SIXTH DIVISION
December 9, 2016

No. 1-14-3134

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. 13 CR 1966
	)	
CHRISTIAN CARDONA,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶ 1 ***Held:*** We affirm defendant's sentences for aggravated battery with a firearm and aggravated discharge of a firearm over his claim that the trial court relied on unattributed and uncorroborated hearsay allegations of witness intimidation in imposing his sentences. The statute providing for 16-year-old defendant's automatic transfer to adult court based on the charge of aggravated battery with a firearm did not violate defendant's due process rights.

¶ 2 Following a bench trial, defendant Christian Cardona was found guilty of one count of aggravated battery with a firearm and three counts of aggravated discharge of a firearm for the shooting of Ramon Villagomez. The court merged the aggravated discharge counts and

sentenced defendant to 6 years' imprisonment to be served consecutively to a 14-year term for the aggravated battery conviction. On appeal, defendant maintains that, in imposing sentence, the trial court improperly relied upon accusations of witness intimidation that were unsworn, unreliable, and based on multiple levels of hearsay. Defendant also contends that section 5-130(1) of the Juvenile Court Act (705 ILCS 405/5-130(1)(a) (West 2012)), which requires the automatic transfer of 16-year-olds charged with aggravated battery with a firearm to adult court, violates procedural and substantive due process and is unconstitutional as applied. For the following reasons, we affirm.

¶ 3 Defendant was charged with seven counts of attempted first degree murder, one count of aggravated battery with a firearm, and five counts of aggravated discharge of a firearm. Because defendant does not challenge the sufficiency of the evidence, a detailed recitation of the facts is not necessary.

¶ 4 The evidence presented at trial showed, in relevant part, that Villagomez and his friend Guadalupe Sanchez were in the area of 48th Street and Ashland Avenue on the day in question. Villagomez testified that shortly after 3 p.m., he heard a gunshot and turned to see the shooter, whom he identified as defendant in court, emerging from an alley with a gun pointed at him and Sanchez. Sanchez and the victim ran. Villagomez was hit in the back as he ran through traffic on Ashland. Defendant continued shooting at Villagomez even after he fell in the street. When the gunshots stopped, Villagomez called the police and was taken to the hospital. As a result of the gunshot, he lost one of his kidneys and had a portion of his lower intestine removed.

¶ 5 Chicago police detective Robert Distasio testified that he investigated the scene of the shooting. His investigation revealed a vehicle with a bullet hole in the windshield. He later learned that a mother and her child had been inside the vehicle when it was shot. In addition, a

truck had a broken driver's side window and a bullet hole in the mirror, Chase Bank had a broken window, and there were 12 different fired cartridge cases. Detective Distasio took a statement from defendant in the presence of his mother. Defendant admitted to the detective that "he saw what he thought were two rival gang members from the LaRaza gang area," told Mascias to stop the car, ran into the intersection, and started shooting at the two individuals with a 9-millimeter hand gun.

¶ 6 The parties stipulated that after defendant was arrested, gunshot residue consistent with gunfire, or close proximity to gunfire, was found on his hands.

¶ 7 The trial court found defendant guilty of aggravated battery with a firearm and three counts of aggravated discharge of a firearm. Defendant filed a motion for a new trial.

¶ 8 At the hearing on defendant's posttrial motion and sentencing, the trial court found that the victim suffered great bodily harm, which triggered mandatory consecutive sentencing, and denied defendant's posttrial motion. The trial court determined that defendant, who was 16 years old at the time of the offense, would be sentenced as an adult stating, "I see how he got transferred over here. He has previously been adjudicated a delinquent and placed on probation. In fact, he was on probation at the time of the offense."

¶ 9 In aggravation, the State presented the transcript from a hearing held on defendant's motion to be housed at the Juvenile Temporary Detention Center past his 17th birthday. At that hearing, Kirk Turner, the supervisor of resident internal affairs at the juvenile detention center, testified that defendant accrued 43 incident reports within a four-month period in early 2013. Noting that defendant was an admitted Latin Saint gang member, Turner testified to four specific incidents of defendant's misconduct during the four months: (1) he carved the words "45th Halo La Raza killer" on the walls of his cell; (2) after flashing gang signs and refusing staff members'

orders, he stated, "Do you know who runs this pod[?] I do," and had to be physically restrained to be returned to his cell where he continued making gang threats and kicked the door; (3) defendant punched another resident; and (4) a staff member found a small, flat, sharpened stone in defendant's inhaler.

¶ 10 In further aggravation, the State presented two recordings of defendant's jail phone conversations.[1] The parties stipulated that defendant's voice was on the phone calls. In one call, placed to a fellow inmate's mother, defendant admitted that he was a "Saint."

¶ 11 The State noted that there had been witness intimidation in this case and elaborated that:

> "One of the witnesses is a business owner in the area where this shooting occurred. He was afraid to testify. This person was served with a subpoena. He did not come into court until Judge Gainer issued a rule to show cause and issued a warrant for his arrest.
>
> Another witness in this case, your Honor, indicated that he was afraid to testify for fear of himself as well as his children. A third witness in this case, your Honor, who was a civilian, indicated she was afraid to testify. She made contact with my office's Victim Witness Unit in an effort to seek possible relocation, assistance in relocating. She indicated that she heard

[1] The record reflects that the tapes were played at the sentencing hearing where the State described their contents, argued that the second tape supported its contentions of witness intimidation, and introduced the tapes into evidence. The tapes are not contained within the record on appeal. As the appellant, a defendant has the burden of providing a sufficiently complete record of the trial court proceedings to support a claim of error. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Any doubts which may arise from the incompleteness of the record will be resolved against the appellant. *Id.* at 392.

> that there was a hit put out on her and the other witnesses because they testified in this case.
>
> And the fourth witness in this case, your Honor, also testified that she was afraid for her well[-]being and her child's well[-]being. She also made contact with my office's Victim Witness Unit, possibly in order to seek assistance in relocating. That witness indicated to me that, at one point in time, she was chased out of a store, she was chased in her car, and that her mother's tires were slashed.
>
> And the reason —"

¶ 12 The trial court interrupted, stating, "Okay. Okay. The defendant, he was in custody when all this happened. If there's other people on the street that were trying to do things on his behalf, there's only so much I can attribute to him." The State then summarized defendant's second recorded jail conversation in which he spoke to his mother and brother about the witness Blanca Quezada:

> "At one point, his mother says something along the lines of — and you'll hear the actual recording — [']You know that Blanca bitch was there too, I'll pass it to Emanuel [defendant's brother] and you can talk to him.['] *** At that point that [*sic*] defendant says, 'Explain that bro. ['And Emanuel] says, 'Shit, chill, amigo, I'm going to go see her, I'm going to go over there.[']"

¶ 13 The State then reviewed the facts of the case, the severe injuries to the victim, and the fact that the shooting took place in a crowded area with pedestrian traffic.

¶ 14 In mitigation, defense counsel presented character letters from defendant's family and former employer, certificates from defendant's teachers at the jail's school, and his report card. Noting defendant's age, defense counsel argued defendant "doesn't exercise the judgment that an adult would." Defendant's mother spoke on his behalf, explaining that defendant had worked at a flea market, in construction, and doing yard work. Regarding the offense, his mother said, "[A]t the time, he was 16, his father was deported, and he's going through a whole bunch of things. And I know when I was 16, I wasn't thinking like I should now. And I'm pretty sure all of us weren't —"

¶ 15 The trial court then said, "None of us were, but not all of us were taking guns and shooting people on the street. I'm sure you weren't doing that."

¶ 16 In imposing sentence, the trial court stated:

> "One of the difficulties about something like this is, he was so young, he was only 16 years old, but he really committed a harsh and violent offense that caused great bodily harm to somebody that lost a kidney that might have lost a life. I did give Mr. Cardona the benefit of all doubt that I could at the time of making my finding.
>
> That being said, I see that he does have some history, some juvenile history, probation he was put on, and an aggravated assault. He was on probation at the time of this event. We have different reports on how he's conducting himself in jail. Apparently, he's doing better in the county jail than he had done in

> the Juvenile Detention Center. He had 43 write-ups for misconduct.
>
> I have to protect the public. I think, right now, he's a danger to the public. The sentence will be 14 years in the penitentiary for aggravated battery with a firearm, consecutive to six years in the penitentiary for aggravated discharge of a firearm. All the aggravated discharge sentences will run concurrent to each other. They will run all consecutive to the aggravated battery with a firearm."

¶ 17 Defendant did not file a motion to reconsider sentence.

¶ 18 On appeal, defendant first maintains that the trial court improperly relied upon accusations of witness intimidation that were unsworn, unreliable, and based on multiple levels of hearsay in imposing sentence. Defendant acknowledges that his trial counsel failed to preserve this claim of sentencing error because he did not object at the sentencing hearing or raise this issue in a postsentencing motion. However, defendant maintains that we may review his claim of sentencing error as plain error. Alternatively, defendant argues that his trial counsel's failure to preserve the sentencing issue for appeal constitutes ineffective assistance of counsel.

¶ 19 Absent error, there can be no plain error. *People v. Bannister*, 232 Ill. 2d 52, 79 (2008). Thus, the first step in the plain-error analysis is to determine whether there was an error. *Id.* at 77. Ordinarily, "we will not disturb sentences that fall within the statutory guidelines unless they are 'greatly disproportionate' to the nature of the offenses of which the defendant has been convicted." *People v. Bailey*, 409 Ill. App. 3d 574, 591 (2011). When potential consideration of

improper sentencing factors is at issue, "the reviewing court can determine from the record that the weight placed on the improperly considered aggravating factor was so insignificant that it did not lead to a greater sentence." *People v. Heider*, 231 Ill. 2d 1, 21 (2008).

¶ 20 In this case, defendant's sentence of 14 years' imprisonment for the Class X felony of aggravated battery with a firearm (720 ILCS 5/12-3.05(e)(1), (h) (West 2012)), is well within the statutorily prescribed range of 6 to 30 years for Class X felonies (730 ILCS 5/5-4.5-25(a) (West 2012)). Defendant's six-year sentence for the Class 1 felony of aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(1), (2), (b) (West 2012)), is on the lower end of the prescribed 4- to 15-year sentencing range (730 ILCS 5/5-4.5-30(a) (West 2012)). Because his sentences were well within the applicable ranges, the burden is on defendant to establish that the alleged improper sentencing considerations led to a greater sentence. See *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 9.

¶ 21 Here, in imposing the sentences, the trial court noted defendant's young age and that his behavior had improved after he was transferred to the county jail. The court pointed out the harsh and violent nature of defendant's crimes, the injuries to the victim, defendant's juvenile history of delinquency, and his 43 write-ups for misconduct while he was held in the Juvenile Detention Center. Noting its duty to protect the public, the trial court found that defendant was a danger thereto. In imposing the sentences, the trial court did not mention any of the State's contentions of witness intimidation, defendant's gang membership, or the phone calls defendant made while imprisoned. Based on our review of the record as a whole, we find that the trial court considered relevant sentencing factors in imposing sentences within the applicable statutory ranges and we find no abuse of discretion. See *People v. Sauseda*, 2016 IL App (1st) 140134, ¶¶ 12, 18.

¶ 22 Because we find no sentencing error, there was no plain error. See *Bannister*, 232 Ill. 2d at 79. Similarly, defendant's trial counsel was not ineffective for failing to object at sentencing and include the issue in a postsentencing motion. See *People v. Peeples*, 205 Ill. 2d 480, 532 (2002) (where the underlying issue has no merit, a defendant suffers no prejudice due to trial counsel's failure to preserve it for appeal).

¶ 23 Relying almost exclusively on the arguments made by the State at the sentencing hearing, defendant nevertheless maintains that the trial court relied upon the four allegations of witness intimidation, which he argues was improper because the allegations were ambiguous and predicated on multiple layers of hearsay from unnamed sources. However, the only comment from the trial court regarding the accusations occurred when the court interrupted the State's presentation of those considerations in aggravation stating: "Okay. Okay. The defendant, he was in custody when all this happened. If there's other people on the street that were trying to do things on his behalf, there's only so much I can attribute to him."

¶ 24 While defendant argues that this statement shows the trial court improperly considered the State's comments regarding witness intimidation in imposing his sentences, we note that in determining whether the trial court relied on improper considerations at sentencing, reviewing courts consider the record as a whole and should not focus on isolated statements. *People v. Walker*, 2012 IL App (1st) 083655, ¶ 30. In addition, sentencing hearings do not occur in a vacuum (*Sauseda*, 2016 IL App (1st) 140134, ¶ 15) and the sentencing court need not detail precisely for the record the process by which it determines a sentence (*People v. Evans*, 373 Ill. App. 3d 948, 968 (2007)). We find that the trial court was merely commenting on arguments presented by the State and did not err in this respect. See *Sauseda*, 2016 IL App (1st) 140134, ¶ 17 (finding that the trial court's statements at sentencing amounted to permissible

commentary); see also *People v. Fort*, 229 Ill. App. 3d 336, 340 (1992) ("An isolated remark made in passing, even though improper, does not necessarily require that defendant be resentenced.").

¶ 25 We find *People v. Washington*, 127 Ill. App. 3d 365, 387 (1984), and *People v. Spears*, 221 Ill. App. 3d 430, 438 (1991), which defendant contends show that the trial court improperly relied on witness intimidation, unpersuasive. In *Washington*, based solely on information an investigator received from unnamed sources, the trial court allowed the investigator to testify regarding the defendant's position in a gang. *Washington*, 127 Ill. App. 3d at 386. The reviewing court found that there was no showing that the information was accurate or reliable. *Id.* at 387. Because the trial court noted its duty to protect the public from "'gangsters'" in imposing sentence, the reviewing court held that the trial court was probably influenced by the investigator's testimony. *Id.* Similarly, in *Spears*, the trial court "specifically" and "heavily relied" on a disputed fact to determine the defendant's character and the likelihood that the offense could recur. *Spears*, 221 Ill. App. 3d at 438.

¶ 26 Here, unlike in *Washington* and *Spears*, the trial court did not reference any of the alleged witness intimidation when it found defendant was a danger to the public. Rather, the trial court noted that defendant had a juvenile history including probation and an aggravated assault, that he was on probation at the time of this event, and defendant's conduct in the Juvenile Detention Center, which included 43 write-ups for misconduct. Immediately thereafter, the trial court found that defendant was a danger to the public and then imposed his sentences. Thus, unlike in *Washington* and *Spears*, there is no indication that the trial court relied on the contested information in this case. Defendant's argument fails.

¶ 27 Defendant next maintains that section 5-130(1) of the Juvenile Court Act (705 ILCS 405/5-130 (West 2012)), which requires the automatic transfer of 16-year-olds charged with aggravated battery with a firearm to adult court, violates his procedural and substantive due process rights. He further argues that the statute is unconstitutional as applied to him. The State argues that we should reject defendant's due process claim in light of *People v. Patterson*, 2014 IL 115102, where our supreme court upheld the constitutionality of the Illinois automatic transfer provision over a defendant's due process and eighth amendment challenges. *Patterson*, 2014 IL 115102, ¶ 127.

¶ 28 Defendant acknowledges that *Patterson* constitutes controlling precedent in this case. However, to preserve the issue for further appeal, he maintains that *Patterson* was wrongly decided. Defendant maintains that *Patterson* is founded upon the incorrect premise that the purpose of the transfer statute is to protect the public and not to punish the defendant. See *id.* ¶¶ 104-05. Because the United States Supreme Court's decisions in *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 132 S. Ct. 2455 (2012), collectively recognize the fundamental differences between juvenile and adult minds that make juveniles less culpable than adults and more amenable to rehabilitation, defendant contends that a punitive transfer law that is mandatory in nature and fails to account for such differences is unconstitutional.

¶ 29 Our supreme court considered and rejected the same due process challenge in *Patterson*. See *Patterson*, 2014 IL 115102, ¶¶ 93, 97-98. In *Patterson*, the defendant argued that our supreme court's prior decision upholding the predecessor to section 5-130(1) over both substantive and procedural due process challenges in *People v. J.S.*, 103 Ill. 2d 395 (1984), was no longer valid in light of *Roper*, *Simmons*, and *Graham*. *Id.* ¶¶ 93, 96. He maintained that

those decisions emphasized a need to recognize the unique characteristics of youthful offenders that is inconsistent with an automatic transfer. *Id.* ¶ 96. Rather than distinguish this case from *Patterson*, defendant maintains that it was wrongly decided. However, "As an intermediate appellate court, we are bound to honor our supreme court's conclusion on this issue unless and until that conclusion is revisited by our supreme court or overruled by the United States Supreme Court." *People v. Fountain*, 2012 IL App (3d) 090558, ¶ 23. Accordingly, we reject defendant's due process claim.

¶ 30 Finally, defendant argues that the automatic transfer statute is unconstitutional as applied. However, defendant did not raise this issue in the trial court. Therefore, we will not adjudicate this claim on appeal. See *People v. Willis*, 2013 IL App (1st) 110233, ¶ 51 (quoting *In re the Parentage of John M.*, 212 Ill. 2d 253, 268 (2004) ("A court is not capable of making an 'as applied' determination of constitutionality when there has been no evidentiary hearing and no findings of fact.")).

¶ 31 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 32 Affirmed.