

No. 1-11-2266

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	08 CR 19099
)	
KENNETH STARR,)	Honorable
)	James Obbish,
Defendant-Appellant.)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Hyman and Justice Mason concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court need not accept the defendant's explanation of what he meant by an out-of-court statement. Evidence that a defendant said he "jacked somebody," combined with testimony that a witness saw the defendant taking a car from a man who later died from injuries he received during the course of the carjacking, sufficiently supported a conviction for felony murder. Prior convictions, and evidence that the defendant committed several robberies and stole another car in the days before his arrest, justified a sentence somewhat greater than the middle of the available range for felony murder.

¶ 2 Following a bench trial, the trial court found the defendant, Kenneth Starr, guilty of

aggravated vehicular hijacking and felony murder, and sentenced him to 45 years in prison. On appeal, Starr argues: (1) the evidence does not support the convictions; (2) the court relied on its biases and facts not in evidence, both in reaching the verdict and in imposing sentence; (3) the court imposed an excessive sentence; and (4) the court improperly entered convictions for both felony murder and its predicate offense, aggravated vehicular hijacking. We find the evidence sufficient to support the convictions, the court did not improperly rely on its biases or facts not in evidence, and we cannot say that the court abused its discretion when it imposed a sentence near the middle of the available range of sentence. We vacate the conviction for aggravated vehicular hijacking and amend the mittimus, but in all other respects, we affirm the trial court's judgment.

¶ 3

BACKGROUND

¶ 4 On September 7, 2008, Carmine Calderazzo was driving her 88-year-old father, Jacint Calderazzo, to the airport in Jacint's grey car, when they decided to stop at a drug store on the way. Carmine left the car running in the store's parking lot as she went into the store. Jacint stepped out of the car. Starr, a drug addict who lived near the drug store, noticed the grey car's open door as he walked past. He got in the car, backed it up quickly, hitting Jacint, and drove off. Two eyewitnesses saw the offense: Yolanda Alexander, who had just come out of the drug store as Starr arrived, and Anthony Washington, who was pulling into the parking lot when Starr took the grey car. When Carmine came out of the drug store, she found Jacint lying on the parking lot pavement with blood pooling around his head and a wide tire mark on his shirt.

¶ 5 Starr drove the grey car for only a few minutes. He hit several cars and then abandoned the damaged grey car a few miles away. Starr took several credit cards in Jacint's name from the car and

1-11-2266

used one to purchase gas for strangers at several gas stations over the next few hours. The strangers paid Starr cash for the gas. Police soon found the grey car, with Jacint's blood on the underside of the car near the rear passenger door.

¶ 6 Two days later, Streamwood Police Officer Paul Petrick heard a report that Elgin police wanted Streamwood police to follow a van. He saw a van that matched the description of the one Elgin police sought, so he followed the van to a store. The driver, Steve Podkulski, stepped out, leaving his passenger, Starr, in the van. Podkulski and a police officer walked behind the van while Petrick went to the driver's side of the van. When Starr slid into the driver's seat, Petrick ordered him to get out of the van. Instead, Starr backed the van quickly toward the other officer, and sped off. More officers followed the van for a way, until Starr jumped out and began running across a field. Police officers arrested Starr. Starr talked to some police officers about the incident in the drug store parking lot.

¶ 7 Jacint, who stood more than 6 feet tall and weighed 290 pounds, died from the injuries he sustained in the parking lot. Prosecutors charged Starr with aggravated vehicular hijacking (720 ILCS 5/18-4 (West 2008)) and felony murder predicated on aggravated vehicular hijacking (720 ILCS 5/9-1(a)(3) (West 2008)).

¶ 8 At the bench trial, Washington, a management consultant, testified that as he pulled into the drug store parking lot, he saw the back of a large man, who gesticulated and yelled as he reached into the driver's window of the grey car. The car backed up quickly, dragging the large man for a few feet, and slammed into a van. The large man banged the back of his head against the van. Washington did not see the grey car run over the large man. Washington identified Starr in a police

lineup, and again in court, as the man he saw driving the grey car out of the drug store's parking lot.

¶ 9 Alexander testified that she turned to look at the grey car when she heard screeching tires. She saw the grey car back up fast into a van and a pole. As the car passed her, she noticed the open back door on the passenger side. She saw Jacint lying on the ground near the spot where the grey car backed into the van and the pole.

¶ 10 The medical examiner testified that Jacint died from multiple injuries consistent with a car running over him. Carmine testified that Jacint kept his golf clubs with him in his car. Police officers found no clubs in Jacint's car.

¶ 11 Starr's girlfriend, Aubry Tanner, testified that she and Starr argued in his home on September 7, 2008, and he left. When he returned, hours later, he told Tanner he had done something wrong. He told her he "had jacked somebody." Tanner assumed that Starr meant he hit someone with his fist. Tanner testified that Starr said he did not know whether anyone got hurt. The next day Starr's friend John Trent came over to Starr's home. Starr told Tanner that he was going to pawn some golf clubs. According to Tanner, Starr did not own any golf clubs.

¶ 12 Officer Chris Blum, who interviewed Starr after his arrest, testified that Starr said he used one of Jacint's credit cards, one which worked without a PIN, to purchase gas for strangers.

¶ 13 Starr sold the gas for half the pump price. Blum testified that before he mentioned the age or gender of the victim in the parking lot, Starr asked Blum, "how is the old man doing?"

¶ 14 Starr testified that when he crossed the parking lot behind the grey car, he saw the trunk and the back door on the passenger side standing open, and he saw no one near the car. He got in the driver's seat and immediately put the car in reverse. He felt a thud, shifted to go forward, and sped

off. The day after he stole the grey car, he invited Trent over. Starr did not tell Trent about stealing the car. He told Trent that someone had tried to jack him for his money, but Starr jacked that man before that man could jack Starr. Starr explained to the court that "jacked," in that context, meant he punched the man. Starr admitted that "jack" can refer to carjacking, and it can also refer to taking money by force, or punching someone.

¶ 15 Starr testified that he never said to Tanner that he had jacked anyone. When Blum spoke to Starr, Blum told him a man had gotten hurt at the drug store parking lot. Starr asked how the man was doing. Starr told police officers he took the grey car, and he hit a van while pulling out of the drug store parking lot. He did not know whether he had hit a man.

¶ 16 The trial court did not believe Starr's testimony. The court said:

"[Starr's testimony] is contradicted [by] what I found to be the extraordinarily credible, the unbiased, and in my mind the unimpeached testimony of Anthony Washington. ***

*** Everything that Mr. Washington said was corroborated.

*** [Y]ou may not in your career *** come across and have the opportunity to cross-examine in a criminal case a more believable, credible and honorable person than Anthony Washington. This was a man without any bias[.]. ***

*** It was a professional man who had plane tickets. ***
Even though all those months or years had *** passed he is still unimpeached. He is a man blessed with a wonderful memory.

Obviously he is a professional man, an educated man, and is a sophisticated person that was just trying to do the right thing.

* * *

*** Mr. Calderazzo is a pretty big gentleman. *** It's impossible that [Starr] would not have seen him in the area. Mr. Starr's testimony is unbelievable. ***

*** [W]hen he is alone with [Tanner] Mr. Starr says he jacked somebody.

*** He is the one that knows what he meant by the term ***.

*** He said it's when somebody punches you and tries to steal your money. Well, if you substitute car for money even under Mr. Starr's definition, it would mirror the vehicular hijacking statute. There is no proof that Mr. Starr ever intended to kill Mr. Calderazzo. He just didn't care. And he wasn't going to let Mr. Calderazzo prevent him from taking advantage of what he viewed as an opportunity."

¶ 17 The court found Starr guilty of aggravated vehicular hijacking and felony murder based on aggravated vehicular hijacking. The court denied Starr's motion for a new trial. The presentence investigation report showed that Starr had long-standing problems with addiction and substance abuse. He had prior convictions for driving under the influence, aggravated driving under the

influence, possession of a controlled substance, domestic battery and aggravated battery. The State also presented evidence that Starr assisted in the theft of numerous lottery tickets and cartons of cigarettes stolen from two stores on the day of the arrest. Starr's counsel argued in mitigation that Starr had not received proper treatment for addiction.

¶ 18 The court said:

"Each and every time an individual is arrested for driving under the influence of alcohol, he must be evaluated at some point. *** Every time you walk into the Department of Corrections, you can ask to be treated for drugs ***."

¶ 19 The court sentenced Starr, then 35 years old, to 45 years in prison for murder and to 30 years in prison for aggravated vehicular hijacking, with the sentences to run concurrently. The court denied Starr's motion for reconsideration of the sentences. Starr now appeals.

¶ 20 ANALYSIS

¶ 21 Starr argues that the evidence did not prove him guilty beyond a reasonable doubt, and that the trial court relied on facts not in evidence to reach its verdict. Starr also raises several issues regarding the sentence.

¶ 22 Sufficiency of the Evidence

¶ 23 Starr argues that the evidence cannot support the conviction because the physical evidence contradicts Washington's testimony, and no evidence apart from Washington's testimony shows that he used force to take the car. When we review the sufficiency of the evidence, we must decide "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), quoted in *People v. Davison*, 233 Ill. 2d 30, 43 (2009). We defer to the trial court's assessment of the credibility of the witnesses, and we will not reverse a conviction for insufficient evidence unless the evidence is so unreasonable, improbable or unsatisfactory that it leaves a reasonable doubt of the defendant's guilt. *People v. Smith*, 185 Ill. 2d 532, 542 (1999).

¶ 24 To prove vehicular hijacking, the prosecution needed to prove that Starr took the car from the "immediate presence of another by the use of force or by threatening the imminent use of force." 720 ILCS 5/18-3(a) (West 2008). The crime in this case would then qualify as aggravated vehicular hijacking because Jacint, the person from whose immediate presence Starr took the car, was over 60 years of age. 720 ILCS 5/18-4(a)(1) (West 2008).

¶ 25 Only Washington testified that he saw a large man leaning into the driver's window, gesticulating and yelling, when Starr threw the car into reverse. Only Washington testified that the car dragged the man back with it, causing the back of the man's head to hit the van Starr hit. No one testified to seeing the car run over Jacint. Starr claims that Washington's description of the offense conflicts irreconcilably with the physical evidence of Jacint's blood on the underside of the car, near the back passenger door, and the medical examiner's testimony that Jacint's injuries appeared to result from a car running over him.

¶ 26 The record on appeal does not present an adequate basis for this court to reject the trial court's assessment of Washington's credibility. See *Smith*, 185 Ill. 2d at 542. Moreover, the trial court did

not rely solely on Washington's testimony to reach the conclusion that Starr used force to take the car from Jacint. Starr testified that he walked behind the car in the parking lot, with its trunk and back door open. The court observed that Starr must have seen Jacint, a large man, before Starr took the car. The court concluded that Starr used the car itself as a threatening weapon to take the car from Jacint's immediate presence. Compare *People v. Belk*, 203 Ill. 2d 187, 194-95 (2003). The court found further support for the verdict in Tanner's testimony that Starr told her he "jacked somebody." Starr and Tanner testified that Starr meant only that he had punched someone, but Starr himself conceded that "jack" could mean to take something like a car by force. The trial court could find that if Starr meant only that he punched someone who tried to rob him, he probably would not have told Tanner he had done something wrong that they would discuss later. Considering all of the evidence in the light most favorable to the prosecution, we find the evidence sufficient to prove aggravated vehicular hijacking. Because Jacint died as a result of injuries he suffered in the course of the hijacking, the evidence also supports the conviction for felony murder. 720 ILCS 5/9-1(a)(3) (West 2008).

¶ 27 Facts Not in Evidence

¶ 28 Next, Starr contends that the trial court improperly relied on Washington's social status, the corroboration of Washington's testimony, and the court's own opinion about the meaning of "jacked," to reach the verdict. Starr admits that he did not raise these issues in the trial court, but he asks us to address the issues as plain error.

¶ 29 The court said it found Washington very credible, and in its finding the court noted that

Washington "is a professional man, an educated man, and is a sophisticated person." The court may consider a witness's occupation when assessing his credibility. *People v. Winchester*, 352 Ill. 237, 244 (1933). The judge also emphasized the corroboration of Washington's testimony. Alexander testified, and Starr admitted, that Starr backed up the grey car quickly and turned it past Washington to exit the parking lot. That evidence corroborated Washington's testimony to the same effect. Some of the physical evidence corroborated Washington's testimony that the car hit Jacint. While no evidence directly corroborated the testimony that Jacint reached into the driver's side of the car before Starr backed it up, or that Starr dragged Jacint for a ways before hitting the van, we cannot say that the trial court erred by finding corroboration for Washington's testimony. See *Raintree Homes, Inc. v. Village of Long Grove*, 389 Ill. App. 3d 836, 869 (2009). Accordingly, we find no reversible error in the judge's comments on Washington's credibility. See *People v. White*, 377 Ill. 251, 254 (1941).

¶ 30 Tanner testified that Starr said he jacked somebody on September 7, 2008. Starr admitted that he said, to Trent, that he jacked someone that day. Tanner said she thought Starr meant he hit someone, and Starr confirmed that interpretation. However, Starr admitted in his testimony that "jack" can mean to carjack, or to rob. In light of the other evidence of Starr's actions on September 7, we find no error and thus no plain error in the court's interpretation of Starr's out-of-court statement as a confession that he took the grey car from Jacint by force. Accordingly, we find no grounds for reversal of the convictions.

¶ 31 Sentencing

¶ 32 Starr raises four separate issues concerning his sentence. He contends that the trial court (1) considered facts not in evidence, (2) imposed an excessive sentence, (3) improperly entered a conviction on aggravated vehicular hijacking, in this case a lesser included offense of felony murder, and (4) failed to credit Starr for all of the time he spent in custody prior to trial.

¶ 33 Facts Not in Evidence

¶ 34 At the sentencing hearing, the trial court asserted that "every time an individual is arrested for driving under the influence of alcohol, he must be evaluated at some point. *** Every time you walk into the Department of Corrections, you can ask to be treated for drugs." Starr points out that no evidence shows that the Department of Corrections provides treatment for every inmate who requests it. But the court did not say that the Department of Corrections always provides the treatment. The court said, first, that anyone charged with driving under the influence gets evaluated for treatment. The Illinois Vehicle Code supports the assertion, as it provides:

"After a finding of guilt *** [for driving under the influence], individuals shall be required to undergo a professional evaluation to determine if an alcohol, drug, or intoxicating compound abuse problem exists and the extent of the problem, and undergo the imposition of treatment if appropriate." 625 ILCS 5/11-501.01 (West 2008).

The court may take judicial notice of the statute. *Siddiqui v. Department of Professional*

Regulation, 307 Ill. App. 3d 753, 758 (1999).

¶ 35 The court added that Starr could have asked for treatment in his prior encounters with the criminal justice system. Starr has not shown that the trial court considered any improper factors or any facts not in evidence in sentencing him. See *People v. Dameron*, 196 Ill. 2d 156, 171-72 (2001). The court's comments show that it did not consider the lack of treatment as a significant mitigating factor because Starr did not present evidence of prior efforts to obtain treatment. We find that the court did not commit reversible error by holding that the lack of treatment did not provide strong grounds for reducing Starr's sentence. See *People v. Whealon*, 185 Ill. App. 3d 570, 573 (1989).

¶ 36 Excessive Sentence

¶ 37 The Uniform Code of Corrections authorizes the court to sentence a defendant found guilty of felony murder to a term between 20 and 60 years in prison. 730 ILCS 5/5-8-1(a)(1)(a) (West 2008). The court sentenced Starr to 45 years in prison. As the sentence falls within the statutory range, we will not disturb the sentence unless the trial court abused its discretion. See *People v. Stacey*, 193 Ill. 2d 203, 209-10 (2000).

¶ 38 The aggravating evidence here included Starr's prior criminal record and the testimony about other crimes Starr committed after he hijacked Jacint's car. Two days after the vehicular hijacking, police spoke to the driver of a van in which Starr rode as a passenger. With a police officer standing behind the van, Starr shifted the van into reverse and drove it at the officer, then drove off. When police recovered the van, they found the proceeds of two different robberies of local stores that had taken place the day of the arrest. In light of the aggravating evidence, we cannot say that the trial

court abused its discretion when it sentenced Starr to 45 years in prison for felony murder. See *People v. O'Reilly*, 250 Ill. App. 3d 622, 627-28 (1993).

¶ 39

Mittimus

¶ 40 Finally, Starr argues that the court improperly entered a conviction and sentence for aggravated vehicular hijacking, the predicate for the felony murder charge (see *People v. Smith*, 233 Ill. 2d 1, 17 (2009)), and the court failed to give him credit for all the time he spent in custody prior to sentencing. The State concedes both issues. Accordingly, we vacate the conviction and sentence for aggravated vehicular hijacking, and we order the clerk of the circuit court to amend the mittimus to reflect a single conviction for first-degree murder and presentence incarceration credit of 1022 days. See *People v. Rodriguez*, 2012 IL App (1st) 72758-B, ¶ 69.

¶ 41 Affirmed in part and vacated in part; mittimus corrected.