2013 IL App (5th) 120197-U

NO. 5-12-0197

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Jackson County.
	)	
v.	)	No. 11-CF-600
	)	
JOSEPH NEWMAN,	)	Honorable
	)	William G. Schwartz,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Justices Stewart and Wexstten concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant waived his argument challenging his sentence as excessive where he failed to file a motion to reconsider with the trial court and could not demonstrate a clear or obvious error that would afford him review under the plain-error doctrine.

¶ 2 The defendant, Joseph Newman, was charged with armed robbery, a Class X felony, pursuant to section 18-2(a)(1) of the Criminal Code of 1961 (720 ILCS 5/18-2(a)(1) (West 2010)), on November 7, 2011. He was found guilty of that charge on February 5, 2012, and was sentenced to 10 years' imprisonment. He now appeals, arguing that his sentence was excessive and that he should have been credited with 164 days in presentence custody rather than the 134 days with which he was credited. Based upon the following, we affirm the sentence of 10 years and pursuant to our authority under Illinois Supreme Court Rule 615(b)(1), we order the clerk of the circuit court to correct the mittimus to reflect a credit of 164 days.

¶ 3 At the defendant's trial, the victims Brittany Bieter and Alexander Radcliff testified that on the night of November 5, 2011, around midnight, they were outside the trailer in which Radcliff lived. They testified that after getting out of a car, they saw two men running toward them. They testified that the two men had guns in their hands. They advised that the men told them to get on the ground. Bieter advised that when she refused to get on the ground, one of the men struck her in the front of the head with his gun. She testified that it hurt, although it did not break the skin. Bieter testified that she believed the gun with which she was struck was a "real" gun, but unloaded.

¶ 4 Bieter testified that she knelt to the ground after being struck and one of the men began to search her, taking her cell phone. He then made her retrieve her purse from the car and dump it out in the front seat. She testified that she was then required to get back on the ground while the man searched through the items until he found her wallet. She testified that he took out her debit card and asked her what the PIN number was. She told him she did not know the number and he then cocked the gun. She testified that because he had been rummaging in his pocket, she believed he had loaded the gun. Bieter testified that the man continued to ask for the PIN but she continued telling him she did not know it. She testified that a car pulled into the trailer park and the two men then ran away. She advised that the man took her wallet, its contents, including her debit card and credit cards, and her cell phone.

¶ 5 Radcliff testified that one of the men put a gun to his head and he believed it was a real semiautomatic weapon. He testified that the man told him to " '[g]ive [him] everything [he] had.' " He testified that the man made him hand over a knife he had in his pocket. He advised that when another vehicle pulled into the parking lot, the two men took off running.

¶ 6 Radcliff and Bieter both testified that the men wore face-coverings during the robbery, and they were unable to identify the defendant at trial. Additionally, it was revealed at trial

that the weapons used during the robbery were BB guns rather than semiautomatic handguns.

¶ 7 ANALYSIS

¶ 8 Sections 5-5-3.1 and 5-5-3.2 of the Unified Code of Corrections (730 ILCS 5/5-5-3.1, 5-5-3.2 (West 2010)) set forth mitigating and aggravating factors to which a trial court is required to give consideration in sentencing. However, " '[t]here is no mandatory requirement that the trial judge recite all' the mitigating and aggravating factors 'before imposing sentence.' " *People v. Spicer*, 379 Ill. App. 3d 441, 469 (2007) (quoting *People v. Jackson*, 375 Ill. App. 3d 796, 802 (2007)). Rather, " '[i]t is presumed that the trial judge considered all of the factors unless the record indicates to the contrary.' " *Id.* (quoting *People v. Jackson*, 375 Ill. App. 3d 796, 802 (2007)). One aggravating factor of relevance in this case is that "the sentence is necessary to deter others from committing the same crime." 730 ILCS 5/5-5-3.2(a)(7) (West 2010). The mitigating factors of relevance or claimed relevance in this case are as follows:

> "(1) The defendant's criminal conduct neither caused nor threatened serious physical harm to another.
>
> (2) the defendant did not contemplate that his criminal conduct would cause or threaten serious physical harm to another.
>
> * * *
>
> (7) The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present crime.
>
> * * *
>
> (9) The character and attitudes of the defendant indicate that he is unlikely to commit another crime.
>
> * * *

(11) The imprisonment of the defendant would entail excessive hardship to his dependents." 730 ILCS 5/5-5-3.1 (West 2010).

¶ 9 While we may reduce a defendant's sentence (Ill. S. Ct. R. 615(b)(4)), "[t]hat power *** should be exercised cautiously and sparingly." (Internal quotation marks omitted.) *People v. Alexander*, 239 Ill. 2d 205, 212 (2010) (quoting *People v. Jones*, 168 Ill. 2d 367, 378 (1995) (quoting *People v. O'Neal*, 125 Ill. 2d 291, 300 (1988))). We "may not alter a defendant's sentence absent an abuse of discretion by the trial court." *Id.* (citing *People v. Hauschild*, 226 Ill. 2d 63 (2007)). " 'The trial judge has the opportunity to weigh such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age.' " *Id.* at 213 (quoting *People v. Stacey*, 193 Ill. 2d 203, 209 (2000)). Therefore, we "must not substitute [our] judgment for that of the trial court merely because [we] would have weighed these factors differently." *Id.* (quoting *People v. Stacey*, 193 Ill. 2d 203, 209 (2000)). A sentence constitutes an abuse of discretion when it is " 'greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense.' " *Id.* at 212 (quoting *People v. Stacey*, 193 Ill. 2d 203, 210 (2000) (citing *People v. Fern*, 189 Ill. 2d 48, 54 (1999))). "When a trial court considers an improper factor in aggravation, the case must be remanded unless it appears from the record that the weight placed upon the improper factor was so insignificant that it did not lead to a greater sentence." *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 18 (citing *People v. Dowding*, 388 Ill. App. 3d 936, 945 (2009)); *People v. Johnson*, 347 Ill. App. 3d 570, 576 (2004); *People v. Schutz*, 201 Ill. App. 3d 154, 162 (1990) (citing *People v. Bourke*, 96 Ill. 2d 327, 332 (1983)). Additionally, "if the sentencing judge *** makes comments indicating he did not consider the statutory factors, a defendant is entitled to a new sentencing hearing." *People v. Walker*, 2012 IL App (1st) 083655, ¶ 30 (citing *People v. Primm*, 319 Ill. App. 3d 411, 425 (2000)).

¶ 10 The defendant concedes that he did not file a motion to reconsider sentence as is required by Illinois Supreme Court Rule 605 (eff. Oct. 1, 2001); however, he invites us to apply the plain-error doctrine.

¶ 11 "The plain-error doctrine is a narrow and limited exception" (*People v. Hillier*, 237 Ill. 2d 539, 545 (2010) (citing *People v. Bannister*, 232 Ill. 2d 52, 65 (2008)) under which "a defendant must first show that a clear or obvious error occurred." *Id.* (citing *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)). In challenging one's sentence under the doctrine, "a defendant must [also] show either that (1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing." *Id.* (citing *People v. Hall*, 195 Ill. 2d 1, 18 (2000)). The defendant bears the burden of persuasion on both prongs. *Id.* (citing *People v. Naylor*, 229 Ill. 2d 584, 593 (2008); *People v. Herron*, 215 Ill. 2d 167 (2005)).

¶ 12 The defendant argues that several mitigating factors apply in this case. He first posits that other than a prior ordinance violation for underage consumption of alcohol, this case is his first encounter with the criminal justice system. He further argues that neither victim "suffered serious harm." The defendant asserts that the robbery was committed with the use of an unloaded BB gun. He points out that the victim struck with the BB gun suffered only "a short headache," and that the blow did not break the skin.

¶ 13 The defendant asserts that he did not contemplate that his conduct would cause or threaten serious physical harm. Additionally, the defendant argues that his character and attitude indicate that he is unlikely to commit another crime. The defendant points to "numerous letters in mitigation saying that *** Newman was a hard-working young man and a diligent student who had successfully avoided the bad influences around him while growing up, and that this offense was 'totally out of character' for him."

¶ 14 The defendant points out that "[a]s a college freshman, [he] was a full-time student

and a father, and still managed to work as a receptionist at the college radio station." He argues that his "imprisonment will cause serious hardship to his dependents." He points to the letter by his girlfriend to the court, which described him as a "loving father and a 'family-oriented man.' "

¶ 15 The defendant argues that "[t]he trial court made no mention of any of these numerous mitigating factors before imposing sentence ***." However, as the State points out, the record reveals otherwise. The court stated as follows prior to sentencing the defendant:

> "But there is enough people who have written about the good things that you did, about the good grades that you've got, about the positive attitude you show through grammar school and through high school, that it's not the guy that I see or tried here in this courtroom. Somewhere along the line and fairly rapidly, you've gotten hardened, you've gotten nasty. And I don't know what it is."

The court also mentioned the defendant's daughter, telling the defendant, "You hold your child out as your dearest most precious thing in life," but "[i]nstead of being with [her] that day, instead of doing all the things a father should do and you purport yourself to be doing, you're hanging around with Antoine, running around robbing people."

¶ 16 The defendant argues that the trial court erred by "focusing primarily on his personal disgust for the crime and the fact that it occurred in his community." In this regard, the defendant refers to the court's comments that this crime was a "hideous act" and that the defendant had "come down here" and "fouled the community" along with fouling Southern Illinois University. The defendant points to further language of the trial judge:

> "You have affected lives in the community. Once upon a time, you could safely walk down the streets in Carbondale outside of your house. Not anymore. People sticking people[ ] up with guns, whacking them in the head with guns. Why? Why? *** I'm not going to have it in this community. You're going to prison. You're going to

prison for ten years."

¶ 17 The defendant cites *People v. Henry*, 254 Ill. App. 3d 899, 905 (1993), to support his argument that the trial court's focus on his personal opinion in sentencing requires remand. In *Henry*, a case involving convictions for armed robbery and aggravated battery, the trial court stated the following to the defendant: " 'This is really a disgusting crime. And that's why you are given this amount of time.' " *Id.* at 904. The appellate court remanded for sentencing, noting that, "[b]ased upon the clarity of the trial court's statement, we cannot say that the court did not rely upon its own opinion of the crime when it sentenced defendant." *Id.* at 905.

¶ 18 The State cites *People v. Walker*, 2012 IL App (1st) 083655, ¶ 36, to support its argument that we should find the court's comments "to be proper statements of the circumstances of defendant's crime, and not an expression of personal opinion."

¶ 19 We agree with the State. As the *Walker* court determined when it considered the defendant's *Henry*-based arguments (*id.*), the present case is also readily distinguishable from *Henry* in that here, the trial court did not specifically state that the sentence he was about to impose was based on his personal disgust of the crime as did the judge in *Henry*. Rather, he pointed to the "attitude" that the defendant had "been portraying," advising the defendant that "[t]hat's the attitude for which you're going to prison." While the attitude of the defendant is relevant to at least one mitigating factor ("The character and attitudes of the defendant indicate that he is unlikely to commit another crime." 730 ILCS 5/5-5-3.1(a)(9) (West 2010)), it is not listed as an aggravating factor. Nonetheless, the statutory list of aggravating factors "is not exclusive." *People v. Floyd*, 160 Ill. App. 3d 80, 88 (1987). "When considering aggravating or mitigating factors in imposing sentence, a trial court may properly consider nonstatutory aggravating factors." *Id.* (citing *People v. Zehr*, 143 Ill. App. 3d 875, 879 (1986); *People v. Allen*, 119 Ill. App. 3d 845, 846 (1983)). We also agree with the State

that the circumstances of a crime along with its effect on the community are relevant to the aggravating factor of deterrence.

¶ 20 The defendant argues that the court errantly considered "the inherent danger of the offense as a factor in aggravation" with the comments "[p]eople sticking people[ ] up with guns" and "whacking them in the head with guns." The State, however, points out that the offense of armed robbery only requires that the defendant "carr[y] on or about his or her person or [be] otherwise armed with a dangerous weapon other than a firearm." 720 ILCS 5/18-2(a)(1) (West 2010). We agree with the State that the circumstances of this case as described by the judge went beyond the mere basics required by the statute, considering that one of the victims was struck in the head and threatened in order for her to give up her ATM PIN number.

¶ 21 The State posits that the fact that the court sentenced the defendant to 10 years' imprisonment rather than the 12 years sought by the State indicates that the court considered mitigating factors in determining the sentence. The State also indicates that the defendant's sentence was not far from the minimum of 6 years, considering that the maximum sentence is 30 years. 730 ILCS 5/5-4.5-25 (West 2010). We agree with the State, and we find no clear or obvious error on the part of the trial court that would allow the defendant to escape the waiver rule.

¶ 22 Finally, the defendant argues that on the date of sentencing, he had spent 164 days in custody, yet he was only credited with 134 days. The defendant asserts that his mittimus should be amended to reflect 164 days of credit, and the State concedes as much. We find the defendant's point in this regard to be well-taken. Therefore, we order the clerk of the circuit court to correct the mittimus to reflect 164 days of credit for presentence custody.

¶ 23 CONCLUSION

¶ 24 We affirm the judgment of the circuit court as modified to reflect the correct amount

of time served in presentence custody.

¶ 25 Affirmed as modified.