2011 IL App (5th) 080354-U

NO. 5-08-0354

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Jefferson County.
	)	
v.	)	No. 06-CF-425
	)	
KRYSTA L. DONOHO,	)	Honorable
	)	Kathleen M. Alling,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Presiding Justice Chapman and Justice Stewart concurred in the judgment.

O R D E R

¶ 1 *Held*: The State proved the defendant guilty of felony first-degree murder beyond a reasonable doubt, the defendant was not denied her fundamental right to a fair and impartial trial where the trial court adequately inquired whether prospective jurors understood the principles enunciated in Supreme Court Rule 431(b) (eff. May 1, 2007), and the trial court did not abuse its discretion by considering the factors it did when sentencing the defendant. The defendant is entitled to a credit to offset her $200 DNA fine.

¶ 2 Following a jury trial, the defendant, Krysta L. Donoho, was found guilty of felony first-degree murder. The circuit court of Jefferson County sentenced the defendant to a 45-year term of imprisonment. On appeal, the defendant presents the following issues: (1) whether the State proved the defendant guilty of felony murder beyond a reasonable doubt where she claimed no evidence was presented to show that the defendant participated in the robbery, (2) whether the defendant was denied her fundamental right to a fair and impartial trial where she claimed the trial court failed

to adequately inquire whether prospective jurors understood the principles enunciated in Supreme Court Rule 431(b) (eff. May 1, 2007), (3) whether the trial court abused its discretion where she claimed the court considered a factor inherent in the offense when sentencing the defendant, and (4) whether she is entitled to an additional $5-a-day credit against her $200 DNA fine for the time she spent in presentence incarceration.

¶ 3 On July 25, 2006, the defendant was charged by information with one count of first- degree murder in that while committing the forcible felony of robbery in violation of section 18-1 of the Criminal Code of 1961 (the Code) (720 ILCS 5/18-1 (West 2006)), Randy Farrar was shot with a gun, thereby causing his death in violation of section 9-1(a)(3) of the Code (720 ILCS 5/9-1(a)(3) (West 2006)). Count II alleged that the defendant committed the offense of robbery in that she knowingly took property from the presence of Randy Farrar, by use of force, in violation of section 18-1(a) of the Code (720 ILCS 5/18-1(a) (West 2006)). A bill of indictment charging the same was entered on August 28, 2006. The codefendants, Demetrius Cole and Christopher Watkins, were also charged with the same offenses.

¶ 4 A jury trial commenced on November 13, 2007. Kelly Tinsley testified that she had been Randy Farrar's business manager at his business, Swanson Property Management. Her office was located in Farrar's home and she was familiar with his house. Tinsley last spoke with Farrar on June 30, 2006. On the morning of July 5, 2006, Tinsley arrived at her office in Farrar's home to find the house in disarray. She saw blood on the basement steps and eventually found Farrar dead in the basement.

¶ 5 Tinsley testified that she was somewhat familiar with Farrar's personal habits. According to Tinsley, Farrar did not have a girlfriend and she believed that he paid

women for sex. Tinsley knew that Farrar kept a large amount of money under his bed at his house, which he would jokingly refer to as his "bail money."

¶ 6 Lisa Bradford testified that she had met Farrar in March 2004. From March 2004 until Farrar's death in July 2006, Farrar had paid Bradford to have sex with him approximately once a week. Bradford was aware that Farrar kept money in his house and she knew that he kept money in a drawer under his bed, in a safe in the closet, and in his bathroom under a drawer. She testified that she had seen stacks of hundred-dollar bills in his house. Bradford last saw Farrar on Friday, June 30, 2006. She was supposed to have spent Fourth of July weekend with him, but he never answered his phone.

¶ 7 Gwendolyn Jones testified that the codefendants, Demetrius Cole and Chris Watkins, were her sons. She also testified that she had known the defendant for about three years. The defendant was Cole's girlfriend. The defendant had previously lived with Jones in the summer of 2006. During the summer of 2006, Jones's telephone number at her residence was "244-0536."

¶ 8 Jones testified that on June 24, 2006, Jones and the defendant went to a liquor store to buy beer. As Jones was coming out of the liquor store, Farrar was entering the liquor store and approached her and asked the defendant's name. Jones told Farrar to ask the defendant. Farrar asked the defendant what her name was and the defendant lied and responded that her name was "Susan." The defendant asked Farrar for money and he gave her $5 and a card with his phone number on it. After Jones and the defendant returned to Jones's home, the defendant said that she was going to Farrar's house to get money. Jones told the defendant that she should not go to Farrar's house because "that would be wrong." Jones assumed that the defendant had gone to Farrar's house because thereafter he would call her house looking for the

defendant.

¶ 9 Jones also testified that she once went to a bar with Farrar and the defendant. Farrar bought drinks for the defendant and the defendant flirted with Farrar. Farrar sat with his arm around the defendant. The defendant was still using the name "Susan." Jones then testified that on July 1, 2006, Cole, Watkins, the defendant, and a 16-year-old girl, Chandra Jones, were drinking in her backyard. The defendant told Jones that she was going to Farrar's house to get some money from him. The defendant, Cole, Watkins, and Chandra Jones left in a white Ford Expedition.

¶ 10 Chandra Jones testified that on July 1, 2006, she met Cole, Watkins, and the defendant. She was walking down the street while the group was in a white Ford Expedition on the corner of Conger and 17th Streets in Mt. Vernon. The group called her over and they began sitting on the vehicle, drinking, and getting to know each other. Shortly thereafter, the group, including Chandra, left in the Expedition. The defendant told her that they were going to Farrar's house to get some money. The defendant also told her that she had previously gone to Farrar's house to get money from him. On the way, they stopped at a Casey's gas station and the defendant went inside to use the pay phone.

¶ 11 When they arrived at Farrar's house, the defendant and Chandra walked up to the door and knocked. Farrar told the defendant that Chandra's "company was not welcome." The defendant went inside Farrar's house and Chandra went back to the white Ford Expedition, which was parked across the street in a driveway. Cole and Watkins got out of the vehicle and started talking to each other, but Chandra could not hear what they were saying. Watkins got back into the vehicle and drove over to Farrar's side of the street. After a couple minutes, Cole returned to the vehicle and backed into Farrar's driveway. Cole and Watkins then left the vehicle, leaving

Chandra alone in the back seat.

¶ 12 Chandra could see into Farrar's house through a "really big" picture window at the front of the house. Cole and Watkins entered the house and crawled along the floor, approaching the defendant and Farrar. Cole and Watkins began beating Farrar, he fell to the floor, and they continued to kick him. They lifted Farrar and walked him across the room in front of the big picture window. The light was then turned off and Chandra could no longer see them. Chandra then heard a gunshot. The defendant opened the front door, stepped outside, screamed, and then went back into the house. Chandra testified that she heard a second gunshot and saw the defendant begin running back and forth in front of the big picture window. Watkins returned to the vehicle with what looked like a handful of hundred-dollar bills. Watkins went back into the house. A few minutes later, the defendant came out of the house carrying a glass, a pen, and a knife.

¶ 13 The group left and made a few stops, including at a Circle K to get gas. They also went to a McDonald's and Watkins and Cole went inside while Chandra and the defendant remained in the vehicle. They then went to a Sonic restaurant where the defendant threw the glass, pen, and knife in a dumpster. They continued to Wal-Mart. Cole asked for Chandra's purse and stuffed soiled clothing into Chandra's purse and handed it to the defendant. The defendant took the purse into Wal-Mart and disposed of the purse.

¶ 14 The group then returned to Farrar's house. The defendant went back into the house to look for a change bowl. The defendant could not find it so Watkins went inside the house and located the bowl and brought it back to the vehicle. They then left and while driving, Cole threw the change from the bowl out of the window. They returned back to Gwendolyn Jones's house. The defendant, Watkins, and Cole then

left for a short period of time, leaving Chandra at Jones's house. When they returned, Watkins gave Chandra money.

¶ 15 John Kemp, the lead detective at the Jefferson County sheriff's department, testified that he had arrived on the murder scene on July 5, 2006. He was alerted that Farrar's lifeless body had been found in the basement. Kemp went to Farrar's bedroom and observed several drawers pulled out, including a drawer from underneath the bed. Farrar's wallet was found with his driver's license and credit cards, but with no cash. Detective Kemp also testified that a yellow Post-it note was found on Farrar's nightstand that had the name "Susan" and telephone number "244-0536" written on it.

¶ 16 Kemp checked Farrar's cell phone for incoming and outgoing calls and voice messages. Detective Kemp explained that the telephone records were eventually subpoenaed. The records revealed that on the date of the murder, July 1, 2006, there was a voice mail message from a woman identifying herself as "Susan." Farrar had called the telephone number "244-0536" on June 25, 2006. From June 24, 2006, through July 1, 2006, phone calls from the telephone number "244-0536" were placed to Farrar 18 times. During that same time frame, Farrar had called the telephone number "244-0536" four times. There were also several incoming calls to Farrar on July 1, 2006, from the telephone number "244-0536" and a couple phone calls from Casey's gas station. The detective learned that the telephone number "244-0536" belonged to the residence of Gwendolyn Jones, the mother of Cole and Watkins, and where the defendant had been residing. Surveillance videos were also subpoenaed. The surveillance tapes from Circle K gas station showed Watkins and Chandra Jones. The surveillance tapes from McDonald's showed Watkins and Cole, and the surveillance tapes from Casey's gas station showed the defendant.

¶ 17 The defendant was tried before a jury, and on November 29, 2007, the defendant was found guilty of first-degree murder and robbery. On December 31, 2007, the defendant's motion for a judgment notwithstanding the verdict or for a new trial was denied. On March 18, 2008, the defendant was sentenced to a 45-year term of imprisonment. The defendant filed a motion to reduce sentence on April 14, 2008, which was denied on July 1, 2008. The defendant then filed a timely notice of appeal.

¶ 18 The defendant first argues that the State failed to prove her guilty beyond a reasonable doubt of felony murder where she claims no evidence was presented to show that she participated in the robbery. When reviewing the sufficiency of evidence, the standard of review 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." (Emphasis in original.) *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). A reviewing court should not substitute its judgment for that of the trier of fact on matters concerning the weight of the evidence or the credibility of the witnesses. *People v. Jackson*, 232 Ill. 2d 246, 280-81 (2009). Accordingly, a criminal conviction will not be set aside unless the evidence presented was so unsatisfactory or improbable that a reasonable doubt of the defendant's guilt remains. *People v. Brown,* 185 Ill. 2d 229, 247 (1998).

¶ 19 Section 9-1(a)(3) of the Code (720 ILCS 5/9-1(a)(3) (West 2006)) provides that to sustain a conviction of felony murder, the State must prove that the defendant, or one for whose conduct she was legally responsible, performed the acts that caused the death of the victim and that the defendant or one for whose conduct she was legally responsible was attempting to commit the underlying forcible felony. Section 2-8 of the Code provides that robbery is a forcible felony. 720 ILCS 5/2-8 (West

2006). Section 18-1 of the Code provides that robbery occurs when an individual takes property from the person or presence of another by the use of force or threatening the imminent use of force. 720 ILCS 5/18-1 (West 2006).

¶ 20 While robbery may be a predicate felony for first-degree murder, to obtain a conviction for felony murder premised on robbery, the State is not required to prove that the defendant intended to kill the victim or knew that her acts created a strong probability of killing the victim. *People v. Battle*, 393 Ill. App. 3d 302, 313 (2009). Rather, in order to support a charge of felony murder, the predicate felony that underlies the charge of felony murder must have an independent felonious purpose. *People v. Davis*, 233 Ill. 2d 244, 264 (2009). Furthermore, the defendant need not actually be the one who killed the victim, but the defendant may be found guilty of first-degree murder under a theory of accountability. 720 ILCS 5/5-2(c) (West 2006). To establish accountability, the State must prove beyond a reasonable doubt that (1) the defendant solicited, ordered, abetted, agreed, or attempted to aid another in the planning or commission of the crime, (2) the defendant's participation took place before or during the commission of the crime, and (3) the defendant had the concurrent intent to promote or facilitate the commission of the crime. *People v. Garrett*, 401 Ill. App. 3d 238, 243 (2010).

¶ 21 The defendant argues that while there is no doubt that a robbery occurred and a murder was committed during the course of that robbery, there is no evidence that the defendant either committed the offenses or is accountable for one who did. However, after a thorough review of the record and evidence in this case, we disagree with the defendant's argument. The defendant was well acquainted with Farrar and knew that Farrar kept money in his house. Witnesses testified that the defendant had gone to Farrar's house to get money from him on more than one occasion. Peculiarly,

the defendant lied to Farrar about her real name and told him her name was "Susan." On the day of the murder, there was a voice mail on Farrar's phone from a woman identifying herself as "Susan." There were also numerous telephone records where Farrar and the defendant had placed phone calls to each other from June 24, 2006, through July 1, 2006. The telephone number which the defendant used to contact Farrar was later identified as Gwendolyn Jones's telephone number at her residence where the defendant resided during that time period. A Post-it note was also discovered on Farrar's nightstand with the name "Susan" and Gwendolyn Jones's home telephone number "244-0536." Both Gwendolyn Jones and Chandra Jones testified that the defendant had stated to them on July 1, 2006, that she was going to Farrar's house to get money from him. The defendant called Farrar several times on that day. There was ample evidence presented by the State to prove the defendant guilty beyond a reasonable doubt.

¶ 22 Chandra testified about the details of the robbery and murder of Farrar. The defendant did not leave Farrar's house to withdraw her involvement in the robbery with Cole and Watkins. Instead, she remained inside Farrar's house. Even after gunshots went off, the defendant opened the front door, stepped outside, and screamed; however, she did not withdraw, but went back inside the house. The defendant left the scene with a glass, a pen, and a knife in her hand that she had taken from Farrar's house, which she disposed of in a dumpster at a Sonic restaurant. The defendant also threw away more incriminating evidence at a Wal-Mart store. When officers arrived at the scene, cash from Farrar's wallet was missing and the money he stored under his bed was missing. Chandra also testified that she observed that Watkins had a lot of money in his hand when he returned to the vehicle.

¶ 23 This evidence was sufficient to establish the defendant's guilt of the underlying

robbery beyond a reasonable doubt. Because the defendant need not actually be the one who killed Farrar, the evidence was also sufficient to prove her guilty of first-degree murder under a theory of accountability. We conclude that the State proved the defendant guilty beyond a reasonable doubt of felony first-degree murder.

¶ 24 The defendant next argues on appeal that she was denied her fundamental right to a fair and impartial trial, claiming the trial court failed to adequately inquire whether prospective jurors understood the principles enunciated in Supreme Court Rule 431(b) (eff. May 1, 2007). Pursuant to Supreme Court Rule 431(b), the trial judge is required to ask the potential jurors individually or in a group whether they understand and accept the following principles: (1) that a defendant is presumed innocent of the charges, (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt, (3) that the defendant is not required to offer any evidence on his or her behalf, and (4) that the defendant's failure to testify cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's failure to testify when the defendant objects. We note that the trial judge made the following comment to the first panel of prospective jurors:

"The law requires that a juror understand and accept that a defendant does not need to testify, to put on any defense or otherwise to prove her innocence. The State has the burden of proving the defendant guilty beyond a reasonable doubt. Can you accept this presumption of innocence?"

¶ 25 The trial court went on to make similar comments to each subsequent jury panel. The State notes that the defendant neither objected at trial nor included this issue in her posttrial motion. Accordingly, the State argues that the defendant has forfeited this issue on appeal. We may review an issue not properly raised as plain

error if we conclude that an error affecting a substantial right has occurred. *People v. Enoch*, 122 Ill. 2d 176, 198-99 (1988). The plain error doctrine will only be applied where the evidence is closely balanced or if the alleged error is of such magnitude that the defendant is denied a fair and impartial trial. *People v. Turner*, 128 Ill. 2d 540, 555 (1989).

¶ 26 The defendant contends that although the trial court mentioned most of the principles of Rule 431(b), [the trial court failed to ask potential jurors if they understood and accepted that the defendant's failure to testify could not be held against her.] The defendant argues that this error is so fundamental and of such magnitude that she was denied the right to a fair trial.

¶ 27 We note that our supreme court has noted that the "essential point is that a trial court's failure to comply with Rule 431(b) does not automatically result in a biased jury, regardless of whether that questioning is mandatory or permissive under our rule." *People v. Thompson*, 238 Ill. 2d 598, 610 (2010). Our supreme court has also held that " '[i]t is not the policy of this court to reverse a judgment of conviction merely because error was committed unless it appears that real justice has been denied.' " *People v. Dudley*, 58 Ill. 2d 57, 61 (1974) (quoting *People v. Morehead*, 45 Ill. 2d 326, 322 (1970)). The burden of persuasion remains on the defendant under both prongs of the plain error test. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009).

¶ 28 In the instant case, we conclude that the trial court complied with three of the four principles in Rule 431(b). However, the defendant has failed to show that she was tried by a biased jury or that the error was structural, requiring automatic reversal. See *People v. Averett*, 237 Ill. 2d 1, 12 (2010). An error is structural, requiring automatic reversal, "only if it necessarily renders a criminal trial fundamentally unfair or an unreliable means of determining guilt or innocence." *Thompson*, 238 Ill. 2d at

609. Structural errors include a complete denial of counsel, denial of self-representation at trial, trial before a biased judge, denial of a public trial, racial discrimination in the selection of a grand jury, and a defective reasonable doubt instruction. *Averett*, 237 Ill. 2d at 13. Here, the defendant has not shown that the trial court's error is so fundamental and of such magnitude that she was denied the right to a fair trial.

¶ 29 The defendant next argues on appeal that her sentence must be vacated and the cause remanded for resentencing because the trial court considered a factor inherent in the offense when sentencing her to a 45-year term of imprisonment. The defendant argues that the trial court abused its discretion because it "attached great significance" to the fact that the defendant's conduct caused or threatened serious harm to the victim in aggravation. The defendant contends that first-degree murder requires death and the trial court listed that the defendant's conduct caused or threatened serious harm. As a preliminary matter, we note that the defendant failed to raise this issue during the hearing on the motion to reconsider sentence or in her postsentencing motion. As such, she has forfeited this issue on appeal. Regardless, we will address her claim.

¶ 30 The sentencing court is in the best position to consider matters relating to sentencing determinations and is vested with wide discretion in making a reasoned judgment on the penalty appropriate for the circumstances of each case. *People v. Workman*, 368 Ill. App. 3d 778, 789 (2006). Where a trial court has considered all the factors in mitigation and aggravation, a reviewing court will not reweigh those factors. *People v. Camp*, 201 Ill. App. 3d 330, 340 (1990). A reviewing court should not alter a sentence on review absent a showing that the sentence imposed constitutes an abuse of discretion. *People v. Beals*, 162 Ill. 2d 497, 505 (1994). An abuse of

discretion occurs when the judgment of the trial court is manifestly unjust. *People v. Anderson*, 112 Ill. 2d 39, 46 (1986). Before a court will interfere with the sentence imposed, it must be manifest from the record that the sentence is excessive and not justified under any reasonable view of the record. *People v. Smith*, 214 Ill. App. 3d 327, 338 (1991). When the sentence imposed is within the statutory limits, a rebuttable presumption arises that the sentence imposed was proper and is only overcome by an affirmative showing that the sentence imposed varies greatly from the purpose and spirit of the law. *People v. Chambers*, 258 Ill. App. 3d 73, 92 (1994).

¶ 31 Pursuant to section 5-8-1(a)(1)(a) of the Unified Code of Corrections (730 ILCS 5/5-8-1(a)(1)(a) (West 2006)) the defendant was eligible for a sentence of not less than 20 years and not more than 60 years' imprisonment for first-degree murder. [The defendant was sentenced to a 45-year term of imprisonment, which was a sentence in the middle of the statutory range.] See *People v. Workman*, 368 Ill. App. 3d 778, 789 (2006). A review of the record reveals that the trial court considered the defendant's conduct causing or threatening serious harm, as well as additional factors including the defendant's prior criminal activity and the defendant's presentence investigation (PSI). The PSI revealed that the defendant had committed crimes of violence against a family member and obstruction of the police. The PSI also revealed that a medical evaluation stated that the defendant is angry, rebellious, and aggressive at home and school. Although the defendant alleged she was abused by her father, the defendant failed to take advantage of counseling and guidance offered through the probation office and the defendant's probation was revoked for failing to comply with its rules and regulations. The court further noted that there is a probability that the defendant will be dangerous in the future and the court believed

such a sentence is necessary to deter others.

¶ 32 As to factors in mitigation, the court did not accept that the defendant's conduct did not contemplate any resulting harm to the victim. The court noted that the defendant was the one who "set him up" for robbery. The defendant went to Farrar's house to receive money from him and he had no intention of harming her. However, the defendant and the codefendants went to Farrar's house to rob him, and but for the defendant's actions, the court believed that Farrar would still be alive.

¶ 33 The court considered many factors in fashioning a sentence and did not only rely on the death of the victim as a major factor. The rule that a court may not consider a factor inherent in the offense is not meant to be applied rigidly, because sound public policy dictates that a sentence be varied in accordance with the circumstances of the offense. *People v. Cain*, 221 Ill. App. 3d 574, 575 (1991). A trial court's reliance on an improper factor does not always necessitate a remand for resentencing. *People v. Andrews*, 105 Ill. App. 3d 1109, 1113 (1982). Where a trial court observes that a defendant's conduct causes death, but the record clearly reveals that the trial court relied on other factors, it may be concluded that "any weight that the trial court placed on the fact that the defendant's conduct caused the ultimate harm was insignificant, and did not result in a greater sentence." *Beals*, 162 Ill. 2d at 510. While the trial court did recite this as a factor in aggravation, it did so in passing and put little weight on it while discussing other factors in aggravation at length. The trial court considered the defendant's demeanor, general moral character, and mentality. The sentence would have remained the same regardless of the trial court's mention of the factor of death or serious harm to the victim. Accordingly, we conclude that the trial court did not abuse its discretion in sentencing the defendant.

¶ 34 The defendant's last argument is that she is entitled to an additional $5-a-day

credit against her $200 DNA fine for the time spent in presentencing incarceration. Pursuant to section 5-8-7(b) of the Unified Code of Corrections (730 ILCS 5/5-8-7(b) (West 2006)), the defendant must be given credit against her prison sentence for time spent in custody as a result of the offense for which the sentence was imposed. Section 110-14(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14(a) (West 2006)) further provides: "Any person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of $5 for each day so incarcerated upon application of the defendant. However, in no case shall the amount so allowed or credited exceed the amount of the fine."

¶ 35 In this case, the only fine imposed on the defendant was a $200 DNA fee. The defendant spent 515 days in presentence incarceration, for a total of $2,575 credit. Because the amount the defendant is entitled to receive exceeds the fee, she is limited to a $200 offset. The State concedes that the defendant is entitled to a full offset of the $200 DNA fee and that the mittimus should be amended to reflect the offset. We therefore conclude that the defendant is entitled to a $200 offset and the mittimus should be amended accordingly.

¶ 36 For the foregoing reasons, the judgment entered by the circuit court of Jefferson County is hereby affirmed and modified only to reflect that the defendant is entitled to an offset of $200 for her time served in presentence incarceration.

¶ 37 Affirmed as modified.