2012 IL App (2d) 110701-U
No. 2-11-0701
Order filed December 20, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 09-CF-1023
GUSTAVO TORRES-MEDEL,	)	Honorable Kathryn E. Creswell,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices McLaren and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The State proved defendant guilty beyond a reasonable doubt of intentional first-degree murder, as the injuries his infant son suffered at defendant's hands, coupled with defendant's admission that he was desperate to stop him from crying, supported the inference that he acted with the conscious objective to kill; (2) the trial court did not abuse its discretion when it sentenced defendant to 45 years' imprisonment for first-degree murder: despite the mitigating evidence, which the court presumably considered, the sentence was justified by the seriousness of the offense; (3) defendant was entitled to an additional day of sentence credit, and we modified the mittimus accordingly.

¶ 2 Defendant, Gustavo Torres-Medel, was charged with five counts of first-degree murder (see 720 ILCS 5/9-1(a)(1), (a)(2) (West 2008)), with all of the counts involving the death of defendant's

three-month-old son. The first count provided that defendant acted with the intent to kill his son (720 ILCS 5/9-1(a)(1) (West 2008)). Following a bench trial, defendant was found guilty of all five counts, and the five counts merged into the first count. The trial court sentenced defendant to 45 years' imprisonment on that one count, and defendant timely appealed. On appeal, defendant raises three issues. He contends that (1) he was not proved guilty beyond a reasonable doubt of intending to kill his son; (2) his sentence is excessive; and (3) he is entitled to an additional day of sentencing credit. For the reasons that follow, we affirm defendant's conviction and sentence, but we modify the mittimus to reflect one additional day of sentencing credit.

¶ 3 Evidence presented at defendant's trial revealed the following. On the evening of April 26, 2009, defendant was at home drinking beer in a West Chicago basement apartment that he shared with Perla Salgado and their two young children. One of the children, Gustavo Jr., was just over three months old. Before putting him to bed, Salgado changed the baby, who did not have any medical problems, and, when she did so, she did not notice any type of injury to his body.

¶ 4 Early the next morning, Salgado left for work, putting defendant in charge of caring for the children. At that time, like the night before, the baby did not have any bruises on his face or chest. At 1 p.m., Salgado received a phone call from defendant, who "sounded different" and "nervous." Defendant told Salgado to leave work, because something tragic had happened. Defendant would not elaborate on what had occurred.

¶ 5 When Salgado got home, she saw the baby sitting in a carseat with a blanket covering his entire body. Salgado asked defendant what had happened, and defendant said that he would be "responsible for any charges that he received." Salgado ran over to the baby and grabbed him. The

baby appeared cold and not moving. Upon further inspection, Salgado discovered that the baby was not breathing, his cheeks were "all bruised," and, aside from the bruising, his skin had no color.

¶ 6 While defendant went to retrieve cigarettes from Salgado's purse, Salgado began yelling at defendant, repeatedly demanding to know what had happened to the baby. Instead of answering, defendant told Salgado to "shut up," as the landlords who lived upstairs would hear them. The landlady, who was home at various times throughout that morning, testified that she did not hear anything coming from defendant's apartment. After telling Salgado to "shut up," defendant left the apartment. When he did so, he, according to the landlady, "was a little in a hurry."

¶ 7 Defendant went to see Alfredo Escobar, a family friend. Defendant, who appeared sad and looked like he was going to cry, told Escobar that a tragedy had occurred, and he asked Escobar to contact his family in Mexico and tell them that he was going to go to jail. Escobar asked defendant what had happened, and defendant eventually said that "the boy was dead." When Escobar asked for further clarification, defendant said that "he had struck the boy because [the boy] was crying[,]" that "[defendant] was just desperate[,]" and that "[w]hat [defendant did] is not going to be forgiven." Although Escobar admitted, and the officer who took his statement confirmed, that he did not initially tell the police that defendant said he was desperate or had done something for which he would not be forgiven, Escobar said that he omitted some things because he was nervous and forgot some of defendant's statements.

¶ 8 When defendant went to talk to Escobar, Salgado, who was crying and holding the baby, called the store where she worked. Soon thereafter, the manager and two of Salgado's coworkers from the store arrived at the apartment along with a police officer the manager knew. At that time,

Salgado was standing outside with the baby. Salgado, her manager, her coworkers, and the officer took the baby back down to the basement apartment.

¶ 9 Rex Vanwinkle, a neighbor from across the street who is a retired firefighter and paramedic, joined the group in the basement apartment after he heard about the incident on his firefighter pager. When Vanwinkle saw the baby, he observed that the baby exhibited no signs of life. At that point, someone in the group may have attempted CPR on the infant.

¶ 10 Subsequently, Salgado's manager saw Salgado talking on the phone with defendant, and he took the phone away from her. The manager asked defendant, "[W]hat have you done[?]" Defendant replied, "I did something wrong." Defendant never specified what he had done "wrong."

¶ 11 When Jeffrey Keefe, a West Chicago paramedic who had been dispatched to the scene at around 1:20 p.m., arrived, his "initial impression was [that] the child was dead" and "had been dead for quite some time." Kevin Farley, who was assigned to the forensic investigation unit in April 2009, arrived at the scene at 2 p.m. to collect and preserve evidence.

¶ 12 Dr. Jeffrey Harkey conducted the autopsy on the baby. Dr. Harkey testified, consistently with photographs, about the bruises that "covered all of the [baby's] cheek area." In addition, there were multiple, meaning at least 15, small bruises on the baby's chest. Dr. Harkey also saw a u-shaped bruise on each of the baby's buttocks. In the photographs, these injuries appeared to resemble bite marks.

¶ 13 In addition to the bruising, Dr. Harkey observed that the baby suffered a rib fracture as well as extensive subarachnoid hemorrhaging to the brain. Based on the numerous injuries from which the baby suffered, none of which were incurred postmortem, Dr. Harkey concluded that the cause

of death was "abusive traumatic injuries of the head and chest" and that these injuries were caused from "being beaten and crushed."

¶ 14 When Dr. Harkey was asked whether the baby could have suffered these head and chest injuries from a fall or from CPR performed incorrectly, he said that such scenarios were extremely unlikely. More specifically, with regard to any claim that the baby suffered these injuries from a fall, Dr. Harkey observed that the baby had no bruising on his arms, hands, feet, or legs. Dr. Harkey stated that, if the baby had been dropped or accidentally fell, he would have suffered injuries to his extremities. Moreover, the baby could not have incurred all of these injuries with one fall or by being dropped one time. Concerning a claim that the baby was injured because CPR was not properly performed on him, Dr. Harkey asserted that he had never seen, in the approximately 2,900 autopsies that he had conducted, rib fractures caused from performing CPR incorrectly. Further, although Dr. Harkey surmised that performing CPR improperly could cause bruising, Dr. Harkey opined that CPR "would have to be very improperly applied" for that to happen.

¶ 15 The trial court found defendant guilty. In doing so, the court commented that, based on the evidence presented, defendant "ferociously beat his own little boy." The court believed that defendant understood that he was guilty based on defendant's conversation with Escobar, that is, when defendant told him that the baby was dead, he had struck the baby because the baby was crying, he was desperate, and he would not be forgiven.

¶ 16 Evidence presented at defendant's sentencing hearing revealed that defendant struck Salgado with a closed fist in December 2007, after defendant had been drinking at a Christmas party. Although Salgado testified that she now has a new family, she also indicated that she was left alone

with one child after defendant killed the baby and that, as a result of the incident, both she and the couple's other young son have gone through therapy.

¶ 17 In allocution, defendant asked for forgiveness, claiming that he never intended to kill his son. In doing so, defendant told the trial court what had happened the morning his son died. Specifically, he indicated that, after drinking beer, he grabbed the baby because the baby was crying. Defendant admitted to biting the baby on the face and the buttocks and squeezing the baby, but he denied hitting his son. Defendant asserted that he placed the baby in the carseat and, in doing so, the baby hit his head on the handle of the carseat. Defendant fell asleep after that, and, when he woke up, he realized what he had done and called Salgado.

¶ 18 The presentence investigation report (PSI), which was presented to the trial court, revealed that defendant's criminal history consisted of the domestic battery involving Salgado and driving without a license. Concerning defendant's family, the PSI indicated that defendant's father had a history of alcohol abuse and that defendant's mother died when defendant was an infant. After his mother's death, defendant went to live with his maternal grandparents, who were physically and verbally abusive. While growing up, defendant saw his brother die. His brother's death troubled defendant and caused defendant to feel lonely. Upon arriving in the United States, defendant obtained a falsified social security card and got a job. Defendant admitted that he has a short temper, denied that he ever hit Salgado or his two children, but was "concerned that he can hurt someone." Defendant also described how he consumed alcohol once a week to the point where he was intoxicated and how he spent $200 a week on cocaine that he consumed. Defendant stated that, when his son was killed, he was under the influence of alcohol and cocaine.

¶ 19 The trial court commented that it had considered the PSI, factors in mitigation and aggravation, the facts presented at trial, and then imposed a 45-year sentence. In imposing the sentence, the court noted that, aside from the 2007 domestic battery offense involving Salgado, defendant had no other significant criminal history.

¶ 20 The trial court balanced defendant's criminal history with the seriousness of the instant offense and defendant's short temper and problems with drugs and alcohol. The court observed that, according to defendant, defendant was under the influence of cocaine and alcohol when he "brutally beat his own son to death." The trial court also commented on defendant's statement in allocution in which it described as "shocking" defendant's admission to viciously biting his son and squeezing him, yet, in contrast to the medical evidence, denying any other type of conduct that would account for the numerous injuries from which the baby suffered.

¶ 21 After being admonished about his right to appeal, defendant filed a timely notice of appeal. The record does not reflect that any postsentencing motion was filed.

¶ 22 On appeal, defendant raises three issues. He contends that (1) the State failed to prove him guilty beyond a reasonable doubt of "intending" to kill his son; (2) his 45-year sentence is excessive; and (3) he is entitled to an additional day of sentencing credit. We address each issue in turn.

¶ 23 The first issue we consider is whether the State proved beyond a reasonable doubt that defendant acted with intent in causing his son's death. In evaluating an attack on the sufficiency of the evidence, we do not retry the case. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). Instead, we defer to the trial court's determinations of the credibility of the witnesses, the weight of their testimony, and the reasonable inferences drawn from the evidence. *People v. Steidl*, 142 Ill. 2d 204, 226 (1991). We deem the evidence sufficient if, viewing it 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. Perez*, 189 Ill. 2d 254, 265-66 (2000).

¶ 24 A defendant commits first-degree murder when, as relevant here, he kills an individual without lawful justification, and he intends to kill that individual. 720 ILCS 5/9-1(a)(1) (West 2008). A defendant acts with intent when he "intends, or acts intentionally or with intent, to accomplish a result or engage in conduct described by the statute defining the offense, when his conscious objective or purpose is to accomplish that result or engage in that conduct." 720 ILCS 5/4-4 (West 2008).

¶ 25 Whether a defendant acted with the intent to kill another often must be inferred from circumstantial evidence. Circumstantial evidence is proof of certain facts and circumstances from which the trier of fact may infer other connected facts that human experience dictates usually and reasonably follow. *People v. Grathler*, 368 Ill. App. 3d 802, 808 (2006). The sole limitation on the use of circumstantial evidence is that the inferences drawn from the evidence must be reasonable. *Id.* "Circumstantial evidence is sufficient to sustain a conviction if it satisfies proof beyond a reasonable doubt of the elements of the crime charged." *People v. Gomez*, 215 Ill. App. 3d 208, 216 (1991). That is not to say that each link in the chain of circumstances must be proved beyond a reasonable doubt. *Id.* Rather, it is sufficient if all the circumstantial evidence taken together satisfies the trier of fact beyond a reasonable doubt that the defendant is guilty. *Id.*

¶ 26 Here, defendant, the father of the three-month old victim, was put in charge of the baby early in the morning on April 27, 2009. The evidence reflected that the baby, by all accounts, was a perfectly normal child who did not suffer from any maladies at that time. Within hours after being placed in defendant's care, the baby was no longer the three-month-old that Salgado, the baby's

mother, remembered when she left him that morning. Rather, during those few hours the baby was under defendant's care, defendant, who was the only adult in the basement apartment with the baby, used physical force to repeatedly strike and bite the baby. The testimony of Dr. Harkey, who asserted that the baby died after being beaten and crushed, corroborates the State's theory.

¶ 27 Added to the State's evidence concerning the severity of the multiple injuries that the baby suffered are the statements defendant made to Escobar. Soon after defendant left the basement apartment, he told Escobar that the baby had been crying, he struck the baby because the baby would not stop crying, that he was desperate, that the baby was dead, and that he would not be forgiven for what he did. Given these admissions, and the testimony of Dr. Harkey, a rational trier of fact could properly infer that defendant's conscious objective or purpose to stop the baby from crying was to beat the baby to death.

¶ 28 Defendant argues that "[t]he precise circumstances of how the baby suffered his fatal injuries were never proved." In making this argument, defendant recognizes that Dr. Harkey concluded that the baby was beaten and crushed, but he claims that there is a "reasonable possibility that the defendant, in his desperate attempt to quiet the baby, struck the baby in the face and squeezed the baby's ribs, but then unintentionally dropped the baby, causing the fatal blow to the head." The State's evidence belies defendant's argument.

¶ 29 First, as the State notes, the claim that defendant was not proved guilty beyond a reasonable doubt given this reasonable hypothesis of innocence must fail, as the State is not required to exclude every reasonable hypotheses consistent with a defendant's innocence. *People v. Larson*, 379 Ill. App. 3d 642, 654 (2008). Second, Dr. Harkey made very clear that the baby would not have died from a fall or from being accidentally dropped. Rather, given the extensive bruising to the baby's

body in addition to the rib fracture and the hemorrhaging in the brain, Dr. Harkey concluded that the baby died from being beaten to death. After viewing the evidence in the light most favorable to the prosecution, we hold that the State proved beyond a reasonable doubt defendant's intent to kill the baby.

¶ 30 The next issue defendant raises is whether his 45-year sentence is excessive. Defendant did not argue in the trial court that his sentence was excessive. To preserve an issue for review, a defendant must both offer a specific objection at trial and raise the matter in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988); *People v. Mendoza*, 354 Ill. App. 3d 621, 627 (2004). If a defendant fails to make an objection at trial and raise the issue in a posttrial motion, the issue is considered forfeited on appeal. *People v. Baez*, 241 Ill. 2d 44, 129 (2011).

¶ 31 Defendant acknowledges that he never raised this issue in the trial court. However, citing *People v. Zapata*, 347 Ill. App. 3d 956, 964 (2004), he claims that this court may nevertheless consider the issue because the error that led to his sentence "consisted of a mistaken finding by the trial court." Our supreme court allows us to consider a defendant's plain error argument raised for the first time in a reply brief. See *People v. Williams*, 193 Ill. 2d 306, 347 (2000) (citing *People v. Thomas*, 178 Ill. 2d 215,235 (1997)). However, despite plain-error review, we cannot conclude that defendant's sentence is excessive.

¶ 32 A defendant convicted of first-degree murder faces a prison sentence between 20 and 60 years. 730 ILCS 5/5-4.5-20(a) (West 2008). Defendant's sentence falls within this range. When a sentence is within the statutory limits for the offense, it will not be disturbed unless the trial court has abused its discretion. *People v. Coleman*, 166 Ill. 2d 247, 258 (1995). An abuse of discretion occurs if the trial court imposes a sentence that "is greatly at variance with the spirit and purpose of

the law, or manifestly disproportionate to the nature of the offense." *People v. Stacey*, 193 Ill. 2d 203, 210 (2000). It is well established that "[a] trial court has wide latitude in sentencing a defendant, so long as it neither ignores relevant mitigating factors nor considers improper factors in aggravation." *People v. Roberts*, 338 Ill. App. 3d 245, 251 (2003). The existence of mitigating factors does not mandate imposition of the minimum sentence (*People v. Garibay*, 366 Ill. App. 3d 1103, 1109 (2006)) or preclude imposition of the maximum sentence (*People v. Pippen*, 324 Ill. App. 3d 649, 652 (2001)). It is the trial court's responsibility "to balance relevant factors and make a reasoned decision as to the appropriate punishment in each case." *People v. Latona*, 184 Ill. 2d 260, 272 (1998). The reviewing court is not to reweigh factors considered by the trial court. *Pippen*, 324 Ill. App. 3d at 653.

¶ 33 Here, defendant advances two reasons why his sentence is excessive. First, he argues that, because the State did not prove that he intended to kill his son, the court essentially considered an improper factor in imposing the 45-year sentence. Because, as noted above, we believe that a rational trier of fact could conclude that defendant acted with the necessary intent, we find defendant's argument here unavailing.

¶ 34 Second, defendant claims that his sentence is excessive because there were "few aggravating factors *** present[ed]" and "several mitigating factors exist." We disagree. The record clearly reflects that the trial court considered the mitigating factors to which defendant cites, such as defendant's upbringing, when it imposed the sentence. The trial court was not required to comment upon each item of mitigating evidence presented, and its failure to do so does not mean that the court failed to properly consider all of the evidence. See *People v. Jarrell*, 248 Ill. App. 3d 1043, 1051 (1993) (a trial court does not need to articulate the basis for its sentence). Further, there is a

presumption that the trial court considered all relevant factors in determining a sentence, and that presumption will not be overcome without explicit evidence from the record that the trial court did not consider mitigating factors or relied on improper aggravating factors. *People v. Payne*, 294 Ill. App. 3d 254, 260 (1998). Here, the record does not contain any indication that the trial court failed to consider defendant's minimal criminal history and his abusive and traumatic upbringing, and defendant points to nothing other than the sentence itself to demonstrate that the trial court did not consider this evidence. See *Roberts*, 338 Ill. App. 3d at 251 (when mitigating evidence was before the trial court, it is presumed that the trial court considered it, and the defendant must point to something beyond the sentence itself to demonstrate that the evidence was not considered). Moreover, weighing against that mitigating evidence was the severity and circumstances of defendant's offense. As the trial court put it, he "ferociously" beat to death his own three-month-old son. The seriousness of the offense is the most important factor in fashioning a sentence. *People v. Gutierrez*, 402 Ill. App. 3d 866, 902 (2010). Accordingly, we hold no abuse of the trial court's discretion occurred in imposing defendant's sentence.

¶ 35 Last, we consider defendant's contention that he is entitled to one extra day of sentencing credit. The State concedes that defendant is entitled to this credit. Thus, we modify the mittimus to reflect that defendant is entitled to one extra day of sentencing credit. See *People v. Sanders*, 393 Ill. App. 3d 409, 414 n.1 (2009).

¶ 36 For these reasons, we affirm the judgment and sentence of the circuit court of Du Page County, but we modify the mittimus to reflect one additional day of sentencing credit.

¶ 37 Affirmed as modified.