No. 3--09--1055

Order filed March 9, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit Will County, Illinois
Plaintiff-Appellee,	)	No. 07--CF--2064
v.	)	
DELON SCOTT,	)	Honorable Daniel J. Rozak
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Presiding Justice Carter and Justice McDade concurred in the judgment.

ORDER

Held: Defendant's sentence of 85 years imprisonment for first degree murder was not excessive where the trial court properly considered all aggravating and mitigating factors and accepted three victim impact statements.

Defendant, Delon Scott, was convicted of first degree murder. The trial court sentenced him to 85 years in prison.

Defendant appeals, arguing that his sentence is excessive because the trial court (1) considered an improper aggravating factor, (2) did not consider his mental health as a mitigating factor, and (3) accepted improper victim impact statements. We affirm.

In November 2007, defendant was charged with first degree murder (720 ILCS 5/9--1(a) (West 2006)) for shooting and killing Cassondra Cawthon on October 8, 2007. On September 29, 2008, defense counsel requested a fitness evaluation of defendant. The trial court entered an order appointing Dr. Zoot to examine defendant to determine his fitness to stand trial. Dr. Zoot saw defendant three times in October and November 2008. During those meetings, defendant denied that he gave a videotaped confession to police even though he was shown the videotaped confession on more than one occasion.

Dr. Zoot prepared a report in which she concluded to a reasonable degree of psychological certainty that defendant was mentally fit to stand trial. She found that defendant was "not showing evidence of a mental disorder." She believed that defendant's lack of cooperation "should be considered volitional and not the result of a mental illness." With respect to defendant's denials about making a videotaped confession, Dr. Zoot stated: "His denial of it being him in the videotape confession is difficult to assess. He may simply be denying it

is him for what he may believe is a legal gain or it may be delusional denial."

In December 2008, defense counsel presented Dr. Zoot's report to the court and stipulated to Dr. Zoot's ultimate conclusion that defendant was fit to stand trial. The trial court found defendant fit to stand trial.

In February 2009, defendant's jury trial began. Testimony at trial indicated that, on October 8, 2007, defendant was the passenger of a blue Chevrolet owned and driven by Cassondra Cawthon. At about 10:30 p.m., Cawthon was driving on I-57.

Several witnesses testified that while they were driving on I-57 at approximately 10:30 p.m., they saw a blue Chevrolet veer off the road, go into a ditch and then pull back onto the highway. When the Chevrolet was back on the roadway, the driver's door opened, and a female body fell onto the roadway. About 100 to 150 feet down the road, the Chevrolet came to a complete stop. A black man wearing a dark hoodie and tan pants exited the vehicle and ran into a field.

Within five minutes, police officers Daniel Stankus and Gary Miller of the Peotone police department arrived on the scene. They found Cawthon dead on the roadway. The Chevrolet had blood on the driver's seat and steering wheel and bullet holes in the driver's seatbelt and seat.

At the scene, Stankus and Miller heard defendant, a black man wearing a black hoodie and tan pants, yelling at them from across the highway. They approached defendant and ordered him to the ground. Defendant refused and started reaching toward his sweatshirt pocket. Miller tackled defendant and took him into custody. Defendant was verbally combative to Stankus and Miller. When he was placed in a squad car, he kicked at the back door and window and eventually kicked out the back window. Defendant was taken to a hospital, where he told a nurse that he shot his girlfriend. Drug tests revealed that defendant was under the influence of amphetamines, opiates and cannabis.

Special Agent Patrick Callaghan of the Illinois State Police met with defendant in the emergency room of the hospital. Defendant told Callaghan that he "shot her, threw her out of the car, and he killed her." Later, at the police station, Callaghan formally interviewed defendant. The interview was taped and played to the jury. In the interview, defendant stated that he shot Cawthon "two or three times," and correctly identified the type of gun used and location of the gunshots.

A few hours after the interview, police found a gun in the field where defendant said he disposed of it. The state police determined that three bullets found in and around Cawthon's body were compatible with the gun found in the field. Gunshot residue

testing on defendant revealed that he either fired a gun or was nearby when a weapon was discharged. Additionally, DNA testing demonstrated that blood on defendant's hoodie and pants was likely Cawthon's. The forensic pathologist testified that Cawthon died as a result of a close range gunshot to her head.

The jury found defendant guilty of first degree murder. The court ordered a presentence investigative report (PSI) and set a date for sentencing. Prior to the scheduled sentencing hearing, defendant filed a *pro se* motion alleging ineffective assistance of counsel. He claimed that his defense attorney was ineffective, in part, for failing to suppress his videotaped statement and not telling the jury that it "wasn't him on the dvd." The trial court denied defendant's motion.

According to the PSI, defendant was told by a psychiatrist at some point that he had ADD and/or ADHD. Defendant did not mention any other past or present mental health issues. When the probation officer who prepared the PSI asked defendant if he "saw visions, heard voices or felt compelled to hurt himself or others," defendant responded, "I don't know."

The PSI contained a statement from Cawthon's mother regarding the effect Cawthon's death had on her and her family. Additionally, at the sentencing hearing, the prosecutor read three victim impact statements -- one written by Cawthon's

mother, Crystal Cawthon, one written by Cawthon's sister, Cristy Cawthon, and one written by Cawthon's children's godmother, Tashyra Garrett. Cristy Cawthon was not present at the sentencing hearing. Defendant did not object to the statements.

At the sentencing hearing, the trial court asked defendant if he had any evidence in mitigation. Defense counsel responded, "Nothing outside the presentence investigation." Defendant argued that he was "not in his right mind" when he shot and killed Cawthon because he was under the influence of several illegal substances.

Before issuing defendant's sentence, the trial court went through each of the factors in mitigation and found that none applied. With respect to the factors in aggravation, the court first stated: "Number 1, his conduct caused or threatened serious harm, that goes without saying in any homicide case." The trial court then discussed the remaining aggravating factors. He found that several did not apply but that three did: (1) defendant had a history of criminal activity, (2) the sentence was necessary to deter others from committing the same crime, and (3) defendant was on mandatory supervised release when he committed the crime.

The trial court specifically noted that defendant did not show any remorse for his crime and appeared amused when the victim impact statements were read. The trial court found that

defendant's "character and attitude indicates that he just doesn't take this seriously at all." The trial court sentenced defendant to the maximum sentence of 60 years imprisonment for murder, plus an additional 25 year enhancement for involvement of a firearm, for a total of 85 years.

ANALYSIS

Defendant argues that the trial court erred in sentencing him the maximum term of imprisonment for first degree murder because the court (1) considered that he caused serious harm to Cawthon, an inappropriate aggravating factor, (2) ignored his mental illness, a relevant mitigating factor, and (3) allowed improper victim impact statements to be presented.

A sentence within the statutory limits for the offense will not be disturbed unless the trial court has abused its discretion. *People v. Flores*, 404 Ill. App. 3d 155, 157 (2010). 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). A trial court has wide latitude in sentencing a defendant as long as it neither ignores relevant mitigating factors nor considers improper aggravating factors. *Flores*, 404 Ill. App. 3d at 158. It is the trial court's responsibility to weigh relevant factors

and make a reasoned decision as to the appropriate punishment in each case. *Id.* A reviewing court is not to reweigh factors considered by the trial court. *Id.*

I. Aggravating Factor

Section 5--5--3.2 of the Unified Code of Corrections (Code) (730 ILCS 5/5--5--3.2 (West 2008)) sets forth the aggravating factors that a trial court is to consider when imposing sentence on a defendant. Among those factors is that the "defendant's conduct caused or threatened serious harm." 730 ILCS 5/5--5--3.2(a)(1) (West 2008).

Consideration of a factor necessarily implicit in the offense cannot be used as an aggravated factor in sentencing. *People v. Conover*, 84 Ill. 2d 400, 404 (1981). Causation of serious harm is implicit in the offense of murder. *People v. Saldivar*, 113 Ill. 2d 256, 271 (1986).

A trial court's mere mention that a defendant convicted of murder caused serious harm does not entitle the defendant to remandment for a new sentencing hearing. See *People v. Merritte*, 242 Ill. App. 3d 485, 493 (1993); *People v. Smith*, 242 Ill. App. 3d 344, 353 (1993). "It is unrealistic to suggest that the court, in sentencing defendant, must avoid mentioning that someone has died or risk committing reversible error." *People v. Benford*, 349 Ill. App. 3d 721, 735 (2004). A trial court's

remark that serious harm is an inherent element of murder does not indicate that the court considered an improper aggravating factor in sentencing. See *People v. Beals*, 162 Ill. 2d 497, 509 (1994); *Benford*, 349 Ill. App. 3d at 735; *Merritte*, 242 Ill. App. 3d at 493.

Even if a trial court considers an inappropriate factor in sentencing, the sentence will be affirmed if the record shows that the weight placed on the improper factor was so insignificant that it did not lead to a greater sentence. *People v. Bourke*, 96 Ill. 2d 327, 332 (1983). Where a trial court mentions the serious harm caused by a defendant convicted of murder, but places little weight on that factor in determining the defendant's sentence, remandment is not required. See *Beals*, 162 Ill. 2d at 510; *Benford*, 349 Ill. App. 3d at 734-35; *People v. Woidtke*, 224 Ill. App. 3d 791, 807 (1992): *Smith*, 242 Ill. App. 3d at 353; *People v. Moore*, 178 Ill. App. 3d 531, 544 (1988).

Here, the trial court addressed each of the applicable factors in aggravation in the order in which they appear in the Code. With respect to serious harm, the court stated, "that goes without saying in any homicide case." This comment indicates that the court recognized that serious harm is an inherent element of murder. It does not indicate that the court

improperly considered serious harm as an aggravating factor. See *Merritte*, 242 Ill. App. 3d at 493. Thus, we find no error.

Even assuming, *arguendo*, that the trial court considered the serious harm caused by defendant when imposing defendant's sentence, remandment is not necessary because the court did not place significant weight on that factor. In issuing defendant's sentence, the trial court focused on several factors, including defendant's prior criminal history, the fact that he was on mandatory supervised release when he committed the murder, the need to deter others from similar conduct, and defendant's lack of remorse. The court's cursory comment regarding serious harm did not affect defendant's sentence.

II. Mitigating Factor

Section 5--5--3.1 of the Code sets forth the mitigating factors a trial court is to consider when imposing sentence. 730 ILCS 5/5--5--3.1 (West 2008). One of those factors is that "[t]here were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense." 730 ILCS 5/5-5-3.1(a)(4) (West 2008).

A trial court is not required to accept a defendant's alleged excuse or justification for committing a crime and consider it as a mitigating factor in sentencing. See *People v. Rader*, 272 Ill. App. 3d 796, 807 (1995). Where a defendant

presents no definitive evidence of a mental deficiency, the trial court need not consider that as a mitigating factor. See *People v. Young*, 250 Ill. App. 3d 55, 64 (1993). The trial court, which has the opportunity to observe the defendant during trial, is in the best position to determine the defendant's mental condition. See *People v. Owens*, 139 Ill. 2d 351, 362 (1990); *People v. Bernasco*, 185 Ill. App. 3d 480, 494 (1989).

Here, defendant presented no evidence at the sentencing hearing that he suffered from a mental illness when he murdered Cawthon. The only evidence regarding defendant's mental health came from the report Dr. Zoot prepared prior to defendant's trial. In that report, Dr. Zoot concluded that defendant did not have a mental illness and suggested that defendant may have feigned mental illness as a trial tactic. The trial court witnessed defendant throughout the trial and was in the best position to determine his mental condition. We find that the trial court did not err in failing to consider defendant's alleged mental illness as a mitigating factor in sentencing.

III. Victim Impact Statements

A trial court is not bound by a rigid adherence to the usual rules of evidence at a sentencing hearing but may search anywhere within reasonable bounds for facts which tend to aggravate or mitigate an offense. *People v. Wallace*, 170 Ill. App. 3d 329,

333 (1988). The trial court's inquiry is limited only by the prerequisite that the information be considered accurate and reliable. *Id.* On appeal, it is presumed that the trial court recognized and disregarded any incompetent evidence introduced during sentencing. *People v. Fields*, 198 Ill. App. 3d 438, 441 (1990).

The Rights of Crime Victims and Witnesses Act (Act) allows victim impact statements to be presented "[i]n any case where a defendant has been convicted of a violent crime." 725 ILCS 120/6(a) (West 2008). The statement may be from "a victim of the violent crime or the victim's spouse, guardian, parent, grandparent or other immediate family or household member." *Id.* A victim impact statement that is presented orally may be done so by the victim, the victim's spouse, guardian, parent, grandparent, or other immediate family or household member or his, her or their representative. *Id.* "The court has discretion to determine the number of oral presentations of victim impact statements." *Id.*

Section 9 of the Act provides: "Nothing in this Act shall create a basis for vacating a conviction or a ground for appellate relief in any criminal case." 725 ILCS 120/9 (West 2008). The Act was intended "as a shield to protect the rights of victims and witnesses forced, through no fault of their own,

to participate in the criminal justice system." *People v. Benford*, 295 Ill. App. 3d 695, 700 (1998). It may not be used as a sword by criminal defendants. *Id.* Thus, even if a trial court errs in admitting victim impact statements that do not comply with the Act, the defendant is entitled to no relief. See *People v. Richardson*, 196 Ill. 2d 225, 230-31 (2001); *People v. Hestand*, 362 Ill. App. 3d 272, 281 (2005); *People v. Harth*, 339 Ill. App. 3d 712, 715 (2003); *People v. Mimms*, 312 Ill. App. 3d 226, 231 (2000); *Benford*, 295 Ill. App. 3d at 700.

A victim impact statement may also be admitted at sentencing pursuant to the Code. *Fields*, 198 Ill. App. 3d at 442. Section 5--4--1(a)(4) of the Code provides that the court "shall consider evidence and information offered by the parties in aggravation and mitigation." 730 ILCS 5/5--4--1(a)(4) (West 2008). Where a victim impact statement is offered by the State in aggravation, it may be properly considered by the court even if it does not strictly comply with the requirements of the Act. See *Fields*, 198 Ill. App. 3d at 442.

Here, the trial court allowed the prosecutor to read victim impact statements from Cawthon's mother, sister and the godmother of Cawthon's children. Defendant argues that the statement from Cawthon's sister should not have been allowed because she was not present at the sentencing hearing. We disagree. While the Act

states that a family member who is present at a sentencing hearing may personally read his or her victim impact statement, the Act does not require the family member's presence at the hearing. See *Wallace*, 170 Ill. App. 3d at 333. The Act allows a victim impact statement to be read by the author's "representative," such as the prosecutor in this case. See 725 ILCS 120/6 (West 2008). Thus, we find no error in the trial court's acceptance of Cristy Cawthon's statement.

Defendant also argues that Garrett's victim impact statement was improper because Garrett was not "the victim, the victim's spouse, guardian, parent, grandparent, or other immediate family or household member." See 725 ILCS 120/6 (West 2008). We agree that Garrett does not fall in any of the categories of individuals listed in the Act. Nevertheless, we find her victim impact statement to be admissible pursuant to Section 5--4--1(a)(4) of the Code as evidence offered in aggravation. See *Fields*, 198 Ill. App. 3d at 442.

Furthermore, even if the trial court erred in considering Garrett's victim impact statement, defendant is not entitled to any relief. See *Richardson*, 196 Ill. 2d at 230-31.

The order of the Will County circuit court is affirmed.

Affirmed.