2015 IL App (3d) 120461-U

Order filed January 13, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit Peoria County, Illinois
Plaintiff-Appellee,	)	
	)	Appeal No. 3-12-0461
v.	)	Circuit No. 11-CF-14
	)	
ANTONIO THOMAS,	)	Honorable Stephen Kouri,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justice Schmidt concurred in part and dissented in part.
Justice Wright concurred in part and dissented in part.

ORDER

¶ 1 *Held*: The evidence was sufficient to sustain defendant's convictions but the trial court erred in sentencing defendant based on the trial judge's personal view and policy.

¶ 2 Defendant Antonio Thomas was convicted after a bench trial of first degree murder, aggravated unlawful use of a weapon, and unlawful possession of a weapon by a felon, and sentenced to an enhanced term of 60 years' imprisonment plus natural life. The charges and subsequent convictions arose from an altercation in a gas station parking lot, where Thomas shot

Curtis Johnson, who was engaged in a fistfight with Thomas's friend, Calvin Brown. We affirm the conviction, vacate the sentence, and remand.

¶ 3 FACTS

¶ 4 Defendant Antonio Thomas was charged in January 2011 with four counts of first degree murder (720 ILCS 5/9-1(a)(1), (2) (West 2010)); one count of aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1) (West 2010)); and unlawful possession of a weapon by a felon (720 ILCS 5/25-1.1(a) (West 2010)). The charges arose from an incident on November 9, 2010, at a Circle K gas station in Peoria. A verbal altercation between Calvin Brown and the victim, Curtis Johnson, escalated into a fistfight. Thomas, a passenger in Brown's car, exited the vehicle and shot Johnson. Thomas then fled on foot.

¶ 5 Six days after the shooting, Brown went to the police station and picked Thomas out of a photo array. Lauren Thomas, another eyewitness to the shooting, picked Thomas out of an in-person lineup. Thomas was arrested and waived his right to a jury trial. Prior to the case proceeding before the trial court, the State dismissed three of the murder charges. The remaining first degree murder charge alleged that Thomas, "without lawful justification, personally discharged a handgun at Curtis Johnson, knowing such act created a strong probability of death or great bodily harm" to Johnson and caused his death. 720 ILCS 5/9-1(a)(2) (West 2010). The weapons charges also remained pending.

¶ 6 At trial, Tiffany Smith testified that she was dating Johnson. The couple had a nine-month-old child together and she was pregnant with their second child when Johnson was killed. On the night of November 9, 2010, she and Johnson stopped at the Circle K after dropping off video rentals. Their nine-month-old and her six-year-old son were with them. At the station, Smith noticed Calvin Brown, who shared a child with her sister, pull up to the gas pumps. He was driving a silver Jeep. Smith described that Brown looked at her strangely and told her to tell

her sister, "she had better take care of [his] fucking daughter." Johnson told Brown that the issue was between Brown and Smith's sister and to leave him and Smith out of it. Johnson and Brown exchanged words, and as Johnson walked off, Brown called him a "bitch ass ******." In response, Johnson chased after Brown, grabbed his dreadlocks and begin hitting him. As the fight intensified, Smith yelled at Johnson to stop hitting Brown.

¶ 7 Smith saw the passenger in Brown's car exit the vehicle, and as Johnson let go of Brown, the passenger shot at Johnson. As Johnson turned toward their vehicle, she noticed there was blood on the stomach area of his shirt. Johnson began walking back to the vehicle and collapsed. Brown drove off in the Jeep. Smith told the responding officer at the scene that "Fred" was the shooter. "Fred" was the name by which she knew Brown. Smith later told the police it was Brown's passenger who shot Johnson. She did not see the shooter's face but observed that he was wearing a black hoodie. She could not describe his height, weight, or build, or whether he had facial hair.

¶ 8 Lauren Thomas, a friend of both Smith and Johnson, was also at the Circle K. She saw Johnson arguing with a man driving a Jeep. She described him as a taller, light-skinned black man with dreadlocks. As Johnson walked away, the man continued to argue with him. When Brown said, "Well, you heard me, bitch," Johnson re-approached Brown and a fight ensued. Brown yelled to his passenger to help him, and the passenger reached between the seats and grabbed a gun. Smith heard a gunshot and drove off. She did not see the shooter's face but noticed he was wearing a black hoodie. She returned to the Circle K with Johnson's brother, who she knew was nearby at a friend's house.

¶ 9 Brown testified that he had smoked marijuana and used both ecstasy and cocaine on the night at issue. He was driving a friend's Jeep and picked up Thomas, who was wearing black pants and a black hoodie with a yellow and white stripe. They stopped at a liquor store and he

dropped Thomas off at a family member's house while Brown continued his drug runs. He picked Thomas up again and drove to the Circle K. Brown saw Smith and Johnson, and told Smith that if she loved her sister, Smith would tell her to go home instead of always going out and getting drunk. He and Johnson argued and then began a physical fight. Brown admitted that Johnson was besting him in the fight and that he lost both his shirt and some hair. Brown heard a gunshot from behind and saw Johnson grab his stomach and collapse. He noticed Thomas was not in the Jeep. He did not know that Thomas had a gun. Brown got in the Jeep and left the gas station.

¶ 10 Brown planned to abandon the Jeep because he knew the police would want to question him about the incident. When he arrived at an alley where he planned to leave the Jeep, Thomas was there and told him not to say anything about the shooting. Thomas's statement indicated to him that Thomas had shot Johnson. Brown waited six days before going to the police and cut off his dreadlocks and shaved his facial hair before he did. His first instinct was to flee. Brown identified Thomas as "Antonio" and by his nickname of "Bo Peep" and picked Thomas out of a photographic lineup. At the time of trial, Brown was in the county jail on a charge of unlawful possession of a controlled substance with intent to deliver. In exchange for his testimony, Brown would receive a lesser sentence on the pending possession charge. He also had prior felony convictions, including aggravated discharge of a firearm and unlawful possession of a controlled substance.

¶ 11 Samuel Hobson witnessed the events at the Circle K, where he had stopped to get gas. A Jeep was blocking some of the pumps so he pulled around to the other side and saw two men arguing and fighting. He then heard a gunshot and saw a man in a greenish or greenish-brown top running away. He did not see the man's face but it was not one of the men who had been involved in the fight. Hobson did not see a gun.

¶ 12 Peoria police officer Bradley Scott responded to the Circle K after a dispatch was issued regarding shots fired there. As he arrived, a silver SUV left the gas station. Peoria police officer Steven Cover searched the area for the SUV. Cover found the vehicle near a vacant lot four blocks from the gas station. The Jeep was locked and unoccupied, but the engine was still warm. In a nearby window well, he found a black hoodie. Eric Ellis, an officer with the crime scene unit, testified that he examined the Jeep, which had been towed to the police station. Ellis lifted latent fingerprints from the driver and passenger sides. The driver side fingerprints matched Brown, but the passenger side print did not match Thomas. Ellis did not find a match for the passenger side prints.

¶ 13 Peoria detective Keith McDaniel, who interviewed Brown when he turned himself in, testified that Brown identified his passenger as "Antonio." Brown said Antonio also went by the name "Bo Peep" and had a "Brick Squad" tattoo on his chest. Brown identified Thomas in a photo array and Thomas was arrested based on the identification. Eyewitness Lauren Thomas identified Thomas at an in-person lineup. The lineup card indicated that her identification was based on his body posture. McDaniel admitted that although he attempted to find volunteers for the lineup that looked like Thomas, some of the volunteers were older and taller than Thomas.

¶ 14 The coroner's forensic pathologist who autopsied Johnson testified that he found no evidence of close-range firing and estimated the gun barrel would have been at least two feet from the entrance wound. The cause of death was a gunshot wound. A forensic scientist at the Morton Crime Lab analyzed the DNA sample taken from the black hoodie and could not exclude either Brown or Johnson from having contributed to the sample. Per the expert, one in three blacks, one in three whites, and one in four Hispanics could not be excluded from having contributed to the sample. The State introduced into evidence and played two videotapes

depicting the Circle K lot. The first video was from the Circle K camera and the second from a camera at a business across the street.

¶ 15 Following presentation of the State's case, the defense moved for a directed verdict. The trial court denied the motion and the defense presented its case. Ed Simmons testified that he knew Brown and John Peyton but was not with them on the night of the shooting. That evening, he was with his cousin. Simmons was currently in prison serving a sentence for delivery of a controlled substance and had a prior felony conviction for aggravated battery. Thomas's aunt testified that Thomas visited her on the night of the shooting around 10 p.m. and stayed for five minutes. Thomas was wearing a black t-shirt, black jeans, and a black jacket.

¶ 16 The testimony of the assistant manager of the Circle K, Annie Sanders, was entered into evidence by stipulation. She was on duty the night of the shooting and told two men over the intercom to stop fighting. She had started to call the police when she heard a gunshot. She saw one of the men who was fighting get in the Jeep and drive off. The testimony of Joseph Bell was also presented by stipulation. Early in the morning of November 10, 2010, Bell saw three men walking around the vacant lot near his house. One of the men had braids. The men appeared to be looking for something and eventually drove off in a burnt red or orange Dodge Avenger.

¶ 17 Peoria police officer Steve Roegge responded to the Circle K. Lauren Thomas was initially outside the perimeter but allowed in to take care of Smith's children. Roegge did not recall Lauren informing him that she was a witness. Peoria police office Elizabeth Blair also saw Lauren at the Circle K but did not remember whether Lauren identified herself as a witness. Cover was recalled as the State's witness. He testified that after the Jeep was towed, he looked for and located the Dodge Avenger parked in a driveway. When he pulled up behind it, the occupants exited the vehicle, and fled on foot. He pursued one of the men, John Peyton, whom he caught and arrested. Peyton identified the two other men but they could not be located.

¶ 18 The defense recalled Annie Sanders, who testified that one of the men she saw fighting had dreadlocks. She initially told the police that the shooter had dreadlocks but she had not known there was another person in the Jeep. Sanders also admitted that other vehicles in the gas station lot blocked her view. She told the detectives that she "probably" saw that the shooter had a gun in his hand, but Sanders could not recall if she actually saw a gun.

¶ 19 Following closing arguments, the trial court announced its ruling. It found Thomas guilty of first-degree murder, aggravated unlawful use of a weapon, and unlawful possession of a weapon by a felon. The trial court stated that it based its finding on the testimony of Smith and Lauren Thomas and did not rely on the testimony of Brown. The trial court also found that Brown's and Lauren's identifications were credible and that the videos and testimony of the forensic pathologist supported the State's case. Thomas moved for a new trial. The trial court heard and denied his motion.

¶ 20 The case proceeded to sentencing. The defense emphasized factors in mitigation, including that Thomas was considered mentally retarded and came from a difficult background, and sought a sentence just above 45 years' imprisonment. In aggravation, the State offered the victim impact statement and evidence of Thomas's other weapons felony conviction. The defense did not present any mitigation evidence but argued the applicability of the statutory factors in mitigation. The trial court stated it read the presentence investigation report, considered all the necessary factors, and was strongly influenced by the victim impact statement. The trial court further stated, "if you're man enough to pull the trigger, you're going to be man enough to do life in prison." It imposed a sentence of 60 years' imprisonment plus a term of natural life for the weapons enhancement. The trial court merged the weapons conviction and imposed a six-year sentence on the aggravated unlawful use of a weapon charge, statutorily mandated to be served consecutively with the murder charge. Thomas moved for

reconsideration of his sentence, which the trial court denied. Thomas timely appealed his conviction and his sentence.

¶ 21 ANALYSIS

¶ 22 Thomas raises three issues on appeal. He argues that the evidence was insufficient to support his conviction, the sentence imposed was excessive, and he was improperly assessed a deoxyribonucleic acid (DNA) analysis fee.

¶ 23 We begin with the third issue because the panel is in agreement that the $200 DNA fee should be vacated. The record establishes that Thomas's DNA was in the database at the time of trial. Accordingly, we find the $200 DNA analysis fee must be vacated. 730 ILCS 5/5-4-3 (West 2010); *People v. Marshall*, 242 Ill. 2d 285, 303 (2011) (finding one-time submission satisfies statutory mandates and requires payment of a single analysis fee).

¶ 24 We next consider Thomas's challenge to the sufficiency of the evidence. He maintains that the State failed to prove him guilty beyond a reasonable doubt. He challenges the accuracy of the eyewitness identifications, the conclusiveness of the DNA from the hoodie, the lack of a fingerprint match in the Jeep, and Brown's credibility as a witness.

¶ 25 To sustain a conviction for first degree murder, the State is required to prove that the defendant killed an individual without lawful justification and in performing the acts which caused the individual's death, the defendant "knows that such acts create a strong probability of death or great bodily harm to that individual." 720 ILCS 5/9-1(a)(2) (West 2010); *People v. Guyton*, 2014 IL App (1st) 110450, ¶ 37. It is the State's burden to prove each element of the offense beyond a reasonable doubt. *People v. Maggette*, 195 Ill. 2d 336, 353 (2001). We will not set aside a criminal conviction based on insufficient evidence unless the proof is so improbable or unsatisfactory that a reasonable probability of the defendant's guilt exists. *Maggette*, 195 Ill. 2d at 353. When considering a challenge to the sufficiency of the evidence, the

relevant inquiry is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could find the essential elements of the offense proved beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985).

¶ 26 The State presented the eyewitness testimony of several witnesses. Three individuals testified to the passenger in Brown's Jeep shoot Johnson. Tiffany Smith identified that the passenger was the shooter and was wearing a black hoodie. Lauren Thomas testified that she saw the passenger grab a gun from the Jeep and approach Johnson. She then heard a gunshot as she turned back to her vehicle. Lauren also identified the shooter as wearing a black hoodie. She picked Thomas out of a lineup, although the trial court discounted the lineup. Samuel Hobson was also at the gas station, saw two men fighting, and heard a gunshot. He then saw a man running and testified that the man was not one of the men involved in the fistfight.

¶ 27 Calvin Brown testified that Thomas was the passenger in his vehicle. He knew Thomas as "Antonio" and "Bo Peep" and said Thomas had a "Brick Squad" tattoo on his chest. Brown picked Thomas out of a photo array. While none of the eyewitnesses besides Brown knew Thomas's identity or saw his face, they all consistently testified that the shooter was a passenger in Brown's car; he was wearing a black hoodie; and he fled on foot after the shooting. Their testimonies were sufficient to identify Thomas as the shooter. In addition to the eyewitness testimony, Thomas's aunt testified that he visited her around 10 p.m. on the night of the shooting and was wearing black jeans and a black jacket.

¶ 28 Thomas also submits that there was no physical evidence linking him to the shooting and that Brown's testimony was unreliable. The trial court, sitting as the trier of fact in a bench trial, determines the credibility of the witnesses, weighs and draws reasonable inferences from the evidence, and resolves conflicts in the evidence. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). Here, the trial court was satisfied that the evidence supported a conviction. Based on the

facts in the record, we do not consider the evidence to be so unreasonable, improbable, or unsatisfactory that it raises a reasonable doubt of Thomas's guilt. *People v. Evans*, 209 Ill. 2d 194, 209 (2004). Although the DNA analysis of the hoodie did not conclusively establish that Thomas wore it, it did not exclude him. This evidence, along with the eyewitness testimony and the lineup identifications, is sufficient to sustain a guilty verdict. We note that the trial court expressly explained that it based its guilty finding on the testimony of Smith and Lauren Thomas, not Brown. We will not substitute our judgment for that of the trier of fact on issues of credibility or the weight of the evidence. *Siguenza-Brito*, 235 Ill. 2d at 224-25.

¶ 29 Justice Wright's partial dissent considers the trial court's credibility assessments "unfounded and erroneous." It challenges the court's conclusions on Brown's identification of Thomas as his passenger, as well as the identifications provided by Smith and Sanders, the gas station manager. Our review of the trial court's findings conflicts with the conclusions Justice Wright's partial dissent draws from the findings. The trial court found Brown credibly identified Thomas as the passenger in his car and that Lauren Thomas and Smith both testified that the shooter was Thomas's passenger. Hobson testified the shooter was not the man in the fight, that is, Brown or Johnson. While the trial court suggested that it was unsure whether Brown said he saw Thomas shot Johnson, it did not conclude that Brown could not have witnessed the events he described, as Justice Wright asserts in her partial dissent.

¶ 30 Justice Wright also questions the trial court's credibility assessment regarding the identification provided by Lauren Thomas, submitting that the trial court rejected her lineup identification but accepted her in-court identification. The trial court expressly downplayed the lineup, describing that it "was not the best lineup" and stating that it did not put much weight on it. Even without the lineup identification, the evidence supports the trial court's conclusion regarding the identification of Thomas as the shooter. Lauren Thomas was an eyewitness and

saw Thomas take a gun from the Jeep. She then heard a shot and saw Thomas running away. We do not consider her identification unsatisfactory or so improbable that the trial court erred in relying on it.

¶ 31 Similarly, Justice Wright challenges Smith's identification of Thomas as inconsistent, stating that she initially identified Brown as the shooter. At trial, Smith denied that she told police that "Fred" shot Johnson, testifying, "No, I just said it was Fred." Smith said she was certain Brown was not the shooter and consistently testified that the passenger shot Johnson before fleeing on foot, while Brown drove off in the Jeep after Johnson collapsed.

¶ 32 Justice Wright's partial dissent makes a similar claim regarding the identification testimony of Sanders, the gas station manager. It is undisputed that Sanders initially identified that Brown shot Johnson. She assumed that the man she saw with dreadlocks who was involved in the fight shot his opponent but clarified at trial that she did not know there was a passenger in the Jeep. She also admitted at trial that she initially told the police she saw a gun when she did not see one. She explained that she assumed there was a gun because she heard the shot and saw Johnson fall down. Sanders also stated that her view was blocked by other vehicles at the gas pumps and customers were running into the store. In addition to these explanations for Sanders' initial misidentification, she also testified that she was in shock at the time of her statements to the police following the shooting.

¶ 33 Although the State was not able to match the fingerprints found on the passenger side of the Jeep to Thomas or connect the DNA from the black hoodie to him, the lack of physical evidence is not dispositive. The State presented other evidence tying Thomas to the crime, including eyewitness identifications and testimony. The trial court found the testimony of the forensic pathologist that the shooter was at least two feet from Johnson significant in its finding. Based on the evidence presented at trial, we find that any rational finder of fact could have found

the essential elements of the charged offenses proven beyond a reasonable doubt. As finder of fact, the trial court did not err in concluding that the evidence supported a finding of guilt.

¶ 34 We next address Thomas's claim that his 60-year plus natural life sentence was excessive. Thomas argues that the trial court imposed an excessive sentence of 60 years plus an enhancement of natural life. According to Thomas, the trial court failed to consider his troubled background, deprived childhood, low intelligence, non-violent criminal history, and his Good-Samaritan act of helping defend his friend, Brown. He further argues that the trial judge has a predisposition to sentence all offenders who use a firearm in the commission of their offense to life or *de facto* life sentences.

¶ 35 Sentences are to be imposed based on consideration of the nature and circumstances of the offense and the offender's character, history and condition. *People v. Perruquet*, 68 Ill. 2d 149, 154 (1977). A sentence that is within the statutory range is not an abuse of discretion unless the sentence is at variance with the law's spirit and purpose or manifestly disproportionate to the nature of the offense. *People v. Alexander*, 239 Ill. 2d 205, 213 (2010) (citing *People v. Stacey*, 193 Ill. 2d 203, 210 (2000)). The sentencing range for first degree murder is 20 to 60 years. 730 ILCS 5/5-4.5-20(a)(1) (West 2010). A mandatory enhanced sentence of 25 years or up to a term of natural life must imposed when the defendant "personally discharged a firearm that proximately caused *** death to another person." 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2010). We will not overturn a sentence unless the trial court abused its discretion in imposing it. *Stacey*, 193 Ill. 2d at 209-10.

¶ 36 The record indicates that the trial court read the presentence investigation report and considered the statutory factors, both mitigating and aggravating, including Thomas's background, childhood, mental status, and criminal history. The trial court also considered the victim impact statement submitted by Johnson's family. It heard arguments at sentencing from

the State and the defense. Although the defense did not present any evidence in mitigation, counsel argued that Thomas came from a troubled background and had a difficult childhood. The trial court was aware of Thomas's personal circumstances and the circumstances that resulted in the shooting. Contrary to Thomas's view that his actions were that of a Good Samaritan, the trial court considered Thomas's act of bringing a gun to a fistfight an aggravating factor. The trial court also stated that it was persuaded by the victim impact statement, expressing that the statement emphasized that when Thomas shot Johnson, "Mr. Thomas ripped the heart out of that family." We find the trial court did not abuse its discretion in sentencing Thomas to a 60-year term.

¶ 37 We find the court did abuse its discretion, however, in sentencing Thomas to a term of natural life as an enhancement for using a firearm. In our view, the trial court failed to exercise any discretion at all and simply sentenced Thomas based on a personal view and policy of sentencing defendants who use a firearm to life or *de facto* life imprisonment. Although the enhancement term is within the sentencing range, the trial court imposed the highest end of the range based on its personal policy regarding use of a weapon in the commission of crimes, not on factors particular to Thomas and his offense.

¶ 38 In sentencing Thomas, the trial judge stated, "if you're man enough to pull the trigger, you're going to be man enough to do life in prison." Thomas offers the trial court's conduct at other sentencing hearings to establish the judge's failure to exercise discretion when imposing the enhancement. See *People v. Hawkins*, 2014 IL App (3d) 120139-U, ¶ 14 (trial court imposed maximum seven-year sentence for unlawful sale of a firearm); *People v. Jordan*, 2015 IL App (3d) 120439-U, ¶ 21 (defendant sentenced to 75-year term of imprisonment for killing another with a gun); *People v. Williams*, 2013 IL App (3d) 110808-U, ¶ 20 (defendant given natural life

for shooting drug dealer during robbery); *People v. Brown*, 2013 IL App (3d) 110669, ¶ 33 (defendant sentenced to natural life for shooting drug dealer.

¶ 39 The State correctly maintains that comparative sentencing has been rejected in Illinois. *People v. Fern*, 189 Ill. 2d 48, 55 (1999). Thomas is not seeking a sentence comparison, however, but using the other sentences to illustrate the trial court's firearm enhancement sentencing policy. *People v. Williams*, 112 Ill. App. 3d 617, 619 (1983) ("we must consider other remarks by the same trial judge in sentencing hearings"). Thomas relies on the other sentences imposed by the trial court not as a means to compare his sentence as excessive but as support for the claim that the trial court applies the firearm enhancement without exercising discretion, resulting in life or *de facto* life sentences for all defendants in his courtroom who have been convicted of discharging a firearm. We will consider the cases in our analysis.

¶ 40 We agree with Justice Schmidt's partial dissent that *Hawkins*, *Williams*, and *Brown* are inapplicable to the issue here. None of the defendants in those appealed their sentences and the facts presentation in the appellate decisions do not provide enough information to support Thomas's argument. *Hawkins*, 2014 IL App (3d) 120139-U, ¶ 8 (defendant arguing ineffective assistance of counsel); *Williams*, 2013 IL App (3d) 110808-U, ¶ 21 (postconviction petition alleging ineffective assistance of appellate counsel), and *Brown*, 2013 Il App (3d) 110669, ¶ 35 (defendant appealed jury instructions, admission of evidence, and imposition of fees). However, we disagree with the dissent that *Jordan* is not applicable or relevant to the instant case. Contrary to the claims made by Justice Schmidt in his partial dissent, the record in *Jordan* is available, including the transcripts from the sentencing hearing, and we are able to conduct a sufficient review. Because *Jordan* was pending in this court during the pendency of the instant appeal, we were able to take judicial notice of its record. *People v. Vaughn*, 200 Ill. App. 3d

765, 768 (1990) (appellate court may take judicial notice of contents on the records on appeal in other cases).

¶ 41 In *Jordan*, the trial court sentenced the defendant to a 75-year term of imprisonment for first degree murder. At the sentencing hearing, the judge stated, "I'm tired of sitting through these sentencings for murder, for guns, shots on the street." The trial court further stated:

> "But I have said it before, and I am going to keep on saying it, if you bring a gun to the fight, you're going to prison; and if your [*sic*] responsible for that gun being fired, either because of you or somebody your [*sic*] with, and you're man enough to have that gun fired and a life is taken, you're going to have to be man enough to spend the rest of your life in prison because that's the line in the sand."

¶ 42 Another matter that was also before this court during the pendency of this appeal was *People v. Cervantes*, 2014 IL App (3d) 120745, and we were able to take judicial notice of its record. *People v. Jimerson*, 404 Ill. App. 3d 621, 634 (2010) (reviewing court may take judicial notice of other judicial proceedings). In *Cervantes*, the trial judge consulted life expectancy tables outside the record to sentence the defendant to a *de facto* life sentence. *Cervantes*, 2014 IL App (3d) 120745, ¶ 26. *Cervantes* did not involve a firearm enhancement; however, we consider that the trial judge's comments in that case are indicative that the court employs blanket sentencing policies based on its personal view and policy.

¶ 43 Justice Schmidt maintains in his partial dissent that Thomas failed to present any evidence of a blanket policy. We interpret the trial court's conduct in *Cervantes*, together with its comments in *Jordan* and the instant case as a clear indication of the court's view that each defendant should spend the rest of his life in prison based on his use of a gun alone in the

commission of a crime. The trial court's comments in this case and *Jordan* convince us that the trial judge employs a personal policy of imposing the equivalent of natural life sentences for every convicted offender subject to firearm enhancements. The use of a blanket policy is prohibited. *People v. Bolyard*, 61 Ill. 2d 583, 587 (1975) (finding trial court acted arbitrarily in sentencing defendant based on judge's "category of disfavored offenders"). It is contrary to sentencing objectives and the legislative intent of the firearm enhancement. *People v. Clemons*, 175 Ill. App. 3d 7, 13 (1988) (trial court's personal policy is improper as sentencing criteria).

¶ 44 In his partial dissent, Justice Schmidt considers *Bolyard*, *Clemons*, *People v. Wilson*, 47 Ill. App. 3d 220 (1977) and *People v. Anderson*, 50 Ill. App. 3d 516 (1977), distinguishable because they deal with a trial court's "outright" denial of probation and probation is not a sentencing option for first degree murder. Thomas does not rely on the cases for factual similarities in sentences but to illustrate the improper application of a trial court's personal view and policy in sentencing a defendant. In all four cases the dissent attempts to distinguish, the reviewing court focused on the trial court's expression of its personal policy in fashioning the sentences. Like the instant case, the trial courts did not limit themselves to consideration of the allowable sentencing factors. We disagree with Justice Schmidt's interpretation of the trial court's comments here and in *Jordan*, and consider that they do express "an inflexible personal policy."

¶ 45 When sentencing Thomas, the trial court stated, "if you're man enough to pull the trigger, you're going to be man enough to do life in prison." In sentencing Jordan, the trial court stated, "you're man enough to have that gun fired and a life is taken, you're going to have to be man enough to spend the rest of your life in prison because that's the line in the sand." Justice Schmidt's partial dissent states the comments "share common characteristics" but maintains the trial court did not allude to an inflexible personal policy or outright refusal to sentence a

defendant to less than the maximum enhanced term. In our view, the trial court has determined a "line in the sand" and when a defendant crosses it, he will be sentenced to life in prison. A defendant crosses the line in the sand when he uses a firearm in committing an offense. We find the trial court's comments express a blanket policy.

¶ 46 Under the statutory sentencing scheme, a trial court is charged with fashioning a sentence within the applicable range that is based on the particular circumstances of the case. *Fern*, 189 Ill. 2d at 55. In his partial dissent, Justice Schmidt argues that the record reflects that the trial court considered all the necessary factors in sentencing Thomas and that under the circumstances of the offense, the maximum term for the firearm enhancement did not vary greatly with the spirit and purpose of the law. While the record reflects that the trial court considered the statutory sentencing factors, the presentence investigation and the victim impact statement in fashioning Thomas's sentence, the record further demonstrates that the trial court did not sentence Thomas based on the statutory factors and other proper sentencing criteria. Rather, the trial court relied on its personal view and policy that "if you're man enough to pull the trigger, you're going to be man enough to do life in prison."

¶ 47 The trial court's personal view and policy are not factors to be considered in sentencing. Because the trial court failed to apply its sentencing discretion, we consider it possible that Thomas's sentence was "arbitrarily given to comport with [the trial court's] stated policy." *Williams*, 112 Ill. App. 3d at 620. Accordingly, we find that Thomas's sentence should be vacated and the case remanded for re-sentencing.

¶ 48 For the foregoing reasons, the judgment of the circuit court of Peoria County is affirmed in part, vacated in part and the cause remanded for re-sentencing.

¶ 49 Affirmed in part, vacated in part, and remanded.

¶ 50 JUSTICE SCHMIDT, concurring in part and dissenting in part.

¶ 51 I concur with the finding that the evidence was sufficient to sustain defendant's convictions. I also concur with the finding that the trial court did not abuse its discretion in sentencing defendant to a 60-year term. I part company with the majority, however, in its finding that the natural life enhancement constituted an abuse of discretion. I, therefore, dissent.

¶ 52 Turning first to the majority's reliance on *People v. Jordan*, 2015 IL App (3d) 120439-U, I acknowledge that the comments made in the instant case and in *Jordan*, *supra* ¶ 41, share some common characteristics. They do not, however, rise to the level of a blanket sentencing policy, which the law is clear constitutes an abuse of discretion and cannot stand. See, *e.g.*, *People v. Bolyard*, 61 Ill. 2d 583, 584-87 (1975) (new sentencing hearing warranted where trial court stated that it personally " 'subscribe[d]" " 'to an inflexible policy' " where any crimes involving sexual violence "were simply not probationable"); *People v. Wilson*, 47 Ill. App. 3d 220, 222 (1977) (sentence reversed and cause remanded for a resentencing hearing where, in imposing sentence, the trial judge disclosed his view or policy, which made it virtually certain that no first-time offender in the traffic of drugs would be granted probation); *People v. Clemons*, 175 Ill. App. 3d 7, 13 (1988) (trial judge erred in refusing to vacate defendant's sentence based on judge's policy of not disturbing a sentence without the victim's approval); *People v. Anderson*, 50 Ill. App. 3d 516, 519 (1977) (sentence of imprisonment vacated where trial court contravened *Bolyard* in stating that it would never consider probation for a defendant who drove a motor vehicle after revocation of his driver's license).

¶ 53 Yet, the aforementioned cases are distinguishable from the case at bar, insofar as they all deal with the trial judges' outright denial of probation for certain offenses. The trial judges in those cases made definitive statements that they would never grant probation when sentencing a defendant convicted of a specific probational crime.

¶ 54 The majority scoffs at this distinction, contending that, "Thomas does not rely on the cases for factual similarities in sentences but to illustrate the improper application of a trial court's personal view and policy in sentencing a defendant." *Supra* ¶ 44. However, it is the "factual similarities" that render those cases inherently different from, and thus inapposite to, the situation confronting us here. The *Bolyard*, *Clemons*, *Wilson*, and *Anderson* defendants were all convicted of probationable offenses—jail time was not necessarily a foregone conclusion, yet, the trial courts arbitrarily and summarily denied the probation alternative. Probation is not an option for a defendant convicted of first-degree murder. See 730 ILCS 5/5-5-3(c)(2)(A) (West 2010). Defendant faced only prison or more prison; he did not suffer the same prejudice as the defendants in those cases. Furthermore, the trial court did not make any definitive statements alluding to an inflexible personal policy, nor did it outright refuse to sentence defendant to anything other than life in prison.

¶ 55 To the contrary, the record demonstrates the trial court relied on proper aggravating and mitigating factors in making its sentencing decision. Of particular import was the victim impact statement, which the trial court noted "strongly influenced" its decision and made clear that "when Mr. Thomas shot Mr. Johnson, Mr. Thomas ripped the heart out of that family." The court further explained that defendant shot Curtis Johnson without provocation. It was Calvin Brown who was getting bested in the fight, not defendant. Instead of jumping into the fray to help Brown, defendant immediately resorted to the gun and shot Johnson.

¶ 56 Two things stand out. First, defendant was in his mid-20s at the time of sentencing. At that age, a 60-year term is, effectively, a natural life sentence. This is especially so when a defendant serving time for first-degree murder is not entitled to any sentence credit and will serve the entire sentence imposed by the trial court. See 730 ILCS 5/3-6-3(a)(2)(i) (West 2010).

¶ 57 Second, the majority correctly notes that section 5-8-1(a)(1)(d)(iii) of the Unified Code of Corrections provides that "if, during the commission of the offense [first-degree murder], the person personally discharged a firearm that proximately caused great bodily harm, *** or death to another person, 25 years or up to a term of natural life *shall* be added to the term of imprisonment imposed by the court." (Emphasis added.) 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2010). With the focus on "shall," it is clear that once the court convicted defendant on the first-degree murder charge, the statute mandated enhancement. Thus, on remand, even if the court imposes the minimum 25-year add-on, defendant will be eligible for parole on or about his 110th birthday. Even if one were to assume that the trial court erred, defendant suffered no prejudice (unlike those defendants in *Bolyard, Clemons, Wilson*, and *Anderson* where the trial court refused to consider the option of probation) as the result of the natural life add-on. Remanding for resentencing makes no sense. Furthermore, let us not be disingenuous. A trial court's personal views are virtually always reflected in a sentence, at least in situations involving a range of potential sentences. Rarely do different trial judges weigh the aggravating and mitigating factors identically.

¶ 58 JUSTICE WRIGHT, concurring in part and dissenting in part.

¶ 59 I do not agree with Justice O'Brien's and Justice Schmidt's decision to affirm defendant's conviction. After carefully reviewing the record, I submit reasonable doubt exists and would reverse defendant's conviction and sentence. In addition, I agree a harsh sentence could be justified for a crime such as this. However, in this case, I cannot agree that the trial court's sentence resulted from the proper exercise of judicial discretion. Consequently, I would not uphold the sentence in this case, but would remand for further proceedings.

¶ 60 First, I turn to the sufficiency of the evidence. To do so, I rely only on the court's assessment of the evidence, as summarized below. After considering the court's findings of

credibility and the undisputed facts of record, unlike the majority, I conclude that the evidence did not establish defendant's guilt beyond a reasonable doubt.

¶ 61 In this case, the court did not believe Brown was able to see defendant fire the fatal gunshot. With good reason, the court found Brown's testimony about the shooting was not credible because Brown's vantage point would not have allowed him to view the events Brown described to the court during his testimony. However, after finding Brown was not credible with respect to the identity of the gunman, the court then found Brown's testimony to be worthy of belief with respect to the identity of his passenger. I respectfully suggest that if the defendant falsified his testimony about defendant being the gunman, his entire testimony should have been viewed with a high degree of skepticism by the court.

¶ 62 The court also made a finding that another eyewitness' account was not worthy of "much weight." Here, the court found the lineup Thomas viewed was suggestive and consequently, the court found Thomas' pre-arrest identification of defendant to be unreliable. Yet, in spite of Thomas' tainted pre-arrest identification of defendant, the court concluded Thomas' in-court identification of defendant as the gunman was credible. Combined with the testimony of Tiffany Smith, the trial court stated "there was no reason, none whatsoever," to think the testimony of either Thomas or Smith was not credible. Contrary to the court's observation, I suggest the unchallenged testimony of Sanders should have caused the court to reasonably doubt whether the State had proved the true identity of the gunman.

¶ 63 Like Smith, Sanders told the police she saw the man with dreadlocks, who was engaged in the fight, shoot the victim. The court did not find Sanders was less-than-credible or mistaken. The store manager's version of the events was consistent from the time of the murder until the day of trial and corroborated Smith's spontaneous statement identifying Brown at the scene of the shooting.

¶ 64 I respectfully suggest the officers at the scene had it right. Brown ended the victim's life over a family dispute instigated by Brown himself. That night, both Smith and the store manager agreed Brown fired the fatal shot. Perhaps Smith had second thoughts about implicating Brown, since her sister is the mother of Brown's child. Nonetheless, I submit reasonable doubt exists.

¶ 65 Since my respected colleagues have upheld defendant's conviction but are divided on the sentencing issue, I next consider the propriety of the 60-year plus natural life sentence imposed by the court. I note, Justice Schmidt makes a good point that the error in this case may be harmless, since a lengthy mandated sentence was required by statute.

¶ 66 However, as previously recognized by this court in *People v. Cervantes*, 2014 IL App (3d) 120745, the life-for-a-life approach will be carefully reviewed for an abuse of discretion. I understand why a judge would seek to deter crime by taking a strong stand on senseless gun violence. However, too often senseless shootings are motivated by a retaliatory life-for-a-life approach to street violence. No matter how well-intentioned, an ordered society requires a more measured approach to crime deterrence from its judiciary. To that end, a trial court must thoughtfully balance factors in mitigation and aggravation without an arbitrary emphasis on retribution alone. Based on the record in this case, I conclude defendant's sentence should be vacated and the matter should be remanded for a new sentencing hearing.