

No. 1-11-2706

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 10147
	)	
FLOYD CHERRY,	)	Honorable
	)	Stanley Sacks,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE McBRIDE delivered the judgment of the court.  
Justices Palmer and Taylor concurred in the judgment.

**ORDER**

¶ 1 *Held:* Trial court did not abuse discretion in sentencing defendant to 18 years' imprisonment for aggravated battery with a firearm; mitigating factors now argued by defendant were given proper consideration by the court. Mittimus corrected to properly reflect presentencing detention credit.

¶ 2 Following a jury trial, defendant Floyd Cherry was convicted of aggravated battery with a firearm and sentenced to 18 years' imprisonment. On appeal, defendant contends that his sentence is excessive in light of various mitigating factors. He also contends, and the State agrees, that the mittimus should be corrected to properly reflect presentencing detention credit.

¶ 3 Defendant was charged with attempted first degree murder and aggravated battery with a firearm, in that he allegedly shot Ronald Bland "about the body" on or about January 4, 2009.

¶ 4 At trial, Ronald Bland testified that he would visit his friend Jerome Hicks about three times a week at Hicks's auto repair shop, where defendant worked as a mechanic. During these visits, defendant "was always getting into my business," and Bland would tell him to "stay out of my business." However, before the day in question, their arguments never became physical nor did they threaten each other. On the morning of January 4, defendant and Bland were standing about 15 feet apart in a parking area outside the garage, having a "heated" argument. Bland did not have a gun or knife, tell defendant that he had a gun or knife, or threaten defendant. When Bland referred to defendant by an insulting term, defendant produced a gun and pointed it at the ceiling. Bland denied having gestured or moved towards defendant before he drew his gun, but once Bland saw the gun he moved towards defendant intending to go around him. Bland was facing defendant but backing away from him when defendant fired at least three shots, striking Bland. Calvin Youngblood, one of Hicks's employees, took Bland away in Hicks's car. At the hospital, Bland was treated over several days for gunshot wounds to his chest, abdomen, and left arm. While bullets were removed from Bland, as of trial he still had one bullet in his body.

¶ 5 Bland testified on cross-examination that he would go to Hicks's shop either to have his car repaired or to socialize with Hicks, but nobody else at the garage. On the morning at issue, Bland went to the garage for repair. He first saw defendant helping a customer; Bland denied speaking to that customer. The argument that morning began when defendant interrupted Bland's conversation with Youngblood, which was witnessed by David Edwards, another mechanic. Bland denied that he insulted defendant first, doing so only after defendant was "talking crazy to me." When pressed on what constituted defendant being "up in [Bland's] business," he said that defendant "was always acting like he knew everything." Bland denied that he disliked defendant because of their prior friction and generally "didn't take it seriously."

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They argued previously, referring to each other in insulting terms, but Bland denied that those arguments were heated, so that he was surprised when defendant produced a gun.

¶ 6 Defendant testified that he kept a gun at work as protection against being robbed when he was working late. He knew Bland for as long as he worked for Hicks, which was over a year. While he was a long-time friend of Hicks, he did not consider Bland a friend. Bland was at the garage three or four times each week, and he and defendant argued nearly every time. Defendant would try to ignore Bland, who "always" said derogatory things to him and tried to "control my work [and] work area as if he was my boss." Defendant denied that he was "up in [Bland's] business" or that he insulted Bland before the day in question. Though Bland did not touch defendant or produce a weapon, he would threaten defendant, saying he would "whoop [his] ass," so that defendant feared that Bland would attack him. He would therefore ask Hicks to tell Bland to desist. Except for Hicks, the others working at the garage ignored their arguments.

¶ 7 On the morning in question, defendant worked on a truck left by a female customer. The customer told defendant that Bland was "making faces or gestures" towards her, which he presumed to be flirtation. However, defendant did not immediately confront Bland, and the customer left the garage before defendant and Bland argued. Defendant admitted that he insulted Bland during this argument. When Hicks arrived at the garage, he and Bland argued about Bland's arguments with defendant. Bland then sought out defendant while "talking about what he was going to do to me," including that he would "fuck him up." When defendant went to tell Bland to leave him alone, Bland was "coming towards me in an aggressive manner" unlike their earlier arguments. Combined with the threatening language, this caused defendant to fear that Bland would become violent with him. Bland reached into his jumpsuit with his right hand and was about to produce something. Though Bland routinely carried a box-cutter, defendant did not

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know what Bland was reaching for. In fear, defendant backed away from Bland and reached for his coat pocket. He found his gun there and, as he feared for his life, he ducked behind a car and fired four shots without looking where he was shooting. He intended to protect himself from Bland and did not intend to kill him. Defendant left the garage after the shooting; he went home and did not return to the shop until four days later, when he used a cutting torch to melt his gun. He did so not to avoid detection but "because I didn't want to touch any more guns again." However, he had also disposed of his coat.

¶ 8 Hicks, Youngblood, and Edwards each testified that he was working under a car at the time of the shooting and thus did not see it, though they heard defendant and Bland arguing and heard the gunshots. They could not tell who began the argument. None kept a gun in the shop or saw one there. None saw Bland with a weapon or heard him threaten defendant before the shots, but Hicks and Edwards admitted they could not hear the argument clearly. All agreed that the frequent arguments between Bland and defendant had never become physical. Hicks and Edwards agreed that defendant and Bland were not friends but Hicks characterized the arguments as "horseplay" and Edwards considered their relationship "strange" in that they frequently bickered but it "never turned into anything." Youngblood testified that Bland would frequently say that "he would whoop" defendant, but Youngblood deemed this a joke. Hicks testified that a customer had left her truck to be repaired by defendant that morning, but she was gone by the time of the argument.

¶ 9 The jury, instructed on the aforementioned offenses and the justification of self-defense, found defendant guilty of aggravated battery with a firearm and not guilty of attempted murder.

¶ 10 The pre-sentencing investigation report (PSI) showed that defendant was born in 1971. He had prior criminal convictions: unlawful use of a weapon (UW) punished in 1989 by one

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year of probation, possession of a controlled substance and possession of a stolen motor vehicle punished in 1994 by consecutive prison terms of three years, UYW punished in 1995 by 30 months' imprisonment, battery in 2000 punished by 12 days' jail, and a 2004 vehicular offense.

¶ 11 According to the PSI, defendant's father was shot to death at home when defendant was 10 years old. His mother, a minister, later married the pastor of her church. Defendant described his childhood as a "good home environment" albeit in a "rough" neighborhood, and he denied any abuse or neglect. He was the only child of his father and mother but has four "maternal siblings;" a fifth was shot to death in 1997. He is unmarried but has lived with his fiancée. He has one child by his fiancée, four children from a previous marriage, and four other children from four prior relationships. His fiancée also has three children from a previous relationship. He "saw all of my children" and denied having any child-support orders against him. He graduated from high school and attended a security training course. In addition to working as a mechanic for Hicks and elsewhere, he worked as a store security guard for five years. He denied serious physical or mental illness except for asthma and childhood behavior disorders. He admitted to drinking beer about twice a week and denied taking drugs or having been in a street gang.

¶ 12 At sentencing, the parties accepted the PSI with minor amendments not affecting the summary above.

¶ 13 Joseph Harrison, a church pastor, testified for the defense that defendant's parents attended Harrison's church for about 30 years so that Harrison and defendant's parents "raised our children together" and Harrison knew defendant since he was about nine years old. When defendant's stepfather became pastor of another church, Harrison and defendant kept in touch. Defendant's stepfather, cousin, girlfriend, and children were in court at sentencing; his mother

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was absent due to severe illness. Harrison described defendant as "very respectable" and "very helpful when it comes to the ministry," including repairing church vans and ministers' cars. He also volunteered in the neighborhood. His family is "tight-knit" and he is loving towards and involved with his children.

¶ 14 Defendant addressed the court, stating that he had considered his actions while in jail and was grateful that both he and Bland "still have our lives" when they could "have been almost destroyed." Defendant was hurt by Bland's injuries, his own actions, and the impact of his actions on his family and loved-ones and on Bland's family and loved-ones. He had "never physically hurt anyone by my own hands" and was hurt by causing someone physical pain "no matter what the cause was."

¶ 15 The State sought a sentence at or close to the maximum for a Class X felony, arguing Bland's physical injuries and that he "didn't deserve what happened to him \*\*\* for mere words that were exchanged."

¶ 16 Defense counsel sought a sentence at or close to the minimum of six years. Counsel noted that defendant's three prior felony convictions had no sentence above three years' imprisonment and his last criminal offense was misdemeanor battery in 2000. Counsel argued that defendant was 39 years old with strong support from his family, constant support from his fiancée who "has not missed a court date," involvement with his own children as well as the community, and the tragedy of his father being killed when he was 10 years old and his brother being killed in a shooting. He "thought he needed to defend himself on that day" and "felt it was different" to their earlier altercations but still regretted what he did. Defendant graduated high school and was employed as a mechanic and a security guard, counsel noted.

¶ 17 The court stated that defendant should not have had a gun because his three felony convictions including weapons offenses rendered him an armed habitual criminal, though that charge had been severed from this case.<sup>1</sup> Moreover, his familial tragedies should have made him painfully aware of what may happen when one carries and fires a gun. All witnesses agreed that defendant and Bland argued almost every time they met, but the others in the garage agreed that "it was all just nonsense stuff" and teasing of no significance. While he had "a little beef" with Bland so that it would have not been unusual for them to "settle up" with a fight, "you don't have to settle up at the point of a gun." Defendant "took it to another level" from their "typical nonsense" by arming himself with a gun. The court found that "there's no real issue about self-defense" when he "got mad" and shot Bland three times "in a pretty concentrated area" though he "supposedly wasn't even looking." The court also agreed with the jury that defendant did not intend to kill Bland. As to the allocution, the court stated that defendant may "feel sorry for Ronald Bland and whatever, it sort of falls on deaf ears being sorry afterwards." The court noted that defendant has "a very nice family" and expressed sympathy for the impact on them "but it's not the family of [defendant] that's before me for sentencing." The court acknowledged that it read the PSI and was "aware of the factors in aggravation and mitigation," and sentenced defendant to 18 years' imprisonment with 824 days of credit for pre-sentencing detention.

¶ 18 Defendant's post-sentencing motion was denied, and this appeal timely followed.

¶ 19 On appeal, defendant primarily contends that his sentence was excessive in light of mitigating factors, including his remorse, that he had no prior prison sentence over three years,

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<sup>1</sup>The State nol-prossed the armed habitual criminal charge and pending UUW charges upon defendant's sentencing herein.

his strong family and job support, and that he shot at Bland when Bland came towards him aggressively after threatening him several times a week for over a year.

¶ 20 Aggravated battery with a firearm is a Class X felony generally punishable by 6 to 30 years' imprisonment. 720 ILCS 5/12-4.2(b); 730 ILCS 5/5-4.5-25(a) (West 2010). A sentence within statutory limits is reviewed on an abuse of discretion standard, so that we may alter a sentence only when it varies greatly from the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. *People v. Snyder*, 2011 IL 111382, ¶ 36. So long as the court did not consider incompetent evidence or improper aggravating factors, nor ignore pertinent mitigating factors, it has wide latitude to impose any term within the applicable statutory range. *People v. Perkins*, 408 Ill. App. 3d 752, 762-63 (2011). This broad discretion means that we cannot substitute our judgment simply because we may weigh the sentencing factors differently. *People v. Alexander*, 239 Ill. 2d 205, 212-13 (2010). The court must balance the relevant factors, including the nature of the offense, the protection of the public, and the defendant's rehabilitative potential. *Alexander*, 239 Ill. 2d at 213. In doing so, the trial court has a superior opportunity to evaluate and weigh a defendant's credibility, demeanor, character, mental capacity, social environment, and habits. *Snyder*, ¶ 36. The court does not need to expressly outline its reasoning, and we presume that it considered all mitigating factors on the record absent some affirmative indication to the contrary other than the sentence itself. *People v. Powell*, 2013 IL App (1st) 111654, ¶ 32; *People v. Brewer*, 2013 IL App (1st) 072821, ¶ 55. Because the most important sentencing factor is the seriousness of the offense, the court is not required to give greater weight to mitigating factors than to the seriousness of the offense, nor does the presence of mitigating factors either require a minimum sentence or preclude a maximum sentence. *Alexander*, 239 Ill. 2d at 214; *Brewer*, ¶ 57.

¶ 21 Here, the court had before it, and expressly considered in its sentencing decision, the PSI and pastor Harrison's testimony. The factors defendant now cites were argued by trial counsel and expressly referred to by the court; that the court gave them different significance or weight than defendant does not constitute an abuse of discretion. We conclude that defendant's sentence of 18 years' imprisonment, squarely in the middle of the sentencing range, is amply supported by his multiple prior felony convictions including weapons offenses – establishing that he should not have had a gun that day, as the court stated – and the circumstances of his offense. Bland was severely injured by defendant's multiple gunshots, still having a bullet in his body despite several days of hospitalization. On the trial evidence, it was reasonable for the court to conclude as it did that defendant shot Bland out of anger rather than fear. In summary, we find that the trial court did not abuse its sound sentencing discretion.

¶ 22 Defendant also contends that his mittimus should reflect a presentencing detention credit of 825 days rather than the 824 days on the mittimus. The State agrees, and the record supports the contention: defendant was in custody for 825 days from his arrest on May 22, 2009, until sentencing on August 25, 2011.

¶ 23 Pursuant to Supreme Court Rule 615(b)(2) (eff. Aug. 27, 1999), the clerk of the circuit court is directed to correct the mittimus to reflect 825 days' credit for presentencing detention. The judgment of the circuit court is otherwise affirmed.

¶ 24 Affirmed, mittimus corrected.