2016 IL App (5th) 130329-U

NO. 5-13-0329

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Franklin County.
	)	
v.	)	No. 12-CF-132
	)	
DOUGLAS L. JOHNSON,	)	Honorable
	)	Thomas J. Tedeschi,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE SCHWARM delivered the judgment of the court.
Justices Goldenhersh and Cates concurred in the judgment.

ORDER

¶ 1 *Held*: The evidence presented at trial supported the jury's finding that defendant committed the offense of robbery, and the trial court did not abuse its discretion in imposing sentence.

¶ 2 After a jury trial in the circuit court of Franklin County, defendant, Douglas L. Johnson, was convicted of robbery (720 ILCS 5/18-1(a) (West 2012)) and burglary (720 ILCS 5/19-1(a) (West 2012)) and sentenced to 22 years in the Department of Corrections on each count with the sentences to run concurrently. On appeal, defendant contends: (1) his conviction for robbery should be reduced to theft because the evidence failed to prove beyond a reasonable doubt that he used force or threatened the imminent use of

force when he grabbed money from an open cash register drawer; and (2) his 22-year prison sentence is excessive and should be reduced. For the reasons that follow, we affirm.

¶ 3 FACTS

¶ 4 On March 25, 2012, Mary Walker was working as a cashier at Heights Market in West Frankfort. At approximately 9:30 p.m., defendant entered the store and attempted to purchase a bottle of water. Walker told defendant it would cost $1.07. Defendant said he only had 99 cents. Walker told defendant that was not a problem, and she would make up the difference. Defendant grabbed the water off the counter and proceeded to walk away. As Walker tried to get change, defendant "lunged" over the counter, took money out of the register, including bills and rolls of coins, and ran out of the store. Defendant was not armed and did not verbally threaten Walker. Walker said she did not give defendant permission to enter her register, nor did she give him permission to push her out of the way. She said she was upset by the incident and was still "[a] little" upset by the incident.

¶ 5 Heights Market is equipped with a video surveillance system, which captured the incident on film. At trial, Walker identified defendant and the video surveillance recordings of the incident captured on DVD. A copy was played for the jury. The DVD was without sound. Walker testified that the DVD fairly and accurately depicted the incident with defendant.

¶ 6 Matthew Spain lives next door to Heights Market. He testified that on the night in question he saw a Dodge Durango back out of the alley behind the store and drive away.

Spain noticed the Durango because it is unusual for a car to be parked behind the store and also because his dogs were barking at it. Spain went to the store to buy something, but the police would not grant him entry because of the robbery. Spain then reported the Durango to the police officer.

¶ 7 Mary Stilley lives behind Heights Market. She testified that on the night of the incident she noticed a vehicle in the alley behind the store. She saw someone wearing a black hood and tan jacket run along the side of the vehicle and then jump in it. The vehicle left without the lights being turned on.

¶ 8 State Trooper Jared Freeman testified he heard a police broadcast concerning an older model Dodge Durango involved in a robbery and learned a member of the Zeigler police force was directly behind it. Freeman responded to the scene. The Durango stopped after the Zeigler police officer activated the emergency lights on his vehicle. Freeman then took charge of the traffic stop. He gave instructions to the driver of the Durango, Cassie Mayo, to exit the vehicle. Freeman told Mayo she was a suspect in a robbery. He obtained her consent to search the vehicle. During a search of the Durango, Freeman found bills and rolls of coins of various denominations underneath a flap of the back passenger seat.

¶ 9 Cassie Mayo testified that she was driving her Dodge Durango and dropped defendant off at Heights Market to purchase some water. She, defendant, and Barry Mayo, Cassie's husband, had been consuming synthetic drugs prior to the stop at the store. She said she did not know defendant was going to rob the store. When defendant got back in the car, he gave her the money and directed her to drive to the town of Zeigler

to purchase more drugs. Cassie dropped off defendant and Barry at her house and was headed to Zeigler when she was stopped by police. Cassie pled guilty to robbery and was given four years' probation for the offense. She said she only pled guilty because she was in jail for 66 days and wanted to get home to her three children.

¶ 10 Barry Mayo testified he knew defendant for approximately one month before the robbery of Heights Market. Barry, his wife, and defendant consumed bath salts earlier in the day. Barry testified he knew nothing about the robbery until after the fact. The police executed a search warrant on his home and found defendant in the bathroom. Barry denied any involvement with the crime but said he pled guilty in order to stay out of jail. He received a sentence of 48 months' probation.

¶ 11 Detective Ron Howard testified he was at the scene where Cassie Mayo was stopped. He identified items recovered from the Durango, including a dark blue sock cap, a bottle of water that was still cold and was the same brand as sold at Heights Market, and money in denominations of tens, fives, ones, and rolls of nickels. Howard executed a search warrant at the Mayo home and discovered several empty containers of bath salts and defendant in the bathroom.

¶ 12 Howard arrested defendant and transported him to the police station. Howard read defendant his *Miranda* rights. Defendant signed a waiver and agreed to talk to Howard. Howard recorded the interrogation. A copy of the interrogation was played for the jury. Defendant admitted that he was using bath salts with Barry and Cassie Mayo and that when they ran out they talked about "options" to get more. Originally, they planned to catch someone at an ATM machine. However, when they stopped at Heights Market,

defendant decided he was going to "try something" there. When the clerk opened the register, defendant said he just "grabbed" money and ran.

¶ 13 After playing the video, the State rested its case. Defense counsel moved for a directed verdict, arguing the State failed to prove defendant entered Heights Market with the intent to commit a theft and had not used force or threatened force when he took money from the cash register. The motion was denied. Defense counsel then moved to publish the written *Miranda* warnings given to defendant. The defense then rested. Defense counsel asked for and received the lesser-included jury instructions for theft. After deliberations, the jury found defendant guilty of robbery and burglary. At counsel's request, the trial court subsequently ordered that defendant obtain a TASC evaluation.

¶ 14 At the sentencing hearing, the State asked the trial court to sentence defendant as a Class X offender in light of his prior felony record. See 730 ILCS 5/5-4.5-95(b) (West 2012). The State noted that in 1989, defendant had been convicted on counts of burglary, felony theft, and possession of burglary tools in Jefferson County, Illinois, and that in 1997, he had been convicted on two counts of burglary in Jefferson County, Oklahoma. The record indicates that defendant was sentenced to concurrent 3-year terms of imprisonment on his 1989 convictions, that he was sentenced to concurrent 20-year terms on his Oklahoma convictions, and that he served approximately 14 years on the latter before being released in August 2011.

¶ 15 The State also asked the court to take judicial notice of the victim impact statement that had been prepared by Mary Walker, who was present at the sentencing hearing but preferred to not read the statement herself. In her statement, Walker

explained that as a result of the robbery, she is now "paranoid," has bad dreams about the incident, and experiences panic attacks at work. She further explained that she still feels like a "nervous wreck," that she physically felt like she aged 10 years since the night in question, that her stress had caused her family stress, and that "[t]o say this has been unsettling is an understatement."

¶ 16 Describing the robbery at Heights Market as a "brazen act" and referencing defendant's prior criminal history, the State argued that defendant had "demonstrated an inability to interact with society" or otherwise "be out in public." The State further argued that eventually, someone was going to be hurt by defendant's conduct. Maintaining that a lengthy sentence was needed to protect the public, the State recommended that the trial court sentence defendant to a 26-year term of imprisonment on each of his convictions and that in its discretion, order that the terms be served consecutively. See 730 ILCS 5/5-8-4(c)(1) (West 2012).

¶ 17 Acknowledging that defendant had a substantial criminal history, defense counsel argued that if the trial court determined that he should be sentenced as a Class X offender, then a sentence closer to the "bottom of the range" would be appropriate under the circumstances. Counsel argued that a sentence at the high end of the range would be unfair given that the Mayos had both been sentenced to terms of probation.

¶ 18 Defendant addressed the trial court and apologized to Ms. Walker. He advised the court that the 20-year sentence he received in Oklahoma was a mandatory sentence because Oklahoma requires anyone with a prior felony to be sentenced to 20 years on a subsequent felony. Defendant said that the Oklahoma prison system is "cluttered with

drugs" and that he had served his time there "with a needle in [his] arm." He explained that there is no reintegration program and that when he came back to Illinois, no one would hire him because of his past criminal history. Defendant asserted that following his release from prison, he had "stayed clean" for 90 days. Defendant said that he had never received any drug treatment and that he did not see the point of sending him back to prison, an environment where he was only going to do more drugs. Defendant noted that the bath salts he had consumed had been purchased legally. Defendant further noted that the Mayos had received sentences of probation, even though "[t]hey did the crime with [him]."

¶ 19 The TASC evaluation that defendant obtained states that his "criminal history has been closely linked to his history of substance abuse and addiction" and that he would "benefit by participating in a residential substance abuse treatment program." The evaluation explains that defendant was ineligible for the TASC program, however, based on his current charge of robbery. See 20 ILCS 301/1-10, 40-5 (West 2012).

¶ 20 Before imposing sentence, the trial court stated that it had reviewed defendant's presentence investigation report "on several occasions" and had also reviewed the TASC evaluation and Walker's victim impact statement. The court further stated that it had considered the costs of incarcerating defendant, as set forth in the financial impact statement provided by the Department of Corrections. The court found that defendant qualified to be sentenced as a Class X offender based on his prior felony convictions and that the applicable sentencing range was thus 6 to 30 years. See 730 ILCS 5/5-4.5-25(a) (West 2012).

¶ 21 The court observed that defendant was 41 and had "spent the majority of his life in and out of the corrections system." The court acknowledged that defendant had apologized to Walker and that his employment opportunities were limited. The court further acknowledged that two accomplices had been involved in defendant's present crimes. The court noted, however, that their criminal histories were not comparable to his and that he was the one who had actually entered Heights Market and committed the robbery. The court acknowledged that defendant had not been armed during the commission of the offense and had not threatened to harm Mrs. Walker. The court observed that "[o]therwise, *** it would be a much more serious crime." The court stated that defendant had "pretty much terrorized Mrs. Walker," however, and that it was "very glad that [she] wasn't injured." The court opined that it had "no doubt that [Walker had] problems, still, to this day" and that it was "a sad state of affairs" that the event had "happened here in Franklin County."

¶ 22 The trial court admonished defendant that he needed to realize that he could not "live in society and do these things." The court encouraged defendant to take advantage of any available drug treatment programs offered by the Department of Corrections. The court stated that it hoped that the Illinois prison system was not "full of drugs" and that if it were, that defendant would refrain from using them while incarcerated.

¶ 23 Referencing the statutory factors in mitigation and aggravation (see 730 ILCS 5/5-5-3.1, 5-5-3.2 (West 2012)), the court found that the following factors in aggravation were applicable: defendant's conduct caused or threatened serious harm; defendant had a history of prior delinquency and criminal activity, and the sentence was necessary to

deter others from committing the same offense. See 730 ILCS 5/5-5-3.2(a)(1), (a)(3), (a)(7) (West 2012). The court found no factors in mitigation.

¶ 24 Stating that in light of defendant's record, a minimum sentence "would not be consistent with the ends of justice," the trial court sentenced defendant to a 22-year term of imprisonment on each count and ordered that the sentences run concurrently. The court noted that defendant would be eligible to receive day-for-day credit while serving his time (see 730 ILCS 5/3-6-3(a)(2.1) (West 2012)) and that he would also receive credit for the 271 days that he had already spent incarcerated in the Franklin County jail (see 730 ILCS 5/5-4.5-100(b) (West 2012)). In its sentencing order, the trial court specifically noted that defendant's offenses had been "committed as a result of the use of, abuse of, or addiction to alcohol or a controlled substance" and that treatment was thus recommended if available.

¶ 25 Defendant subsequently filed a *pro se* motion to reduce sentence. Defendant argued that he needed substance abuse treatment and that a 22-year sentence was not going to turn him into a productive member of society. Defense counsel later filed a motion to reconsider sentence, arguing that defendant's sentence was unjustly disproportionate to his codefendants' sentences, excessive, and constituted cruel and unusual punishment. The trial court denied the motion following a hearing. At the hearing, the court defended its sentencing determination, stating that it did not "take these issues lightly." The court emphasized that defendant had first been convicted of burglary in 1989 and that the present offenses had been committed less than eight months following his release from prison on his subsequent burglary convictions. The court

stated that it had considered imposing consecutive sentences as the State had requested but ultimately "chose not to do that." Defendant now appeals.

¶ 26 ANALYSIS

¶ 27 I. SUFFICIENCY OF THE EVIDENCE

¶ 28 Defendant first contends his conviction for robbery should be reduced to theft because the evidence failed to prove beyond a reasonable doubt that he used force or threatened the imminent use of force when he grabbed money from the open cash register. We disagree.

¶ 29 "A person commits robbery when he or she knowingly takes property *** from the person or presence of another by the use of force or by threatening the imminent use of force." 720 ILCS 5/18-1(a) (West 2012). On the other hand, a person commits theft when he or she knowingly obtains or exerts unauthorized control over property and intends to deprive the owner permanently of the use or benefit of the property. 720 ILCS 5/16-1(a)(1)(A) (West 2012). The only difference between theft and robbery lies in whether force or intimidation is used. *People v. Pierce*, 226 Ill. 2d 470, 478 (2007).

¶ 30 When a challenge to the sufficiency of evidence is presented on appeal, it is not the function of the reviewing court to retry a defendant. *People v. Banks*, 161 Ill. 2d 119, 135 (1994). The relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Moore*, 171 Ill. 2d 74, 95 (1996); *People v. Collins*, 106 Ill. 2d 237, 261 (1985). Defendant claims that because there was video evidence of the incident, there is no dispute as to the facts, and, therefore,

there is no need to defer to the jury's finding of guilt. In support of his argument, defendant relies on numerous cases, all of which we find either distinguishable or unpersuasive because they involved factual situations different from the instant case.

¶ 31 As the State points out, while the video recording of the incident was not in dispute, the inferences to be drawn from the videotape were in dispute. Deferring to the jury is particularly important here, where the jury considered a video recording without sound. The jury heard the testimony of Mary Walker, the cashier on duty at the time of the incident, as to what transpired between her and defendant. She also narrated the video as it was played to the jury. The jury also saw the recorded interrogation of defendant, which did capture sound. Thus, contrary to defendant's assertions, this was a case in which live testimony played a role in resolving a disputed issue of fact, *i.e.*, whether defendant threatened the imminent use of force or used force against Mary Walker to commit the offense of robbery.

¶ 32 "In determining a defendant's guilt, the trier of fact is entitled to draw reasonable inferences that flow from the evidence [presented]." *People v. Kirkpatrick*, 365 Ill. App. 3d 927, 929-30 (2006). It is the jury's function to weigh the evidence, assess credibility of witnesses, resolve any conflicts in the evidence, and draw reasonable inferences therefrom. *People v. Hadden*, 2015 IL App (4th) 140226, ¶ 27. Here, we cannot say, after viewing the evidence in the light most favorable to the State, that a rational trier of fact could not have found the essential elements of robbery beyond a reasonable doubt.

¶ 33 The use of force or imminent use of force is an essential element of robbery. See *People v. Hollingsworth*, 120 Ill. App. 3d 177, 178-79 (1983); *People v. Bradford*, 78 Ill.

App. 3d 869, 874 (1979). The threat of imminent force requirement is satisfied "if the fear of the alleged victim was of such a nature as in reason and common experience is likely to induce a person to part with property against his will." (Internal quotation marks omitted.) *Bradford,* 78 Ill. App. 3d at 874. Here, we cannot say the threat of imminent force requirement was not satisfied.

¶ 34 By his own admission, defendant went into the Heights Market to "try something" in order to obtain money to purchase more synthetic drugs. Defendant attempted to purchase water, and when the cashier opened the cash drawer, he "lunged" over the counter and grabbed money out of the register. His movement was quick and certainly aggressive. While he did not verbally threaten the cashier, she testified she was "upset" by the incident so much so that she remained upset at trial. Walker appeared startled on the video and backed away from the drawer. Defendant is considerably larger than Walker. At one point, Walker put her hands on top of defendant's hands in an apparent attempt to stop defendant from taking the money. However, she immediately pulled her hands back and put them at her sides. Thus, the jury could have reasonably concluded that the cashier's fear of defendant induced her to part with the money for the sake of her own safety.

¶ 35 After careful consideration, we find that defendant raises questions of fact and credibility that were properly left for resolution by the jury. The trial court was correct to instruct the jury on both robbery and the lesser included offense of theft. After reviewing the record as a whole, we conclude that the evidence, while close, was sufficient for a rational trier of fact to have found defendant guilty of robbery rather than theft.

¶ 36 II. SENTENCE

¶ 37 Defendant next contends his 22-year prison sentence is excessive and asks us to reduce his sentence to a "more reasonable term." Defendant insists the sentence is disproportionate to the nature and circumstances of the offense, which was committed to support his long-term drug addiction, a problem which he contends he never had the opportunity or resources to address. The State responds that the sentence is well within the trial court's discretion. We agree with the State.

¶ 38 A sentencing judge is charged with the difficult task of fashioning a sentence that appropriately balances the goal of rehabilitating the offender and the need to protect society. *People v. Jeter*, 247 Ill. App. 3d 120, 131 (1993). Where a sentence is within the statutory range of possible penalties, it will not be disturbed on appeal absent an abuse of discretion. *People v. Jones*, 168 Ill. 2d 367, 373-74 (1995). An abuse of discretion will be found where a trial court's decision is arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it. *People v. Kladis*, 2011 IL 110920, ¶ 23. An abuse of discretion will also be found where the sentence is greatly at variance with the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. *People v. Stacey*, 193 Ill. 2d 203, 210 (2000).

¶ 39 "A reasoned judgment as to the property sentence to be imposed must be based upon the particular circumstances of each individual case." *People v. Perruquet*, 68 Ill. 2d 149, 154 (1977). Thus, "[t]he propriety of the sentence imposed in a particular case cannot properly be judged by the sentence imposed in another, unrelated case." *People v.*

Fern, 189 Ill. 2d 48, 56 (1999). A reasoned sentencing judgment must be based on several relevant factors, including the nature and circumstances of the offense and the defendant's age, credibility, demeanor, habits, and general moral character. *People v. Saldivar*, 113 Ill. 2d 256, 268-69 (1986). "In determining the appropriate sentence, the trial judge is to consider all matters reflecting upon the defendant's personality, propensities, purposes, tendencies, and indeed every aspect of his life relevant to the sentencing proceeding." *People v. Barrow*, 133 Ill. 2d 226, 281 (1989). "A reviewing court gives great deference to the trial court's judgment regarding sentencing because the trial judge, having observed the defendant and the proceedings, has a far better opportunity to consider these factors than the reviewing court, which must rely on the 'cold' record." *Fern*, 189 Ill. 2d at 53. "Consequently, the reviewing court must not substitute its judgment for that of the trial court merely because it would have weighed these factors differently." *Stacey*, 193 Ill. 2d at 209.

¶ 40 As noted, in the present case, the applicable sentencing range was 6 to 30 years, and the sentence imposed was 22 years. Defendant argues that the sentence is excessive given that no physical injuries occurred and no weapon was used. The trial court considered these facts, however, stating that it was "very glad that Ms. Walker wasn't injured" and that the use of a weapon would have made the offense "a much more serious crime." At the same time, the court observed that defendant had "pretty much terrorized Mrs. Walker" and that she was undoubtedly still experiencing problems as a result of defendant's conduct. The court thus determined that defendant's conduct caused or threatened serious harm. 730 ILCS 5/5-5-3.2(a)(1) (West 2012). The psychological

harm to the victim may be properly considered as an aggravating factor (*People v. Avila*, 2014 IL App (2d) 121311, ¶ 30; *People v. Cain*, 221 Ill. App. 3d 574, 575 (1991)), and having reviewed Walker's victim impact statement, we cannot conclude that the trial court erred in that respect.

¶ 41 Noting that his criminal conduct in the present case was directly related to his long-time drug addiction, defendant also argues that the trial court wrongly determined that there were no factors in mitigation. Giving due deference to the court's findings, however, we disagree.

¶ 42 "Drug addiction is not one of the statutorily-mandated mitigating factors to be considered, although in appropriate cases courts might consider drug addiction as a factor in mitigation." *People v. Whealon*, 185 Ill. App. 3d 570, 573 (1989). "Where a trial judge considers a defendant's drug addiction, but nonetheless decides that the addiction, if proved, does not entitle the defendant to lenient treatment, it cannot be said that an abuse of discretion has occurred." *People v. Smith*, 214 Ill. App. 3d 327, 340 (1991). This would seem especially true where as here, there is no indication that the defendant had ever previously sought treatment for the illness. Compare *People v. Fort*, 229 Ill. App. 3d 336, 341 (1992) (noting that although the defendant blamed his use of drugs for his commission of the offense, there was no evidence that he had ever sought drug treatment), with *People v. Kosanovich*, 69 Ill. App. 3d 748, 751 (1979) (noting that the defendant had voluntarily sought treatment for her drug addiction on several occasions prior to the commission of the offense).

¶ 43 Here, the trial court clearly considered defendant's drug addiction. The court repeatedly referenced the issue, stated that it had reviewed the TASC evaluation, and in its sentencing order, specifically noted that defendant's offenses were the result of addiction and abuse and that drug treatment was therefore recommended. The court encouraged defendant to seek treatment while incarcerated and to refrain from using drugs if they were available. It is apparent, however, that defendant's addiction notwithstanding, the court was primarily concerned with his history of prior criminal activity. 730 ILCS 5/5-5-3.2(a)(3) (West 2012). A defendant's prior criminal activity provides insight into his character (*People v. Hudson*, 157 Ill. 2d 401, 452 (1993)) and is relevant to a determination of his propensity to commit crime (*People v. La Pointe*, 88 Ill. 2d 482, 498 (1981)). See also *People v. Canizalez-Cardena*, 2012 IL App (4th) 110720, ¶ 23 ("A defendant's unwillingness to learn from his mistakes or to respect laws enacted for the protection of the public's safety is a proper factor for the trial court to consider in sentencing.").

¶ 44 As previously noted, at the sentencing hearing, the trial court made several references to defendant's prior criminal history and admonished him that he needed to realize that he could not "live in society and do these things." The court also stated that given defendant's record, a light sentence "would not be consistent with the ends of justice." When later denying defendant's motion to reconsider sentence, the court emphasized that defendant had first been convicted of burglary in 1989 and that the present offenses had been committed less than eight months following his release from prison on his subsequent burglary convictions. Additionally, stating that it was a "sad

state of affairs" that the offense had occurred "here in Franklin County," the court further found that the sentence was necessary to deter others from committing the same crime. 730 ILCS 5/5-5-3.2(a)(7) (West 2012). "In the exercise of its discretion a court may logically give reasonable consideration to the need for deterrence as a factor in the imposition of a sentence." *People v. Harris*, 231 Ill. App. 3d 876, 881 (1992). "Deterrence, punishment, the nature of the crime, and the protection of the public are to be considered equally with the rehabilitation of the offender in the fixing of sentences." *Id*.

¶ 45 Keeping in mind that "the trial court is in the best position to fashion a sentence that strikes an appropriate balance between the goals of protecting society and rehabilitating the defendant" (*People v. Risley*, 359 Ill. App. 3d 918, 920 (2005)), we cannot conclude that the sentences imposed on defendant's convictions are at great variance with the spirit or purpose of the law or are manifestly disproportionate to the nature of defendant's criminal conduct. By requesting that we reduce his sentence, defendant is essentially asking that we reweigh the evidence presented for the trial court's consideration, which we cannot do. See *Stacey*, 193 Ill. 2d at 209. We lastly reiterate that when denying defendant's motion to reconsider sentence, the trial court noted that it had considered imposing consecutive sentences as the State had requested but ultimately "chose not to do that." The court also anticipated that with day-for-day credit and credit for time already spent in custody, defendant would ultimately serve less than 11 years. Under the circumstances, we find no abuse of discretion.

¶ 46 CONCLUSION

¶ 47 For the foregoing reasons, we affirm defendant's convictions and sentences for robbery and burglary.

¶ 48 Affirmed.