

No. 1-14-0997

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).

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.)	No. 09 CR 11566
)	
ANTHONY BROWN,)	Honorable
)	Thomas V. Gainer, Jr.,
Defendant-Appellant.)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Pierce and Justice Simon concurred in the judgment.

O R D E R

¶ 1 *Held:* Evidence sufficient to convict defendant of second degree murder and aggravated battery, and in particular to find that his belief in self-defense justifying his use of deadly force was unreasonable. Prison sentence of 20 years total for killing one person and wounding another, by firing multiple shots on a street with several other people present, is not excessive.

¶ 2 Following a bench trial, Anthony Brown, the defendant, was convicted of second degree murder and aggravated battery with a firearm and sentenced to consecutive 10-year prison terms. On appeal, he contends that the trial court erred in finding his belief that he acted in defense of another was unreasonable, and that his sentence is excessive. We affirm.

¶ 3 Defendant was charged with the first degree murder of Antonio Smith and the attempted first degree murder and aggravated battery with a firearm of Kenneth Smith for allegedly shooting them on or about May 23, 2009.

¶ 4 At the December 2013 trial, Latronica Smith testified that she was the sister of Antonio and cousin of Kenneth. On May 23, 2009, Latronica, Antonio, their sister Latasha Smith, Kenneth, Antonio's girlfriend Dionna Curtis, Latronica's husband Willie Osbey, Latasha's boyfriend Terrance Osbey, and others went to Curtis's home at 1108 South Independence Boulevard in Chicago after a long barbecue in a park at which alcohol was served and marijuana was smoked. They were on Curtis's front porch and in the street talking, listening to music, and drinking alcohol. To the best of her knowledge, none of the people in front of Curtis's home was armed. During this time, she noticed a person using a phone on the porch of 1114 Independence. Shortly before 11 p.m., Antonio walked Latronica to her car and then went to Willie's car (parked in front of Latronica's car) to speak with him. Antonio was walking on the sidewalk in front of 1114 Independence with a cup in his hand when "he scrunched down" and then was "tussling" with someone who Latronica could not see at first as she was in the process of driving away. Kenneth was "backing up" when defendant fired multiple gunshots from the front steps of 1114 Independence. Latronica drove away but quickly returned when Willie sounded his car horn and yelled that Antonio had been shot; she then saw Antonio lying face-down in the street. Latronica did not speak with police that night but spoke with detectives later.

¶ 5 On cross-examination, Latronica admitted that they ran out of alcohol at the barbecue when they went to Curtis's home but denied that she, Antonio, or Kenneth smoked marijuana at the barbecue. Latronica clarified what she meant by Antonio "tussling" with a man: he argued

1-14-0997

with a man who had been standing on the porch of 1114 Independence, then picked up the man and dropped or "body slammed" him to the pavement. The man had not swung at or tried to strike Antonio before Antonio picked him up. Terrance was standing next to Antonio during the tussle and Kenneth was approaching them; Latronica denied that anyone was "stomping" the man and denied that Antonio or Terrance participated in the tussle. Defendant was in the gangway next to 1114 Independence and did not appear to be arguing with Antonio before he fired.

¶ 6 Kenneth Smith testified that he was dancing in the street in front of Curtis's home when he glanced over and saw Antonio in "an altercation" with a man he later learned to be Anthony Thomas (Thomas) in front of 1114 Independence, and the defendant was standing next to Thomas. Kenneth was walking towards 1114 Independence when he saw Antonio "slamming" Thomas to the ground, so he ran over. When asked where Antonio was after Thomas went to the ground, Kenneth "couldn't really say" because his focus was briefly elsewhere. Kenneth was about eight feet away from Antonio when defendant drew a gun and fired at Kenneth, who did not see anyone else being shot because he turned away and fled. He was shot in the right buttocks as he fled, falling to the ground. He denied seeing anyone but defendant with a weapon on the night in question. Kenneth was taken to a hospital and was still there on May 27 when he viewed photographic arrays from which he identified defendant as the shooter and Thomas as the man in the altercation with Antonio. Kenneth had been shot twice, and one of the bullets had exited behind his right ear. He required a "trach" tube in his neck, had a punctured lung, and his fractured right femur caused nerve damage and required metal rods in his leg.

1-14-0997

¶ 7 Kenneth admitted to having a 2007 conviction for possession of a controlled substance. On cross-examination, Kenneth initially denied being aware of a "beef" Antonio had with Thomas's brother over an alleged unpaid loan but then admitted a vague awareness of a dispute over money. Kenneth admitted having a few drinks, but denied smoking marijuana, on the night in question. He denied telling a detective in November 2009 that Antonio went directly to 1114 Independence rather than first to Latronica and Willie's cars. Kenneth admitted that Antonio approached defendant and Thomas, who were not shouting before he approached. Kenneth denied that he reached Thomas and kicked him, maintaining that he was several feet away when defendant fired. He testified that he was running to Antonio not to join in a fight but "to ensure that he wasn't getting jumped on," though Antonio had already slammed Thomas. Kenneth also maintained that defendant fired first at him rather than Antonio, though Kenneth was not struck by the first shot.

¶ 8 Terrance Osbey testified that, during the party at the Curtis home, Antonio walked over to 1114 Independence, where defendant was on the porch and Thomas was nearby. Terrance followed Antonio, who put down a cup he had been holding and then immediately upon meeting Thomas grabbed him by the waist and demanded "my money." Terrance was standing only about two feet away, holding a cup, when Antonio dropped Thomas. Thomas landed on his feet and said "up the gun," and defendant drew a gun from his pocket. Nobody but Antonio, Thomas, Terrance, and defendant was in the vicinity. Antonio did not attack Thomas after he landed, and Thomas was not visibly injured. Nonetheless, defendant aimed at Antonio and fired several shots; Terrance fled, but spoke with the police after they arrived at the scene. Terrance denied that anyone but defendant was armed that night. He admitted to smoking marijuana and having

several drinks on the day in question and to having 2006 and 2009 convictions for possession of a controlled substance.

¶ 9 On cross-examination, Terrance admitted that he approached and stared at defendant upon arriving at Curtis's home because he was concerned about a man standing alone on a nearby porch. However, no words or blows were exchanged, nor did defendant draw his gun. Terrance knew on the day in question that Thomas lived at that house but denied mentioning this to anyone at Curtis's party. Terrance did not recall whether he told police that Thomas landed on his feet rather than being slammed to the ground, but did recall telling police that Thomas told defendant to draw his gun. Terrance testified before the grand jury that Antonio slammed Thomas and that Thomas told defendant to draw his gun before Antonio picked up Thomas. Terrance denied that either he or Antonio were "stomping on" Thomas and denied that Kenneth was next to himself and Antonio just before the shooting.

¶ 10 Dionna Curtis testified that she was pregnant on the day in question and thus drank no alcohol either at the barbecue or at her home afterwards. During the party at her home, she noticed defendant and Thomas standing near 1114 Independence. After Antonio walked over to Latronica's car to speak with her, he was walking back to the party, which brought him past defendant and Thomas. An argument arose between Antonio and Thomas, during which Antonio put down a cup he had been holding and said to Thomas "You want to fight?" As Antonio and Thomas stood near enough to strike each other, Antonio repeatedly gestured towards Thomas's head but Curtis was uncertain from her vantage whether Antonio was actually striking Thomas on the head. Antonio then picked up Thomas and "slammed" him; Thomas landed on his back with Antonio over him. Thomas was grasping Antonio's shirt, but Antonio was too close for

Thomas to swing at him. Thomas then told defendant to draw his gun, and Antonio tried to pull away. During the fight, defendant was standing right behind Antonio while Terrance was right next to Antonio, smoking a cigarette, holding a cup, and not participating in the fight. Defendant drew a gun, aimed at Antonio, and fired several times at Antonio. Kenneth was still about eight feet away when defendant fired. As Antonio fell wounded to the ground, defendant and Thomas fled. Curtis had known that Antonio was upset with Thomas because he had paid late on a loan by Antonio to Thomas's brother. On cross-examination, Curtis testified that Terrance did not follow defendant as he met with Latronica but joined him later in front of 1114 Independence.

¶ 11 Donny Dukes testified that, on the evening in question, defendant and Thomas were drinking and talking with him at a home other than 1114 Independence, then left together. During the conversation, neither defendant nor Thomas expressed any hostility towards Antonio or Kenneth nor displayed a weapon. Defendant and Thomas returned about an hour later, running up to the home. Thomas and defendant seemed "scared or paranoid," but Thomas was not visibly injured. Dukes learned later that evening that his cousins Antonio and Kenneth had been shot, and later identified defendant from a photographic array and lineup. Dukes admitted to convictions in 2004 for computer fraud and 2005 for possession of a controlled substance.

¶ 12 A police detective testified to reporting to the scene of the shooting that night and seeing five spent shell casings in front of 1114 Independence as well as blood on the street nearby. Another detective testified that a physician gave him a bullet removed from Antonio's body at the hospital. Another detective testified that defendant "turned himself in" at a police station in early June 2009. A police officer testified that an informant led him in mid-June 2009 to a loaded pistol behind a garbage can, several blocks away from Independence Boulevard. The parties

stipulated to forensic testing showing that the spent casings from the scene were fired from that pistol while the bullet from Antonio's body was not established or eliminated as having been fired from that pistol.

¶ 13 The parties also stipulated regarding Antonio's autopsy. His body had one gunshot to the back that passed through his right lung and heart and exited his chest, two shots through his left arm, and a shot through his left leg; none of the shots showed evidence of close-range firing. Antonio's blood tested positive for ethanol at 55 milligrams per deciliter.

¶ 14 Defendant made a motion for a directed finding, which the court denied.

¶ 15 Defendant testified that he lived with his parents at 1146 S. Independence as of May 2009, was employed as a security guard and had a valid firearm owner's card. He and Thomas were best friends for years. On May 23, 2009, defendant was with Thomas for several hours at a barbecue; defendant did not drink during the barbecue and did not see Thomas drinking. Defendant was carrying a gun but did not show or mention it to Thomas, nor had Thomas asked him if he was carrying a gun. After several hours, defendant and Thomas went to Thomas's home at 1114 Independence, stopping on the way to buy liquor. As they arrived, defendant noticed a party down the block with people dancing in the street. Defendant and Thomas had been standing on the porch of 1114 Independence for a few minutes when Antonio approached with a cup in his hand, followed a few feet behind by Terrance and Kenneth. Antonio and Thomas argued; Antonio put down his cup, and Thomas raised his hands and shook his head "no." When Thomas turned to go back up the porch steps, Antonio picked up Thomas by the waist and threw him to the pavement. Antonio, Terrance, and Kenneth then repeatedly kicked Thomas as he was on his back on the ground. Thomas groaned in pain. Defendant believed Antonio, Terrance, and

1-14-0997

Kenneth were going to kill Thomas, so he drew his gun and fired several shots. He admitted that he did not tell Antonio, Terrance, or Kenneth to stop attacking Thomas, nor did he fire a warning shot but aimed his first shot at Antonio. Though the gun had 13 bullets, defendant believed he fired seven shots. Defendant first stated he was firing "towards the crowd" but then testified that he was shooting at Antonio. Defendant and Thomas fled after defendant stopped firing, and defendant noticed that Thomas was limping. Defendant dropped the gun as he fled along Independence Boulevard and briefly but unsuccessfully looked for it. He did not know how the gun came to be where police recovered it. Defendant left Thomas with his father at his father's home rather than bringing him to a hospital. Defendant did not go to the police after the May 23 incident until he went with counsel to a police station on June 2, after learning the police were looking for him.

¶ 16 Defendant offered the parties' stipulation that a police officer would testify that he took a statement on the day of the shooting from Michelle Johnson and she told him that she was with the Smiths at their party when Antonio and Kenneth engaged in an argument with some men on a nearby porch. The argument escalated into a fight, "someone started shooting" and Antonio and Kenneth fell wounded. Then two men from the porch fled along Independence Boulevard.

¶ 17 Following closing arguments, the court found defendant guilty of second degree murder and aggravated battery with a firearm. Noting that Curtis had not been drinking on the night in question, the court found that her testimony – Antonio slammed Thomas to the ground, then defendant fired several shots at Antonio – established that defendant shot Antonio to prevent Thomas from being beaten by Antonio. However, the court found that Terrance and Kenneth were not involved in attacking Thomas. The court also found that the "defendant overreacted"

and that defendant's belief that he needed to use deadly force to protect Thomas from death or great bodily harm was unreasonable. The court further found that the State's evidence proved the second degree murder of Antonio. The court gave no particular weight to the evidence that defendant seemed afraid after the shooting or that he surrendered himself, though it also found that he "embellished his testimony by trying to put two other guys in the beating." The court found that defendant did not intend to kill Kenneth, based on Curtis's testimony that defendant was shooting at Antonio, but acted knowingly when he fired his gun so there was evidence to support the defendant's conviction for the aggravated battery of Kenneth.

¶ 18 Defendant filed a post-trial motion challenging the sufficiency of the evidence and in particular the court "rejecting" his affirmative defense of defense of another. The court denied the post-trial motion and proceeded immediately to sentencing.

¶ 19 The presentence investigation report (PSI) states that defendant had a 2001 disposition of supervision for retail theft, which was terminated satisfactorily. He was born in 1983, lives with his father, and has an excellent relationship with his father and mother. He was raised by both parents, who were married until he was 12 years old, and has five siblings; he denied any childhood abuse or neglect. He completed high school and did not attend college but intends to. He was previously employed and supported by his father when unemployed. He denied any physical or mental health issues and denied alcohol or drug abuse. He denied gang affiliation, and while some of his friends have criminal records, none are gang members.

¶ 20 At sentencing, the State had no corrections or amendments to the PSI. Defendant amended the PSI to add that he grew up in a "bad" neighborhood and at the time of his arrest was attending his first semester at "Lincoln Tech." The court noted that defendant had no prior

criminal convictions, only a disposition of supervision for theft. The State offered a victim-impact statement from Latronica, which the court read.¹

¶ 21 The State argued that defendant fired several shots on a street with several people nearby, including shooting Kenneth in the back as he fled, and sought consecutive sentencing and a term "somewhere in the 20s." Defendant argued that he had no violence in his background and came from an intact family so that he had a "real support system," was never in a gang, went to high school and was attending college, and worked. His PSI was "stellar," and no aggravating factor but the inherent factor of causing serious physical harm applied while several mitigating factors applied including his belief that he was defending Thomas. Trial counsel sought the minimum prison terms of four years for second degree murder and six years for aggravated battery, and argued that they should run concurrently if the court had discretion to do so. Defendant clarified for the court that he was not claiming that mandatory consecutive sentencing was inapplicable.

¶ 22 Defendant addressed the court, stating that he did not intend the outcome and regretted it. "I really truly thought I was acting out there to really help somebody." He apologized for the pain he caused and "I never intend to do anything like this again."

¶ 23 The court thanked defendant and agreed that his PSI was extraordinary among people charged with similar crimes. The court reiterated its trial conclusion that defendant believed he was acting to defend Thomas but his belief was unreasonable, noting that Antonio and Kenneth were shot in the back and reiterating its finding that Kenneth was not involved in the fight when he was shot as he fled. The court found that Kenneth suffered severe bodily injury. The court

¹ The court did not read the victim-impact statement aloud, and the record on appeal does not include the written statement.

sentenced defendant to consecutive 10-year prison terms for second degree murder and aggravated battery with a firearm.

¶ 24 Trial counsel filed a post-sentencing motion, arguing that the court failed to consider the mitigating factors including defendant's lack of a publishable criminal record, the evidence that he did not provoke the incident but was acting in defense of another, his family support, education, employment, lack of gang membership and substance abuse, and his sincere apology. The court denied the motion, and this appeal followed.

¶ 25 On appeal, defendant first contends that the court erred in finding his belief that he acted in defense of another – Thomas – was objectively unreasonable, because defendant fired at Antonio after Antonio made an unprovoked attack on Thomas by slamming him to the ground.

¶ 26 Section 7-1 of the Criminal Code (Code)(720 ILCS 5/1-1 *et seq.* (West 2012)) defines the justification of defense of person:

"A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force. However, he is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another, or the commission of a forcible felony." 720 ILCS 5/7-1(a) (West 2012).

A person commits second degree murder by committing first degree murder with the mitigating factor that "at the time of the killing he or she believes the circumstances to be such that, if they existed, would justify or exonerate the killing under the principles stated in Article 7 of this

Code, but his or her belief is unreasonable." 720 ILCS 5/9-2(a)(2), citing 720 ILCS 5/7-1 *et seq.* (West 2012).

¶ 27 The justification of defense of person is an affirmative defense: when a defendant raises the justification and provides some evidence of it, the State must prove beyond a reasonable doubt that the defendant did not act in defense of person along with the elements of first degree murder. 720 ILCS 5/7-14 (West 2012); *People v. Nibbe*, 2016 IL App (4th) 140363, ¶ 38. For second degree murder, the State must prove the elements of first degree murder beyond a reasonable doubt while the defendant must prove a mitigating factor by preponderance of the evidence. 720 ILCS 5/9-2(c) (West 2012). Defense of person consists of (1) force threatened against a person (2) who is not the aggressor, when (3) the danger of harm was imminent, (4) the threatened force was unlawful, (5) the actor believed a danger existed requiring the use of the force he or she applied, and (6) that belief was objectively reasonable. *Nibbe*, ¶ 38. The State disproves the justification by showing beyond a reasonable doubt that at least one of the six factors was not present, while second degree murder is appropriate if the trier of fact finds by a preponderance of the evidence that all but the sixth factor was present. *People v. Washington*, 2012 IL 110283, ¶¶ 35-37; *Nibbe*, ¶ 38.

¶ 28 On a claim of insufficiency of the evidence, we must determine whether, taking the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *In re Q.P.*, 2015 IL 118569, ¶ 24. It is the responsibility of the trier of fact to weigh, resolve conflicts in, and draw reasonable inferences from the testimony and other evidence, and it is better equipped than this court to do so as it heard the evidence. *In re Jonathon C.B.*, 2011 IL 107750, ¶ 59. We do not retry the

defendant – we do not substitute our judgment for that of the trier of fact on the weight of the evidence or credibility of witnesses – and we accept all reasonable inferences from the record in favor of the State. *Q.P.*, ¶ 24. As witness credibility is a matter for the trier of fact, it may accept or reject as much or little of a witness's testimony as it chooses, and we need not reverse a conviction merely because of conflicting evidence. *People v. White*, 2015 IL App (1st) 131111, ¶ 19. The trier of fact need not be satisfied beyond a reasonable doubt as to each link in the chain of circumstances; instead, it is sufficient if all the evidence taken together satisfies the trier of fact beyond a reasonable doubt of the defendant's guilt. *Jonathon C.B.*, ¶ 60. The trier of fact is not required to disregard inferences that flow normally from the evidence, nor to seek all possible explanations consistent with innocence and elevate them to reasonable doubt, nor to find a witness was not credible merely because the defendant says so. *Id.* A conviction will be reversed only where the evidence is so unreasonable, improbable, or unsatisfactory that a reasonable doubt of the defendant's guilt remains. *Q.P.*, ¶ 24.

¶ 29 Here, taking the evidence in the light most favorable to the State as we must, we cannot find that no rational trier of fact would agree with the trial court. The court found that defendant believed that he needed to act to defend Thomas from Antonio's attack, but the court also found it objectively unreasonable for defendant to believe that he needed to use the force he used: firing several gunshots on a street where several other people were present. Defendant admitted that he immediately fired his gun at Antonio upon drawing it, rather than telling Antonio to cease his attack. A rational trier could accept the testimony, from Curtis, Latronica, and Kenneth as well as defendant, that Antonio "slammed" Thomas to the ground and he did not land on his feet as Terrance testified. However, a rational trier could also accept the testimony (not just from

Kenneth and Terrance themselves but corroborated by Curtis) that Kenneth and Terrance were not attacking Thomas when defendant fired, despite defendant's testimony that they were. Lastly, a rational trier could find as the court did that defendant was shooting at Antonio but struck Kenneth when he was several feet away fleeing with his back turned. In sum, a rational trier of fact could find it objectively unreasonable to believe that the circumstances required using the deadly force that defendant used.

¶ 30 Defendant also contends that his prison sentence of consecutive 10-year terms for second degree murder and aggravated battery is excessive as he does not have an adult criminal history, has rehabilitative potential shown by his family, education and employment, and committed his offenses while defending Thomas from attack.

¶ 31 Second degree murder is a Class 1 felony punishable by 4 to 20 years' imprisonment. 730 ILCS 5/5-4.5-30(a) (West 2012). Aggravated battery with a firearm is a Class X felony punishable by 6 to 30 years' imprisonment. 720 ILCS 5/12-3.05(e)(1), (h); 730 ILCS 5/5-4.5-25(a) (West 2012). Consecutive sentencing is mandatory where at least one of the defendant's offenses is a felony of Class 1 or greater and he inflicted severe bodily injury, including death. 730 ILCS 5/5-8-4(d)(1) (West 2012); *People v. Griffin*, 375 Ill. App. 3d 564, 573-74 (2007). 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. The court's 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).

¶ 32 In imposing a sentence, the trial court balances the relevant factors including the nature of the offense, the protection of the public, and the defendant's credibility, demeanor, general moral character, social environment, habits, age and rehabilitative potential. *People v. Abrams*, 2015 IL App (1st) 133746, ¶¶ 32-34. The statutory mitigating factors include that "[t]here were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense." 730 ILCS 5/5-5-3.1(a)(4) (West 2012). The trial court has a superior opportunity to evaluate and weigh a defendant's credibility, demeanor, character, mental capacity, social environment, and habits. *Snyder*, ¶ 32. The court does not need to expressly outline its reasoning for sentencing, and we presume that the court considered all mitigating factors on the record absent an affirmative indication to the contrary other than the sentence itself. *Abrams*, ¶¶ 32-33. 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 severity of the offense, nor does the presence of mitigating factors require a minimum sentence. *Alexander*, 239 Ill. 2d at 214; *Abrams*, ¶ 34.

¶ 33 Here, as in all sentencing matters, the most important factor is the seriousness of the offenses. Just as death is inherent to homicide offenses, the existence of a sincere if unreasonable belief that one needed to use deadly force in defense of person is inherent to second degree murder, and our legislature provided for prison sentences of up to 20 years. As stated above, the trial court properly found that defendant intended to defend Thomas from further attack by Antonio but the force he chose to use – firing several gunshots on a street with several other people present – was disproportionate and objectively unreasonable. Antonio and Kenneth were shot in the back, the latter suffering severe bodily injury from a punctured lung and fractured

1-14-0997

femur. As to the various mitigating factors argued by defendant, the court had all those factors before it from the trial evidence and PSI and expressly addressed many of them. We cannot find under the circumstances that the court abused its sound discretion by sentencing defendant to two consecutive 10-year prison terms, in the middle of the sentencing range for second degree murder and at the low end of the sentencing range for aggravated battery with a firearm.

¶ 34 Accordingly, the judgment of the circuit court is affirmed.

¶ 35 Affirmed.