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2012 IL App (3d) 100793-U

Order filed May 4, 2012

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
Plaintiff-Appellee,	)	Will County, Illinois,
	)	
v.	)	Appeal No. 3-10-0793
	)	Circuit No. 08-CF-90
ALEXANDER MOORE,	)	
	)	Honorable
Defendant-Appellant.	)	Carla Alessio-Policandriotes,
	)	Judge, Presiding.

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PRESIDING JUSTICE SCHMIDT delivered the judgment of the court.  
Justices Holdridge and Wright concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court did not abuse its discretion when it denied a jury instruction on involuntary manslaughter, but allowed an instruction on voluntary intoxication. Likewise, we find no abuse of discretion in sentencing.

¶ 2 A Will County jury convicted Alexander Moore of first degree murder in the shooting death of Kyle Parnell (720 ILCS 5/9-1(a)(1) (West 2008)). The trial court sentenced him to 48 years' imprisonment before adding the required 25-year firearm enhancement. Defendant appeals, arguing that: (1) he was denied due process when the trial court refused to give a jury

instruction on involuntary manslaughter, but allowed a nonpattern jury instruction on voluntary intoxication, and (2) his sentence was excessive. We affirm.

¶ 3 FACTS

¶ 4 I. Trial

¶ 5 On February 7, 2008, defendant was charged by indictment with first degree murder. 720 ILCS 5/9-1(a)(1), (a)(2) (West 2008). The indictment alleged that on January 12, 2008, defendant shot Kyle Parnell with a firearm that proximately caused his death.

¶ 6 The cause proceeded to a jury trial. Jasmine Berry testified that on January 11, 2008, at approximately 10:30 or 11 p.m., she went to a recording studio, where Parnell worked, with Bianca Cousin, Danzell Mitchell, and Darrell McGee. Parnell arrived shortly after, and they all went into the studio to record music. Defendant arrived at the studio about 45 minutes later with his younger cousin. Berry testified that defendant had an automatic gun in the waistband of his pants. When defendant entered the studio he lifted up his shirt to show his gun. Defendant also pointed the gun at Berry and teased her, but she did not believe defendant was going to shoot her. At some point, defendant left to take his cousin home and returned to the studio by himself.

¶ 7 Berry testified that there was a party at the studio and people were smoking marijuana. At approximately 12:40 a.m., Berry went outside with Cousin because they were going to leave. Defendant was outside, and after Berry spoke to him he went inside the studio. Berry and Cousin waited in Berry's vehicle for Mitchell to come outside. While waiting, defendant came out of the studio and walked past Berry's car and said "you haven't seen anything. You-all don't know anything[.]" Defendant then got into his vehicle and left. Shortly after, Mitchell and McGee came out of the studio and got into Berry's vehicle. They were frantic and told Berry to leave

immediately. When Berry asked what happened, Mitchell told her that defendant shot Parnell. Mitchell said defendant asked Parnell "if he was with them or if he was about his music."

Defendant did not give Parnell a chance to answer; he shot him.

¶ 8 After Berry drove McGee home, she went with Cousin and Mitchell to the home of Mitchell's sister; defendant arrived shortly after. Berry asked defendant why he shot Parnell. Defendant told her it was because Parnell associated with people who had both killed defendant's uncle and a person named Chunky, and had also shot at defendant.

¶ 9 Berry testified that defendant and Mitchell asked Berry if there was anything at the studio that she had touched because they were going back to clean up. After going to the studio, defendant and Mitchell returned to the house with a McDonald's cup that belonged to Parnell. Berry did not call the police because defendant had told her at the studio that she did not see anything. On January 12, 2008, Berry saw defendant and again asked him why he shot Parnell. Defendant told her that if anything were to come out, he would "man up[.]"

¶ 10 Cousin testified that when she arrived at the studio with Berry, Mitchell, McGee, and Parnell they were drinking, smoking, and writing music. Cousin testified that she saw defendant with a gun and he pointed it at her and the others. When Cousin told defendant to stop, he said there was no clip in the gun. Defendant then pointed the gun at his head and pulled the trigger. When defendant left to take his younger cousin home, he returned to the studio shortly thereafter.

¶ 11 Cousin testified that when she was at the home of Mitchell's sister, she overheard defendant tell Berry that he shot Parnell. Defendant and Mitchell also said they were going back to the studio to clean up. When defendant and Mitchell returned from the studio, they had a McDonald's cup and an ashtray, which had Cousin's cigarette in it. Defendant and Mitchell said

that they were going to burn the cup because it was evidence.

¶ 12 McGee testified that he arrived at the studio at approximately 11:30 p.m., and defendant arrived about 10 minutes later with his cousin. While at the studio, he also saw defendant with a gun in his waistband. McGee saw defendant point the gun at Parnell, but there was no clip in the gun. Thereafter, defendant left with his cousin and returned by himself.

¶ 13 McGee testified that when defendant returned to the studio, McGee was with Parnell and Mitchell inside the studio. Parnell and Mitchell were in the recording room, and McGee was in a room adjacent to it. After defendant walked into the doorway of the recording room, McGee heard one gunshot. McGee looked into the recording room and saw Parnell slumped over in a chair. McGee saw defendant's hand holding the gun which he had pointed at Parnell earlier that night. Mitchell was standing next to defendant. McGee ran outside and got into Berry's vehicle. Berry dropped McGee off at his house, but later that night defendant stopped by and told him not to snitch. McGee did not call the police because he was afraid defendant would kill him.

¶ 14 Dearius Johnson testified that on December 29, 2009, he was with defendant in the court holding area of the Will County courthouse. Defendant told Johnson to tell Lanita Faint, who was Johnson's girlfriend and the mother of McGee's child, that he was going to kill McGee for being a key witness to the case. Johnson also overheard defendant tell another inmate that when he was at the studio with Parnell, defendant felt like Parnell did not want him there. Defendant said he could not take it anymore so he killed Parnell.

¶ 15 James Lewis testified that he was the operator of the recording studio where Parnell worked as a sound engineer. Lewis lived in the apartment above the studio. At approximately 11:30 p.m. on January 11, 2008, Lewis arrived at his apartment and heard music coming from the

studio below. At approximately 2 a.m., Lewis went downstairs to the studio because the music had stopped. The front door to the studio was open, and the lights were on. Lewis walked into the recording room and found Parnell sitting in a chair, leaning slightly forward. Lewis saw blood dripping from Parnell's face, which pooled on the floor underneath the chair. Parnell was still breathing, but it was labored. Lewis called 911. Lewis saw no one else at the studio.

¶ 16 Felinda Holmes, Parnell's mother, testified that after her son was shot, he was taken to the hospital and eventually died on January 17, 2008. Dr. Scott Denton testified that the cause of Parnell's death was a gunshot wound to the head. Denton also testified that Parnell's toxicology came back negative, except for trace amounts of alcohol. There was no indication of defensive injuries on Parnell's body.

¶ 17 Lisa Giovingo, an evidence technician, testified that a shell casing with the markings "Smith and Wesson 40" was found in the recording room where Parnell was shot. Giovingo testified that a semiautomatic firearm ejects a casing like the one located. Mary Wong, a forensic scientist, testified that a gunshot residue kit was performed on a pair of black sweat pants that were recovered from defendant's bedroom. Gunshot residue was found on the front waistband of the pants. The hands of both Mitchell and McGee tested negative for gunshot residue.

¶ 18 After the close of the State's evidence, defense counsel requested an involuntary manslaughter jury instruction. The trial court found insufficient evidence to support the instruction and denied the request. Prior to closing arguments, the State requested a nonpattern jury instruction on voluntary intoxication, which stated that "[a] person who is in an intoxicated or drugged condition is criminally responsible for conduct unless such condition is involuntarily produced and deprives him of substantial capacity either to appreciate the criminality of his

conduct or to conform his conduct to the requirements of law." See 720 ILCS 5/6-3 (West 2008). Defense counsel objected, arguing that even though he was going to argue that people at the studio were smoking and drinking, he would not state that defendant was intoxicated because he was not raising an intoxication defense. The trial court allowed the instruction.

¶ 19 At the close of all the evidence, the jury found defendant guilty of first degree murder. It further found that defendant personally discharged a firearm that proximately caused the death of Parnell. Defendant filed an amended motion for a new trial, which the trial court denied.

¶ 20 II. Sentencing

¶ 21 At defendant's sentencing hearing, his presentence investigation report (PSI) showed that he had a juvenile adjudication for unlawful possession of a controlled substance and an adult conviction for unlawful possession of cannabis with intent to deliver. Defendant received probation for each offense. Petitions to revoke both probations for noncompliance were filed prior to defendant's arrest for the present offense. The PSI showed that defendant attained his General Equivalency Diploma while incarcerated. Defendant was also employed at Wal-Mart for two weeks, but left due to boredom. Defendant was 18 years old at the time of the present offense.

¶ 22 The State presented an assistant principal from Joliet Central High School to testify to defendant's numerous disciplinary incidents for disregarding rules, truancy, and fighting. While describing one incident, where defendant threatened a teacher, defendant laughed out loud in court. Defendant was also expelled twice from Joliet Central, once for coming to school under the influence and once for battery.

¶ 23 The State also presented witnesses to testify about defendant's conviction for possession

of cannabis with intent to deliver, his forging of a letter documenting community service hours required for his probation, and his classification as a medium threat at the Will County jail due to fighting. Defense counsel presented defendant's sister and aunt, who testified that defendant was brought up in a supportive family home. Defendant participated in a special education program when he was younger because he had a speech impediment. As a result, defendant was bullied growing up.

¶ 24 After hearing all of the evidence in aggravation and mitigation and reviewing the PSI, the trial court sentenced defendant to 48 years' imprisonment for first degree murder (720 ILCS 5/9-1(a)(1) (West 2008)), with a 25-year mandatory firearm enhancement, for a total sentence of 73 years' imprisonment. 730 ILCS 5/5-4.5-20, 5-8-1(a)(1)(d)(iii) (West 2008). Defendant's motion to reconsider sentence was denied. Defendant appeals.

¶ 25 ANALYSIS

¶ 26 I. Jury Instruction

¶ 27 A. Involuntary Manslaughter

¶ 28 On appeal, defendant first argues that he was denied due process when the trial court refused to give an involuntary manslaughter jury instruction because it was supported by the evidence.

¶ 29 The giving of a jury instruction is a matter within the sound discretion of the trial court. *People v. Jones*, 219 Ill. 2d 1 (2006). While a defendant is entitled to an involuntary manslaughter instruction if there is slight evidence upon which a given theory could be based, there must be some evidence of reckless conduct. *People v. Trotter*, 178 Ill. App. 3d 292 (1988). A person acts recklessly when he consciously disregards a substantial and unjustifiable risk that

his acts are likely to cause death or great bodily harm to another. See 720 ILCS 5/4-6 (West 2008); *People v. DiVincenzo*, 183 Ill. 2d 239 (1998).

¶ 30 In the instant case, the trial court did not abuse its discretion in refusing to instruct the jury on involuntary manslaughter because defendant has not presented even slight evidence that he was reckless when he shot Parnell. During defendant's initial visit to the recording studio, he was seen pointing the unloaded semiautomatic handgun at numerous people, including himself, and pulling the trigger. However, after playing with the unloaded handgun, defendant left the studio, and when he returned he shot Parnell in the head. Obviously someone loaded the gun during this time. There was no evidence of defendant's recklessness after he returned to the studio and shot Parnell. The record does not indicate that defendant thought his semiautomatic handgun was unloaded at that time, that the handgun was accidentally discharged, or that another person handled the handgun in the short time it took before defendant returned to the studio. The lack of defendant's recklessness is further supported by the threats defendant made following the incident, the justification he gave for killing Parnell, and the fact that he did not call the police following the shooting. There is nothing in the evidence to suggest that the shooting was anything but intentional. The trial court did not err by denying defendant's request for an instruction on involuntary manslaughter.

¶ 31 **B. Voluntary Intoxication**

¶ 32 Defendant also argues that the trial court erred when it gave a nonpattern jury instruction on voluntary intoxication because he did not raise an intoxication defense; therefore, to give this instruction would only mislead the jury.

¶ 33 As a general rule, if an appropriate pattern jury instruction exists it must be used, unless

the court determines that the particular instruction does not accurately state the law. *People v. Pollock*, 202 Ill. 2d 189 (2002); Ill. S. Ct. R. 451(a) (eff. July 1, 2006). However, the decision to give or refuse a nonpattern jury instruction rests within the sound discretion of the trial court. *Pollock*, 202 Ill. 2d 189. Whether a trial court has abused its discretion will depend on whether the nonpattern instruction is an accurate, simple, brief, impartial, and nonargumentative statement of the law. *Id.*

¶ 34 Here, the trial court did not abuse its discretion in giving a nonpattern jury instruction on voluntary intoxication. Despite defendant's argument to the contrary, it was not error to give this instruction even though defendant did not raise an intoxication defense. *People v. Johnson*, 110 Ill. App. 3d 965 (1982) (State was entitled to intoxication instruction even though defendant did not raise it as a defense). Additionally, although there was an Illinois Pattern Jury Instruction on voluntary intoxication (Illinois Pattern Jury Instructions, Criminal, No. 24-25.02 (4th ed. 2008)), the trial court instructed the jury with a verbatim recitation of the statute governing voluntary intoxication, which accurately stated the law. 720 ILCS 5/6-3 (West 2008); see *Pollock*, 202 Ill. 2d 189. Furthermore, there was evidence presented that the parties present at the studio were drinking alcohol and smoking marijuana. Therefore, we do not find that the trial court abused its discretion in limiting the inferences to be drawn from that evidence.

¶ 35 II. Excessive Sentence

¶ 36 Defendant next contends that his 73-year sentence was excessive in light of his youth and rehabilitative potential.

¶ 37 The Illinois Constitution mandates that all penalties be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship.

Ill. Const. 1970, art. I, § 11. However, the determination and imposition of a sentence involves considerable judicial discretion, and we will not reverse a trial court's sentence unless we find that the court abused its discretion. *People v. Alexander*, 239 Ill. 2d 205 (2010). A trial court is in a far better position than an appellate court to fashion an appropriate sentence, based upon firsthand consideration of factors such as defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. *People v. Streit*, 142 Ill. 2d 13 (1991). Therefore, we will not substitute our judgment for that of the trial court just because we may have balanced the sentencing factors differently. *Id.*

¶ 38 First degree murder has a sentencing range of 20 to 60 years' imprisonment. 730 ILCS 5/5-4.5-20 (West 2008). The mandatory firearm enhancement adds 25 years or up to a term of natural life to defendant's sentence. 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2008). Defendant was sentenced to 48 years' imprisonment for first degree murder, which was in approximately the upper-middle of the sentencing range. Defendant also received 25 years for use of a firearm, which was the minimum mandatory enhancement.

¶ 39 The record reveals that trial court explicitly considered all aggravating and mitigating evidence when sentencing defendant. Defendant argues that the trial court did not give enough weight to his relative youth and rehabilitative potential. However, the trial court was presented with this mitigating evidence; we cannot substitute our judgment for that of the trial court merely because we might have weighed the factors differently. See *Alexander*, 239 Ill. 2d 205; *People v. Shaw*, 351 Ill. App. 3d 1087 (2004) (trial court was not required to give greater weight to defendant's rehabilitative potential and other mitigating factors than to the circumstances of the offense). In light of the numerous factors in aggravation, we cannot say that the court abused its

discretion when it weighed the factors and found a sentence of 48 years' imprisonment appropriate. The 25-year add-on was statutorily required.

¶ 40

#### CONCLUSION

¶ 41 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 42 Affirmed.