2016 IL App (1st) 140260-U

FOURTH DIVISION
December 22, 2016

No. 1-14-0260

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 21614
	)	
DAVID BROWN,	)	Honorable
	)	Noreen Valeria-Love,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Ellis and Justice Howse concurred in the judgment.

O R D E R

¶ 1 *Held*: We affirm the ruling of the trial court where the State proved at trial that defendant's crime was accompanied by exceptionally brutal and heinous behavior indicative of wanton cruelty. *Mittimus* is corrected to reflect only one conviction for strong probability first degree murder.

¶ 2 Following a bench trial, defendant David Brown was convicted and sentenced to life imprisonment on, *inter alia*, one count of strong probability first degree murder (720 ILCS 5/9-1(a)(2), (b)(16) (West 2012) and two counts of felony murder (720 ILCS 5/9-1(a)(3), (b)(16)

(West 2012)). On appeal, defendant contends that the State failed to prove that he acted with especially brutal and heinous behavior indicative of wanton cruelty and thus his case must be remanded for resentencing. Defendant further argues that his two felony murder convictions should merge into his strong probability first degree murder conviction. We correct the *mittimus* and affirm.

¶ 3 Defendant was charged with 38 felony counts stemming from the robbery and murder of 81-year old Gertrude Franklin. The case went to trial on nine counts. Relevant here, defendant was charged with six counts of first degree murder. Two counts alleged defendant "knowingly inflicted blunt force trauma" to the victim's head "knowing that such acts created a strong probability of death or great bodily harm." 720 ILCS 5/19-1(a)(2) (West 2012). Four counts alleged felony murder (720 ILCS 5/9-1(a)(3) (West 2012)) based on residential burglary and robbery. The State sought an extended term in one of the strong probability murder counts (Count 6) and two of the felony murder counts (Counts 12 and 14) because the victim was over 60 years old and the death "resulted from exceptionally brutal or heinous behavior indicative of wanton cruelty." 720 ILCS 5/9-1(b)(16) (West 2012). Defendant was also charged with robbery (720 ILCS 5/18-1(a) (West 2012)), possession of a stolen motor vehicle (625 ILCS 5/4-103(A)(1) (West 2012)), and aggravated fleeing (625 ILCS 5/11-204.1(a)(1) (West 2012)). The case proceeded as a bench trial.

¶ 4 At trial, Michael Love testified that he was Gertrude Franklin's great nephew. On October 28, 2009, he and his wife accompanied Franklin home after a party, following behind her as she drove her tan Buick Century. Franklin arrived home at 1017 Barnsdale Road in LaGrange Park at approximately midnight. On October 29, 2009, Love learned that Franklin was taken to the hospital that morning. He learned that she passed away on November 12, 2009, from her injuries.

¶ 5 Officer Darren Pedota testified that, around 4:00 a.m. on October 29, 2009, he was on duty, parked near 31st Street and Barnsdale Road. He "heard a clunky noise" behind him and saw a "tan Buick" traveling northbound on Barnsdale. He could not see who was driving but believed it was Franklin's vehicle, who he knew resided at 1017 Barnsdale, a half block away. Pedota followed the vehicle and checked the license plate, confirming it was Franklin's car. As the vehicle continued northbound, it twice crossed the double yellow line, so Podeta pulled it over. The driver, identified in court as defendant, opened the driver's side door, looked back, saw Podeta, closed the door, and accelerated away. Podeta followed in pursuit. The vehicle ran three stop signs and crashed into a tree. Defendant "fell out of the vehicle." Podeta recovered from defendant's jeans and coat pockets "a couple" watches, a bracelet or necklace, other jewelry, a set of keys, and a black coin purse. Defendant was transported to Loyola Hospital.

¶ 6 Officer Matthew Fellers testified that, at 7:15 a.m. on October 29, 2009, he, along with Officer Drexler, reported to 1017 Barnsdale in LaGrange Park in response to a 911 call. Fellers entered through the back door, noting it had "been broken or fractured from a forced entry." Immediately upon entering the apartment, he saw a woman lying on the kitchen floor with "a large pool of blood around her head and face." She was wearing a robe or nightgown, her "feet were bound together," and "she also had binding on her *** left wrist area." Fellers recognized the woman as Franklin. Upon receiving no response from Franklin, Fellers called for an ambulance. Franklin was transported to the hospital with Fellers following.

¶ 7 Firefighter/paramedic Christopher Baudler was dispatched to Franklin's address at approximately 7:15 a.m. on October 29, 2009. He testified that, when he arrived, he noticed a woman "face down" who was "bound by her hands and feet." Baudler wanted to check her breathing, so he rolled her over at which point she took "an agonal gasping breath." He removed

the gray necktie binding her left arm and noted a black necktie binding her legs. Baudler stated there was "[o]bviously *** facial trauma." Elaborating, he testified that it "appeared to be that the right side of her face was completely smashed in." Baudler testified that the "best description" he could give was that Franklin's face was "as flat as *** a pan." There was "a large amount of blood where her face was sitting." He tried to assist Franklin's breathing by inserting a tube into her throat, but could not as there "was a lot of blood clots and debris that was inside her throat." There were "bruises around her eyes" and "blood covering almost every part of her face."

¶ 8 Police crime scene investigator Sean Grosvenor testified that "there was a pool of blood like substance" on the kitchen floor when he arrived at Franklin's home. He observed a coffee cup on the floor "near the blood-like stains." Blood-spatter reached the oven and cabinet on the northwest side of the kitchen as well as the south cabinet in the kitchen. The "blood like stains" led from the kitchen to the bedroom, where "there were several jewelry boxes that were open, items scattered on the bed." Grosvenor testified that "[m]any of the boxes *** [were] partially empty." A lottery ticket with a "partial footwear impression in a blood like stain" was recovered from the bedroom. Grosvenor obtained footprint impressions from the blood stains and the lottery ticket. The impressions matched the tread on defendant's shoes.

¶ 9 After processing Franklin's apartment, Grosvenor returned to the police station where he examined a gold Buick Century with front-end damage as well as the clothes from both Franklin and defendant. Defendant's jeans had "several blood like stains" and there was a "blood like stain" on his coat. His red and white shoes had "several blood like stains." The interior of Franklin's crashed vehicle tested positive for blood. The coffee cup recovered from the scene showed "dried blood like stain on all sides, including the interior and the bottom." He photographed Franklin while she was in her hospital bed, and he described her thusly:

> "The victim, Miss Franklin, was unconscious. She was on a ventilator. She had a tube inserted into her head. She had a feeding tube, and showed several bruises, abrasions, and lacerations in the area of her face and head."

¶ 10 William Anselme testified as an expert in the field of forensic biology. He tested various items recovered from the crime scene. Anselme found that a size-10, red and white gym shoe contained blood, the coffee mug recovered from the scene contained blood, and the lottery ticket recovered from the scene contained blood.

¶ 11 Christopher Webb testified as an expert in the field of forensic biology and DNA analysis. The DNA he extracted from Franklin matched the DNA from the blood found on defendant's shoe. The DNA extracted from the blood found on the coffee mug and the lottery ticket matched Franklin's. The DNA extracted from the silver and gray tie used to restrain Franklin's arm matched defendant's.

¶ 12 Thomas Merchie testified as an expert in the field of blood spatter analysis. In March of 2011, he tested "a pair of pants and a pair of shoes" recovered from defendant. The majority of the blood was on defendant's left shoe, inside the right arch of the shoe. Merchie concluded that the stains on defendant's shoe were impact splatter. The shape of the stain indicated that the left shoe and jeans were within a short distance of that impact splatter from a blood source perpendicular to the shoe. Merchie concluded the splatter on the shoes and jeans was consistent with "any blunt force trauma including" a coffee cup being struck to a woman's head.

¶ 13 Johanna Jackson testified she was Franklin's great-niece. She identified jewelry, a watch, keys, and a black coin purse shown in photographs as belonging to Franklin. The parties stipulated that Franklin was 81 years old at the time of the attack. They also stipulated that no fingerprints were found on the coffee mug. They stipulated to testimony from a medical

examiner who found "[m]ultiple blunt force trauma to the head" and concluded Franklin died as a result of "cranial cerebral injuries due to assault." The State rested. The court denied defendant's motion for a directed verdict.

¶ 14 Defendant testified that, on the night before the murder, he was "[p]robably in Maywood smoking some weed on the porch with some guys." He finished around midnight and could not remember what he did until 2:00 a.m., when he "[p]robably smoked some weed." At approximately 3:00 a.m., defendant made arrangements to purchase more marijuana. He called the man who sells him marijuana, whose name he did not know. The man told defendant to meet him in "LaGrange." Defendant "[ran] into a lady friend" whose name he did not know, who agreed to take him to his aunt's house in LaGrange Park. Defendant was going there to borrow his Aunt Gertrude Franklin's car. Defendant called his aunt at approximately "3:00, 3:15" a.m. The lady friend dropped defendant off at Franklin's apartment at approximately "3:30, 4:00" a.m. and left when Franklin answered the door. There were two other people in the apartment, an "elderly" man and woman, aged approximately 60, drinking. Franklin agreed to lend defendant her car as long as he returned it "between 7:30 and 8:00" a.m.

¶ 15 Defendant was driving from "7-Eleven" after meeting with "[t]he guy that I come out there to see" when he noticed a police officer following him. Although the officer did not indicate to defendant that he wanted him to pull over, defendant did so. The officer approached defendant, drew his gun, and told defendant to put his hands on the steering wheel. Defendant, who had marijuana "wrapped up on the seat," "pulled out" and threw the marijuana out of the window. He lost control of the vehicle as he had been drinking, and crashed the car. Defendant denied having blood on his clothing or his shoes and stated that he did not take any jewelry from his aunt's house. He testified that the jewelry found on him was his mother's. He denied any

knowledge of a coin purse and he denied striking, hurting, or threatening his aunt in any way. He denied owning a tie and offered no explanation when asked how his DNA was recovered from the tie used to restrain Franklin.

¶ 16 In rebuttal, the State called the police officer who interviewed defendant at the hospital after the crash. He testified that defendant did not tell him there was anyone else present at his aunt's house when defendant borrowed her car.

¶ 17 During closing arguments, the State argued that defendant "broke into [Franklin's] home, beat her to death with a coffee mug, and then proceeded to rob her of jewelry, the keys to her car, and other items." It argued Franklin was a "bloody mess." It stated that "her head had been smashed, and she is lying in a pool of blood." The State pointed out that there were lacerations and contusions and that the "right side of her face is as flat as a pancake." It said that Franklin's ankles were bound together "disturbingly" by a neck tie. When arguing the brutal and heinous nature of the crime, the State contended that defendant need not have killed the 81-year-old, 5'3", 121-pound women in order to steal her possessions but did, and in the process, "tie[d] her up like she was an animal."

¶ 18 The court found defendant guilty of all nine counts, finding Franklin's death resulted from exceptionally brutal and heinous behavior indicative of wanton cruelty. It merged the two strong probability murder convictions (Count 4 merged into Count 6), the two felony murder convictions predicated on residential burglary (Count 11 merged into Count 12), and the two felony murder counts predicated on robbery (Count 13 into Count 14). The court also merged the robbery conviction (Count 22) into Count 14. The court denied defendant's motion to merge the felony murder convictions into the strong probability murder conviction.

¶ 19 In aggravation, the State referred to defendant's "lengthy criminal background," the fact that the victim was his aunt (whom he referred to at trial as "Auntie"), and reiterated the "senseless" nature of the killing, stating that defendant not only robbed her other possessions but "her right to die with any kind of dignity." In mitigation, defense counsel argued that defendant has mental health problems, was intellectually disabled, suffered from alcohol and chemical addiction, was 56 years old with a highest level of education completed being 7th grade, and that he was under the influence of drugs and alcohol at the time of the murder.

¶ 20 The trial court stated that it "can still see the photos quite vividly of a woman who is bound by her ankles; had a ligature on at least one wrist when the authorities got there; who was lying in her own blood, in her own home with her face caved in." It stated that defendant did not have to use force to take her possessions but chose to do so and "left her lying in her own blood to die like a dog." The trial court reiterated that "this was a murder that was exceptionally brutal and heinous" and sentenced defendant to concurrent terms of life in prison on counts 6, 12, and 14. It also sentenced defendant to 30 years' imprisonment for possession of a stolen motor vehicle and 6 years' imprisonment for aggravated fleeing, to be served consecutively to the life terms. The court denied defendant's motion to reconsider.

¶ 21 We first address defendant's argument, to which the State concedes, that the *mittimus* should be corrected to reflect only one conviction for first degree murder under the one-act, one-crime doctrine. Defendant asserts his convictions for felony murder predicated on residential burglary and robbery arose from the same act as his conviction for strong probability murder and, as strong probability murder is the more serious offense, this is the only conviction that can stand. We agree. "It is axiomatic that 'where there is only one victim and multiple convictions are obtained for murder arising out of a single act, sentence should be imposed only on the most

serious offense.' " *People v. Alvarez-Garcia*, 395 Ill. App. 3d 719, 734 (2009) (quoting *People v. Smith*, 233 Ill. 2d 1, 21 (2009)). As strong probability murder has a more culpable mental state than felony murder, it is the more serious offense. See *People v. Artis*, 232 Ill. 2d 156, 170-71 (2009) ("where the degree of the offenses and their sentencing classifications are identical, this court has also considered which of the convictions has the more culpable state" to determine which is a more serious offense). Pursuant to Supreme Court Rule 615(b)(1), we direct the clerk of the circuit court to correct defendant's *mittimus* to reflect only one conviction for first degree murder: strong probability under Count 6.

¶ 22 Defendant's remaining contention is that the State failed to prove beyond a reasonable doubt that Franklin's murder was accompanied by exceptionally brutal and heinous behavior indicative of wanton cruelty. 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 natural life imprisonment may be imposed. 730 ILCS 5/5-4.5-20(a)(3) (West 2012); 730 ILCS 5/5-8-1(b) (West 2012). It was on this basis that the trial court sentenced defendant to natural life on the murder charges.

¶ 23 Other than the fact of a prior conviction, any factual finding that increases a defendant's sentence beyond the statutory nonextended-term maximum, as the finding of exceptionally brutal and heinous behavior does here, must be submitted to the trier of fact and proven beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *People v. Swift*, 202 Ill. 2d 378, 392 (2002). The finding that a defendant's behavior is exceptionally brutal and heinous and indicative of wanton cruelty is treated as an element of the offense. See *People v. Callahan*, 334 Ill. App. 3d 636, 648-49 (2002) (finding exceptionally brutal and heinous behavior indicative of

wanton cruelty is an element of the offense that must be alleged in the charging instrument and proven beyond a reasonable doubt at trial). 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.

¶ 24 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. *Id*. "Heinous" is defined as enormously and flagrantly criminal, hatefully or shockingly evil, or grossly bad. *Id*. "Wanton cruelty" is defined as consciously seeking to inflict pain and suffering on the victim of the offense. *Id*.

¶ 25 "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). Instead, the trier of fact, here the trial court, must consider all of the facts surrounding the incident in question and decide the case on those facts. *Id*. Some of the factors to consider in determining whether to impose an extended-term sentence are whether the defendant exhibited remorse, inflicted prolonged pain, torture, or mental suffering on the victim, and whether the offense was premeditated or defendant was provoked. *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 to support a finding of exceptionally brutal or heinous behavior. *Nitz*, 219 Ill. 2d at 418.

¶ 26 The evidence shows that defendant's behavior was both exceptionally brutal and heinous. Unprovoked, he broke into his 81-year-old aunt's house and, in some order, tied her up and beat her with a blunt object until her face was flattened and her throat clogged with blood and debris. He then left her bleeding on the kitchen floor to die while he cold-bloodedly ransacked her bedroom, and then left with her jewelry and car. Defendant used enough force to send blood splatter flying to the cabinets on multiple walls. He showed no remorse or concern for the victim, leaving her restrained to die face-down in a pool of her own blood. He further denied any involvement in her death despite overwhelming evidence tying him to the murder. The evidence amply supports finding defendant's behavior was exceptionally brutal and heinous.

¶ 27 It also supports a finding that this behavior was indicative of wanton cruelty. Blood spatter patterns and the injuries Franklin sustained indicate that defendant repeatedly struck her about the head while she was on the floor. As our supreme court has found, repeatedly striking a victim while he or she is on the ground is indicative of wanton cruelty. See *Nitz*, 219 Ill. 2d at 419 (striking the victim repeatedly after he fell to the ground supported a finding "that defendant intentionally inflicted pain and suffering upon [victim], and thus displayed wanton cruelty"). The evidence established wanton cruelty beyond a reasonable doubt.

¶ 28 Defendant argues that his behavior was not "grossly ruthless," "devoid of mercy or compassion," or "hatefully or shockingly evil." He claims there was "no evidence that the murder was premeditated," that he "used significant force to cause" the injuries, or that he "tortured" Franklin or "otherwise inflicted gratuitous violence on" her. As previously noted, that type of behavior was not required for a finding of exceptionally brutal and heinous behavior (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. Further, the evidence

contradicts defendant's assertions, demonstrating that although Franklin was already on the floor, he beat her over and over, using such significant brutal force as to render her face "as flat as *** a pan" and send blood splatter to corners of the room. It follows, then, that the violence he inflicted upon Franklin was entirely gratuitous and devoid of mercy or compassion.

¶ 29 Defendant further argues that the trial court did not make any specific factual findings at trial that detailed why defendant's behavior was exceptionally brutal and heinous indicative of wanton cruelty. At trial, the trial court set forth the evidence in exacting detail and then made a specific factual finding that defendant's offenses were accompanied by exceptionally brutal and heinous behavior indicative of wanton cruelty. It then reiterated and elaborated on this finding at sentencing, stating that it "can still see the photos quite vividly of a woman who is bound by her ankles; had a ligature on at least one wrist when the authorities got there; who was lying in her own blood, in her own home with her face caved in." It explained that the victim "who is 81-years old; who is some thirty years older than the defendant; and to rob and steal her jewelry is one thing because this is a woman who could have easily by him been pushed aside" but "[s]he didn't have to be bound," "[s]he didn't have to be struck," and defendant "certainly did not have to murder this woman." It continued that defendant did not have to use force to take her possessions but chose to do so and "left her lying in her own blood to die like a dog." The court clearly made a specific factual finding that the offense was accompanied by exceptionally brutal and heinous behavior indicative of wanton cruelty, and we will not disturb that finding on review.

¶ 30 Defendant also contends that the trial court's statement at sentencing that the behavior was exceptionally brutal and heinous indicative of wanton cruelty because defendant "certainly did not have to murder this woman" was reasoning explicitly rejected by our supreme court as

"every murder is by nature unnecessary." *People v. Andrews*, 132 Ill. 2d 451, 465-66 (1989). However, the trial court clearly made this comment in concert with its finding that defendant went to his aunt's house to rob her and, considering the difference in size and age between defendant and Franklin, could have done so without brutally beating her and leaving her to die. The comment was directed to the gratuitous, brutal nature of defendant's actions, not to a factor inherent in every murder.

¶ 31 Ultimately, defendant shockingly, grossly, and needlessly beat his elderly aunt to death so that he could steal her jewelry and Buick. Based upon all the facts surrounding Franklin's death (see *Pugh*, 325 Ill. App. 3d at 346), we conclude that a 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, warranting the extended term sentence.

¶ 32 As defendant's convictions under the felony murder statute violate the one-act, one-crime doctrine, we hereby correct the *mittimus* to reflect only one conviction for first degree strong probability murder under Count 6 rather than the three first degree murder convictions that currently appear. As the State proved at trial beyond a reasonable doubt that defendant's behavior was exceptionally brutal and heinous indicative of wanton cruelty, we affirm the trial court's holding in all other respects.

¶ 33 Corrected and affirmed.