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2012 IL App (3d) 110809-UB

Order filed June 19, 2012
Modified Upon Denial of Rehearing August 1, 2012

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. 3-11-0809
) Circuit No. 08-CF-2592
ARTURO ROMERO,)
) Honorable
Defendant-Appellant.) Edward A. Burmila, Jr.,
) Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices O'Brien and Wright concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The evidence was sufficient to prove defendant guilty of the crimes charged; (2) the trial court did not abuse its discretion in sentencing defendant; and (3) the introduction and use of defendant's nickname was not reversible error.

¶ 2 Defendant, Arturo Romero, was convicted of aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2008)), aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2008)), and attempted first degree murder (720 ILCS 5/9-1(a)(1), 8-4(a) (West 2008)). The trial court sentenced defendant to 30 years' imprisonment. Defendant appeals, arguing that: (1) the

evidence was insufficient to prove him guilty of the crimes charged; (2) his sentence was excessive; and (3) the use of his nickname during trial was reversible error. We affirm.

¶ 3

FACTS

¶ 4 Defendant was charged with aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2008)), aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2008)), and attempted first degree murder (720 ILCS 5/9-1(a)(1), 8-4(a) (West 2008)). The cause proceeded to a jury trial.

¶ 5 At trial, the victim of the shooting testified that an individual shot him while he was standing in front of his house. The victim was able to focus on the shooter's face and physical features just before being shot, and later identified defendant as the shooter after being shown a photo lineup. The victim again identified defendant in court, saying, "That's him. That's the one—that's the one that almost killed me and almost killed my son."

¶ 6 The State also produced testimony from three men who were in a vehicle with defendant the night of the shooting. David Hensley, Roberto Flores, and Arthur Almanza all testified that they were engaged in a confrontation with the victim and his family on the night of the shooting. Following an earlier incident, the men retrieved a gun and headed to the victim's house. Defendant possessed the gun, and upon their arrival at the victim's house, defendant exited the vehicle by himself and proceeded toward the residence. After the three men heard shots being fired, defendant returned to the vehicle out of breath and stated that he thought he had shot someone. Evidence was presented that the gun the three men claimed defendant carried the night of the shooting was the gun used in the shooting.

¶ 7 During Hensley's testimony, the State introduced defendant's nickname, "Insane." Hensley

stated that he would refer to defendant as "Insane" and not by his proper name when they were together. Defense counsel objected to the introduction of the nickname; however, his objection was overruled. Thereafter, the State used defendant's nickname a number of times during the testimony of Hensley and others. The State also used the nickname during closing arguments.

¶ 8 The jury found defendant guilty of attempted first degree murder, aggravated discharge of a firearm, and aggravated battery with a firearm. The presentence investigation report indicated that defendant was 17 years old when he committed the offense. The trial court sentenced defendant to 30 years for attempted first degree murder, noting that it did not believe the minimum sentence was appropriate because defendant was on probation for a different aggravated battery conviction at the time of the offense. Defendant appeals.

¶ 9

ANALYSIS

¶ 10

I

¶ 11 Defendant argues that the evidence produced at trial was insufficient to prove him guilty beyond a reasonable doubt. When presented with a challenge to the sufficiency of the evidence, it is not the function of this court to retry defendant; rather, the relevant question 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. *People v. Collins*, 106 Ill. 2d 237 (1985). A conviction will only be overturned where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt. *People v. Smith*, 185 Ill. 2d 532 (1999).

¶ 12 Here, we find that evidence produced at trial was sufficient to allow a rational trier of fact to prove the essential elements of the crimes charged. The victim made an in-court identification

of defendant, saying, "That's him. That's the one—that's the one that almost killed me and almost killed my son." Further, three individuals testified that they were in a vehicle with defendant on the night of the shooting. Prior to shots being fired, defendant left the other three men and proceeded towards the victim's house with a gun. Upon his return, defendant told the occupants of the vehicle that he thought he had shot someone. The State also produced evidence that the gun the three men claimed defendant was carrying was the gun used to shoot the victim. Therefore, based on this evidence and the rest of the evidence presented at trial, we find that a rational trier of fact could have concluded that defendant was guilty of attempted first degree murder, aggravated discharge of a firearm, and aggravated battery with a firearm.

¶ 13

II

¶ 14 Defendant next argues that the trial court abused its discretion when it sentenced him above the statutory minimum because it failed to properly consider his potential for rehabilitation and placed an unwarranted emphasis on his criminal background. In fashioning a sentence, the trial court should consider a number of factors, including defendant's prior criminal history and his rehabilitative potential. *People v. Smith*, 214 Ill. App. 3d 327 (1991). The existence of mitigating factors does not automatically oblige the trial court to reduce a sentence from the maximum sentence allowed, and where mitigation evidence is before the court, it is presumed that the court considered it. *Id.* 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. Stacey*, 193 Ill. 2d 203 (2000). A sentence that falls within the statutory range does not amount to an abuse of discretion unless it is manifestly disproportionate to the nature of the offense. *People v. Jackson*, 375 Ill. App. 3d 796 (2007).

¶ 15 Attempted first degree murder is a Class X felony (720 ILCS 5/8-4(c)(1)(C) (West 2008)) with a sentencing range of not less than 6 years and not more than 30 years (730 ILCS 5/5-8-1(a)(3) (West 2008)). However, because defendant discharged a firearm during the commission of the offense, an additional 20 years was mandated. 720 ILCS 5/8-4(c)(1)(C) (West 2008). Thus, the true sentencing range for defendant was not less than 26 years and not more than 50 years.

¶ 16 Here, the trial court did not abuse its discretion when it sentenced defendant. Defendant's sentence of 30 years was near the statutory minimum of 26 years. Further, we do not find that the court failed to consider factors in mitigation or that it improperly considered the fact that defendant was on probation when he committed the crime. Therefore, we cannot say that an abuse of discretion occurred.

¶ 17

III

¶ 18 Defendant further argues that the introduction and continued use of his nickname, "Insane," was unduly prejudicial and denied him a fair trial. Generally, there is no impropriety in referring to a defendant by his or her nickname. *People v. Murillo*, 225 Ill. App. 3d 286 (1992). However, general principles of fair play dictate that a nickname that has a pejorative connotation be used sparingly. *People v. Salgado*, 287 Ill. App. 3d 432 (1997). Still, it is not improper to allow a defendant to be referred to by his nickname, even if it is pejorative, if witnesses knew and identified defendant by that name. *Id.* A trial court's decision on the admission of evidence will not be disturbed unless the court abused its discretion. *Id.*—

¶ 19 Defendant contends that the trial court abused its discretion when it overruled defense counsel's objection and allowed the introduction of defendant's nickname during the testimony of

Hensley.¹ During his testimony, Hensley stated that he normally called defendant "Insane" and did not refer to him by his proper name. Therefore, because the witness knew and identified defendant as "Insane," it was not an abuse of discretion for the trial court to allow the State to use defendant's nickname during Hensley's testimony.

¶20 Defendant also claims that the trial court erred by allowing the continued use of the nickname and by allowing the nickname to be used during closing arguments. An alleged error that could have been raised during trial is procedurally forfeited unless defendant raised the issue in both a trial objection and a written posttrial motion. *People v. Bannister*, 232 Ill. 2d 52 (2008). Defendant claims that his objection to the use of his nickname during Hensley's testimony also served as an objection to its continued use as well as its use by other witnesses and by the State during closing arguments. We find this argument unpersuasive. In order to determine whether a witness may use defendant's nickname, the trial court must determine whether the witness knew and commonly identified defendant by that name. It is possible that a court would allow one witness to use defendant's nickname while not allowing its use by other witnesses, or that it would allow the introduction of defendant's nickname during a witness's testimony but sustain a later objection to its repeated use. Therefore, unless the record shows otherwise, an objection to a witness using defendant's nickname is specific to that witness' experience, knowledge and use of the nickname. Thus, we find that defendant's objection during Hensley's testimony only served as an objection to its initial use by Hensley.

¹Defendant's objection was in a sidebar off the record. However, defense counsel submitted an affidavit stating that he objected to the use of the nickname and that the court overruled the objection because defendant's friends had called him by that name in the past.

¶ 21 Because we find that defendant's objection only applied to the introduction of the nickname during Hensley's testimony, and because defendant did not make any further objections to the use of the nickname during trial, the remaining issues with regard to defendant's nickname were forfeited and cannot be considered on appeal unless there was plain error. Ill S. Ct. R. 615(a) (eff. Aug. 27, 1999). The plain error doctrine bypasses forfeiture principles and allows a reviewing court to consider unpreserved error when: (1) the evidence is close, regardless of the seriousness of the error; or (2) the error is serious, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167 (2005).

¶ 22 Initially, we note that the evidence was not close; therefore, we do not find reversible error under the first prong of the plain error doctrine. The question then becomes whether the alleged errors were serious enough to qualify as plain error under the second prong of the doctrine. The supreme court has equated the second prong of plain error review with structural error, *i.e.*, a systemic error which serves to erode the integrity of the judicial process and undermine the fairness of the defendant's trial. *People v. Thompson*, 238 Ill. 2d 598 (2010). The supreme court has found structural error to exist in only a limited class of cases, such as a complete denial of counsel, trial before a biased judge, racial discrimination in the selection of a grand jury, denial of self-representation at trial, denial of a public trial, and a defective reasonable doubt instruction. *Id.* We do not find that the alleged errors in this case were serious enough to be considered under the second prong of the plain error doctrine; thus, we do not find plain error.

¶ 23 CONCLUSION

¶ 24 The judgment of the circuit court of Will County is affirmed.

¶ 25 Affirmed.

