FOURTH DIVISION
February 16, 2017

No. 1-14-1499

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. 12 CR 16484
	)	
MARSHAWN CUNNINGHAM,	)	Honorable
	)	Nicholas Ford,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE ELLIS delivered the judgment of the court.
Justices Howse and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Affirmed. Sentence of 16 years for aggravated battery was not excessive in light of violent nature of crime involving shooting of victim with firearm, defendant's criminal history, and fact that sentence fell within lower half of Class X sentencing range. Trial court considered defendant's youth and difficult childhood in its decision.

¶ 2 Defendant Marshawn Cunningham was convicted at a bench trial of aggravated battery for knowingly discharging a firearm and injuring Eddie Williams. He was sentenced to sixteen years' incarceration. On appeal, defendant contends his sentence was excessive because the trial court did not adequately consider his youth, troubled childhood, or the fact that he did not have a previous term of incarceration as an adult. We hold that the trial acted within its discretion and affirm the sentence.

¶ 3 I. BACKGROUND

¶ 4 The State's evidence at trial showed that defendant shot the victim, Eddie Williams, in his lower back on August 1, 2012. On that day, Williams was walking on 66th Street with friends Anthony Ross, Jimmy Simmons, and Kewan Smith carrying an icy cup and cookies.

¶ 5 As the group passed an alley, they drew the attention of three males on bicycles. Williams testified that he knew all three individuals. Defendant—or as Williams knew him, "Money"—asked Williams for some of his icy. When Williams said "naw," defendant replied with "[N]aw. Why can't I get none?" Williams again denied the request, saying, "[N]aw, Bro, you can't get none." Defendant, apparently offended, replied, "[Y]ou a bitch." According to Williams, this exchange inspired more conversation between the two, with defendant's friends telling him to "chill out," and Williams' friends advising him to "just keep walking."

¶ 6 Williams testified that as he kept walking away from defendant, defendant hopped back on his bicycle to chase after him yelling, "[Y]o Bitch ass won't be able to hoop again." When he caught up with Williams, defendant hopped off his bicycle and pulled a silver gun out of his pocket. Williams, realizing defendant had a gun, raised his hands, showing his palms, and turned to walk away. Williams stated that, when he turned to walk away, defendant shot at him once, hitting him in the lower left back.

¶ 7 Chicago Police Officer Zepeda (Zepeda) testified that he visited Williams at the hospital the night of the shooting but refused to answer his questions. Christopher Durr, a friend of Williams who was present during Zepeda's questioning, stated that Zepeda was looking for a man who went by the name "Money." Williams would later acknowledge during trial that he initially refused to cooperate with the police out of concern for being labeled a snitch.

¶ 8 Chicago Police Officer Jaime testified that he arrested defendant on August 1, a few blocks from the site of the shooting for matters unrelated to the case. Zepeda also testified that when questioned, defendant acknowledged his nickname as "Money." The parties stipulated that a gunshot residue test was administered to defendant upon his arrest, with a negative result.

¶ 9 On August 2, the day after the shooting, police officers came to Williams's house, and he again refused to provide them with information. But on August 14, Williams went with his mother to the police station, where he did give information regarding the shooting. While there, he also viewed a line-up and identified defendant as the person who shot him. His friend, Anthony Ross, also picked defendant in a line-up that same day.

¶ 10 Defendant was found guilty of aggravated battery but acquitted of attempted first degree murder. A motion for new trial was denied.

¶ 11 A presentence review of defendant's background showed three juvenile offenses: a 2008 aggravated battery for which he was sentenced to five years' probation, terminated unsatisfactorily; a 2009 burglary for which he was committed to the intensive probation supervision program (IPS), then the Department of Corrections, then recommitted to IPS, and finally to the Cook County Juvenile Temporary Detention Center; and a 2010 robbery for which he was committed to the Department of Corrections. Defendant also had one adult robbery conviction in 2012, for which he was serving a 24-month probationary sentence at the time of his aggravated battery on Williams in August 2012.

¶ 12 At the sentencing hearing, the court received evidence that defendant had witnessed several traumatic incidents during his childhood, including his father badly beating his mother and the murder of defendant's best friend. The court also learned that defendant's mother would move the family often to get away from defendant's abusive father, and that he was homeless at

least once. At the time of sentencing, defendant was working towards his high school diploma, eventually earning that diploma in 2014, and was hoping to begin a career in either construction or auto mechanics.

¶ 13 Before imposing sentence, the trial judge stated that the following aspects were considered: evidence presented at trial; the presentence investigation report; evidence presented in mitigation and aggravation; defendant's mother's statements regarding his social circumstances; the financial impact of incarceration; arguments of attorneys; the impact of this crime on the victim; and what defendant said before sentencing. The court also pointed out that, though there were compelling aspects to his social upbringing, defendant also was a "veteran of the juvenile justice system before he even arrived to us here," citing defendant's three juvenile delinquency adjudications. Moreover, prior to the commission of the offense in question, defendant had been put on probation for an adult robbery conviction in 2012 in which defendant had "punched the victim in the head and face, proceeded to take from the victim's coat pocket $5 and a Blackberry cell phone and a pair of glasses, another violent crime." And despite being granted an "intensive probation" for that 2012 adult conviction, the court noted that defendant did not make it even a year into that probation before committing a violent crime with a handgun.

¶ 14 Defendant was sentenced to 16 years in the Illinois Department of Corrections, followed by three years mandatory supervised release. Defendant filed a motion to reconsider sentence. That motion was denied, and this appeal followed.

¶ 15 II. ANALYSIS

¶ 16 Defendant's sole argument on appeal is that his sentence is excessive because the trial court failed to adequately consider his youth, traumatic childhood, and the lack of a prior sentence to the Department of Corrections in mitigation of his offense.

¶ 17 The State, in response, argues the trial court adequately considered such factors in aggravation and mitigation as contained in the presentence investigation report and presented by defendant at the sentencing hearing, as evidenced by a sentence in the lower half of defendant's class X sentencing range. In reply, Defendant maintains the sentence fails to account for "significant mitigating factors," and "completely discounts" his "considerable potential for rehabilitation."

¶ 18 "A sentence within the statutory limits will not be disturbed absent an abuse of discretion." *People v. Coleman*, 166 Ill. 2d 247, 258 (1995). A trial court abuses its discretion when the sentence is "greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *People v. Stacey*, 193 Ill. 2d 203, 210 (2000).

¶ 19 The trial court is best positioned to review all factors in mitigation and aggravation, such as "defendant's age, demeanor, habits, mentality, credibility, criminal history, general moral character, social environment, and education, as well as the nature and circumstances of the crime and of defendant's conduct in the commission of it." *People v. Quintana*, 332 Ill. App. 3d 96, 109 (2002). The seriousness of the offense is the most important factor in sentencing. *People v. Kelley*, 2015 IL App (1st) 132782, ¶ 92. The trial court is presumed to have considered all relevant factors and mitigation evidence, and defendant must make an affirmative showing to overcome that presumption. *People v. Burton*, 2015 IL App (1st) 131600, ¶ 38.

¶ 20 A sentence within statutory guidelines is presumed proper, unless defendant can make an affirmative showing that the sentence is disproportionate to the nature of the offense. *People v.*

Knox, 2014 IL App (1st) 120349, ¶ 46. An aggravated battery for knowingly discharging a firearm and causing injury to another person is a Class X felony. 720 ILCS 5/12/3.05(e)(1), (h) (West 2012). The sentencing range for a Class X felony "shall be…not less than 6 years and not more than 30 years." 720 ILCS 5/5-4.5-25(a) (West 2012).

¶ 21 In this case, the trial court did not abuse its discretion in sentencing defendant to 16 years in the Department of Corrections. Defendant argues that a lack of an extensive adult criminal record was not adequately considered as mitigating evidence. Defendant was seventeen years of age at the time of the offense and correctly notes that he had just one adult robbery conviction prior to this current one, in 2012, for which he was sentenced to a 2 year intensive probation period.

¶ 22 That adult robbery conviction in 2012, as previously discussed (see ¶ 13), involved defendant punching a victim several times and stealing $5, a cell phone, and a pair of glasses. The trial judge here, who also had sentenced defendant to that intensive probation for the 2012 robbery conviction, noted that defendant "didn't even make a year on that probation" before appearing again for another sentencing.

¶ 23 And preceding that 2012 adult robbery conviction, defendant had prior juvenile delinquency adjudications for aggravated battery in 2008, burglary in 2009, and robbery in 2010, leading the court to refer to defendant "as a kind of veteran of the juvenile justice system." The trial court could consider these delinquency adjudications, along with the prior adult conviction, as evidence of recidivism. See *People v. Jones*, 2016 IL 119391, ¶ 29 ("A juvenile adjudication, therefore, is no less valid or reliable a form of recidivism than is a prior conviction" for purposes of sentencing).

¶ 24 Defendant also argues his youth and troubled childhood were not adequately considered during sentencing. As stated above, defendant was seventeen at the time of the offense, and was born to a father who beat his mother badly enough that they were constantly on the move, and at one point were even homeless. At the outset of its remarks, the trial court mentioned a list of factors it considered for sentencing, among them: the evidence presented at trial; the presentence investigation report; evidence presented in aggravation and mitigation; "in particular" his mother's statements regarding his mitigation and his circumstances; and comments from defendant himself. Commenting further on the presentence investigation report, the trial court noted "it points to a lot of the really socially compelling aspects of [defendant's] upbringing." Despite noting these factors, the trial court had no obligation either to award a particular value or hierarchy to any of them. *People v. Perkins*, 408 Ill. App. 3d 752, 763 (2011). Nor has defendant made an affirmative showing, or any showing for that matter, that relevant factors were not considered beyond simply listing the ones already recited by the trial court. See *Burton*, 2015 IL App (1st) 131600, ¶ 38.

¶ 25 The crime itself further supports our holding. Defendant asked Williams for some of his frozen drink and cookie. When Williams refused and walked away, defendant responded by following and taunting Williams before shooting him once in his lower back. We would not agree with defendant's characterization of his actions as "impulsive." The victim tried to end the encounter by walking away, but defendant continued after him, first on his bike, then by foot, ultimately travelling down a city block and crossing a street, taunting the victim and drawing his weapon, despite his friends' attempts to stop him from using the gun, and despite the victim raising his hands palms up, an obvious attempt to de-escalate the situation. This was not a spur-of-the-moment occurrence, a split-second reaction. It may not have involved hours of

premeditation, but defendant had ample opportunity to let the encounter end without violence and chose, instead, to open fire on a defenseless boy whose only crime was refusing to share his drink with defendant.

¶ 26 Defendant cites *People v. Maldonado*, 240 Ill. App. 3d 470 (1992), in support of a reduced sentence. In *Maldonado*, defendant was found guilty of first degree murder and sentenced to 40 years in prison. *Id.* at 474. The court reduced that sentence to 20 years, in part because a 40-year sentence, the maximum, typically was reserved for murders committed for money or as a planned execution. *Id.* at 486. As such, the court reasoned that the actions of this defendant, who fired into a moving car recklessly without premeditation or to gain money, did not warrant the imposition of the maximum 40-year penalty.

¶ 27 In this case, defendant was given a 16-year sentence for a Class X felony whose sentencing range stretches between 6 and 30 years. Not only was defendant not given the maximum penalty, as in *Maldonado*, but defendant's sentence was on the lower end of that spectrum. We do not deny that a sentence of 16 years for a 17-year-old defendant is significant, but the trial court properly considered all relevant factors, and based on defendant's criminal history and the particularly senseless and violent nature of the crime here, we cannot say that the trial court's sentence was an abuse of discretion. The judgment of the circuit court is affirmed.

¶ 28 Affirmed.