty beyond a reasonable doubt of armed robbery, where the State alleged that he took Bridges' cell phone and money in the indictment, but the evidence at trial showed that he took Bridges' keys and a paycheck. The State responds that in order to sustain the conviction, the evidence must establish beyond a reasonable doubt that defendant took property from Bridges by force while armed with a gun, and that the language identifying the specific property taken from Bridges is "mere surplusage."

¶ 23 Where, as here, a defendant challenges the sufficiency of the evidence, a criminal conviction will not be overturned unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to the defendant's guilt. *People v. Givens*, 237 Ill. 2d 311, 334 (2010); *People v. Collins*, 106 Ill. 2d 237, 261 (1985). It is not the function of this court to retry the defendant; rather, the relevant inquiry 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. *Givens*, 237 Ill. 2d at 334; *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

¶ 24 At the outset, defendant's argument is undercut by a fact we noted above (see ¶ 8)—that the court *did* hear evidence that defendant and his accomplices took money from Bridges: Harper testified that they removed money from his pockets. Thus, the evidence at trial did not vary from the indictment's allegation that Bridges had money taken from him.

¶ 25 Defendant acknowledges Harper's testimony but claims that her testimony should have been disregarded because Bridges would have better knowledge of what was taken from his own pockets. Maybe so, but maybe not. After all, Bridges was repeatedly struck in the head and was in the midst of a terrifying and savage attack; what, precisely, was taken from his pockets may not have been foremost on his mind. He could not remember all of his attacker's faces when he was in the hospital, either. Considering that we must review the evidence in the light most favorable to the State, we see no basis for favoring the testimony of a victim, while in the midst of a brutal assault that resulted in a significant brain injury, on this particular point over that of another witness who testified that she had a clear view of these events as they unfolded.

¶ 26 But even assuming that the evidence established that only keys and a paycheck were taken, we would still hold that the State's trial evidence did not fatally vary from the allegations of the indictment. To be fatal, "a variance between the allegations in a criminal complaint and the proof at trial must be material and be of such character as may mislead the defendant in making his or her defense, or expose the defendant to double jeopardy." *People v. Maggette*, 195 Ill. 2d 336, 351 (2001). An indictment must state the name of the accused; set forth the name, date and place of the offense; cite the statutory provision the defendant allegedly violated; and set forth in the statutory language the nature and elements of the charged offense. *People v. Collins*, 214 Ill. 2d 206, 219 (2005). Where an indictment charges all of the essential elements of a crime, matters that are unnecessarily added may be regarded as surplusage. *Id*. at 220. In *Collins*, for example, where the indictment charged the defendant with recklessly discharging a firearm and thus endangering the safety of a particular police officer, but the proof at trial showed that others, not that police officer, were so endangered, the supreme court held that the

proof at trial did not fatally vary from the indictment because "[t]he specific identity of the victim is not an essential element of the offense of reckless discharge of a firearm." *Id*. Likewise, we recently held that, where an indictment for attempted armed robbery alleged that the defendant was reaching for an individual's gun, while the proof at trial showed he was reaching for that individual's keys, there was no fatal variance between the indictment and proof because the indictment set forth the essential element of attempted armed robbery—attempting to take property by force or threat of force—and "the naming of the item that defendant attempted to take from [the victim] was surplusage." *People v. Reese*, 2015 IL App (1st) 120654, ¶ 96.

¶ 27 To prove defendant guilty of armed robbery, the State had to prove that he knowingly took property from the person or presence of Bridges by the use of force or by threatening the imminent use of force, while armed with a firearm. See 720 ILCS 5/18-2(a)(2) (West 2010). In this case, the armed robbery count alleged that, on or about September 27, 2011, defendant knowingly took property, "to wit: a cellular phone and United States currency" from the person or presence of Bridges by the use of force or by threatening the imminent use of force, and that defendant was armed with a firearm.

¶ 28 The allegation that defendant took a cell phone and currency from Bridges was not a material element of the charge of armed robbery. Rather, the indictment set out the essential elements of robbery by alleging that defendant knowingly took property from Bridges by the use of force while armed with a firearm. See 720 ILCS 5/18-2(a)(2) (West 2010). The naming of the specific items that were taken during the offense was surplusage. See *Reese*, 2015 IL App (1st) 120654, ¶ 96; *People v. Lewis*, 165 Ill. 2d 305, 340 (1995) (elements of robbery are "taking property by force or threat of force. Nothing more is required to sustain the conviction."). Nor

was Defendant prejudiced by the allegation detailing the specific property taken from Bridges, as he was put on notice of the charge with sufficient detail to permit him to mount a defense to the charge of armed robbery. See *People v. Espinoza*, 2015 IL 118218, ¶ 38 (due process requires that charging instrument adequately notify defendant of offense charged with sufficient specificity to enable proper defense). Defendant does not, and could not possibly, claim that his defense would have been different if he knew that the proof would show he took a paycheck and keys instead of a cell phone and U.S. currency.

¶ 29 We are unpersuaded by defendant's reliance on *People v. Daniels*, 75 Ill. App. 3d 35 (1979). In *Daniels*, not only was there a variance between the charging instrument and the evidence adduced at trial (the defendant was charged with the armed robbery of money, while the evidence at trial focused on a watch taken from the victim), but the reviewing court also found that the evidence adduced at trial was insufficient to prove the defendant guilty of even taking the watch. *Id*. at 40-41. Specifically, the State had not shown that the victim owned or wore a watch, or that the watch possessed by one of the defendants was taken from the victim. *Id*. at 41.

¶ 30 In this case, the difference between the indictment and the evidence adduced at trial was nowhere near as drastic as in *Daniels*. In *Daniels*, there was insufficient evidence of a robbery of any kind, whether the item was alleged to be money or a watch. Here, there is no lack of evidence of the armed robbery itself, only a question of whether the indictment properly alleged what precisely was taken. See *Reese*, 2015 IL App (1st) 120654, ¶ 97 (likewise distinguishing *Daniels* on this basis). There is no question here that the evidence established that defendant did, in fact, take property from Bridges with the use of force—his keys and paycheck at a minimum,

if not his money as well. We find that the State presented sufficient evidence to establish defendant's guilt, and that the trial evidence did not fatally vary from the allegations of the indictment.

¶ 31 Defendant also contends that the concurrent 30-year prison terms imposed by the trial court were excessive in light of certain mitigating evidence. He argues that although the trial court acknowledged that defendant's incarceration would be a hardship to his family, the court failed to give this evidence the "proper weight."

¶ 32 Here, defendant was convicted of the Class X felonies of home invasion and armed robbery. See 720 ILCS 5/12-11(a)(3), (c) (West 2010); 720 ILCS5/18-2(a)(2), (b) (West 2010). The sentencing range for a Class X felony is 6 to 30 years in prison. See 730 ILCS 5/5-4.5-25 (West 2010). Additionally, because a firearm was used in the commission of the offenses, defendant was subject to a 15-year sentencing enhancement (see 720 ILCS 5/12-11(c) (West 2010); 720 ILCS 5/18-2(b) (West 2010)), making his sentencing range 21 to 45 years in prison.

¶ 33 A trial court has broad discretion in determining the appropriate sentence for a particular defendant, and its determination will not be disturbed absent an abuse of that discretion. *People v. Patterson*, 217 Ill. 2d 407, 448 (2005). A sentence within the statutory range will not be considered excessive unless it varies greatly from the spirit of the law or is manifestly disproportionate to the nature of the offense. *People v. Brazziel*, 406 Ill. App. 3d 412, 433-34 (2010). When balancing the retributive and rehabilitative aspects of a sentence, a court must consider all factors in aggravation and mitigation including, among other things, a defendant's age, criminal history, character, education, and environment, as well as the nature and circumstances of the crime and the defendant's actions in the commission of that crime. *People v.*

Raymond, 404 Ill. App. 3d 1028, 1069 (2010). "Even where there is evidence in mitigation, the court is not obligated to impose the minimum sentence." *People v. Sims*, 403 Ill. App. 3d 9, 24 (2010).

¶ 34 The record reveals that at sentencing, the parties presented evidence in aggravation and mitigation, including defendant's minimal criminal record, his involvement in the family business, and his mother's assertion that defendant had been negatively influenced by his childhood friends.

¶ 35 In sentencing defendant, the trial court stated boot camp did not get defendant's "attention." The court also noted the violent nature of the offense, along with the fact that defendant had previously been convicted of a violent offense. In light of these factors, a total prison term of 30 years, which sat in the middle of (and slightly to the lower end of) the sentencing range, was not an abuse of discretion. See *Patterson*, 217 Ill. 2d at 448.

¶ 36 We reject defendant's contention that the trial court failed to adequately consider the mitigation evidence presented. Unless the record shows otherwise, we presume that the court properly considered the mitigating factors presented. *Brazziel*, 406 Ill. App. 3d at 434. Here, the trial court specifically acknowledged that defendant's incarceration would be a burden on defendant's family. Nothing shows that the trial court neglected defendant's mitigation evidence relating to his education or work history. The trial court did not abuse its discretion simply by weighing the evidence presented in mitigation less highly than defendant would prefer. The seriousness of the offense is the most important factor in determining a sentence (*People v. Quintana*, 332 Ill. App. 3d 96, 109 (2002)), and the trial court is not required to impose a minimum sentence merely because mitigation evidence exists (*Sims*, 403 Ill. App. 3d at 24).

¶ 37 The crimes of which defendant was convicted included the forcible invasion of one's home and the savage beating of one of the occupants once inside, all while armed with firearms. This was no run-of-the-mill, minor offense, yet the trial court did show mercy in sentencing defendant near the low end of the sentencing range. We would note that many of the factors defendant asks us to consider in reversing the sentence—removing defendant from his child and family and his father's business—would be true even had the trial court sentenced defendant to the minimum sentence of 21 years. The trial court did not abuse its discretion in sentencing defendant to 30 years in prison.

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

¶ 39 Affirmed.