2017 IL App (1st) 143395-U

No. 1-14-3395

Order filed July 21, 2017

Fifth Division

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 DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 CR 248
	)	
DEMETRIUS JACKSON,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HALL delivered the judgment of the court.
Justices Gordon and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for first degree murder is affirmed over his argument that it should be reduced to second degree murder based upon his unreasonable belief in the need for self defense. Defendant's sentence of 35 years in prison for first degree murder is not excessive when defendant points to nothing in the record, other than the sentence itself, to show that the trial court did not consider the evidence presented in mitigation.

¶ 2 Following a bench trial, defendant Demetrius Jackson was found guilty of first degree murder and sentenced to 35 years in prison. On appeal, defendant contends that his conviction

should be reduced to second degree murder because he had an actual but unreasonable belief that he had to use deadly force to defend himself against the victim. In the alternative, defendant contends that this cause must be remanded for resentencing because the 35-year sentence imposed by the trial court does not reflect that the court adequately considered his "demonstrated rehabilitative potential" or explained its justification for the sentence. Defendant finally contends that his mittimus must be corrected to reflect the 656 days that he spent in custody prior to sentencing. We affirm and correct the mittimus.

¶ 3 Defendant's arrest and prosecution arose out of the fatal stabbing of the victim, William "Mike" Terry, on November 21, 2012. The evidence at trial established that defendant and Terry were friends and that Terry was stabbed seven times after he intervened in an argument between defendant and defendant's wife Charity Hamilton.

¶ 4 Essie "Regina" Jackson, Terry's sister, testified that on November 21, 2012, Terry was at her home.[1] At one point, Hamilton knocked on the door, and asked to use the phone to call the police. The police were not called; rather, Terry and Hamilton left. Later, Essie's husband told her to call 911. When she went to the front door, she saw Terry "on the porch bleeding."

¶ 5 Valjean Jackson, Essie's husband, testified that when he arrived at home he saw defendant and Hamilton arguing on their front porch. Valjean heard defendant say "you better quit playing with me," and "I'll kill you b***." Once inside, he saw Terry watching television. Shortly thereafter, defendant's stepson walked in and said "Uncle Mike" was hurt. Valjean did not know that Terry had left. He ran to the front door and saw Terry with blood "dripping down."

[1] Essie is also referred to as Regina in the record. Neither Essie nor Valjean is related to defendant.

Valjean went inside, told Essie to call 911, and ran back outside. Terry had been stabbed in the neck, shoulder, and "a couple other places."

¶ 6 Michelle Nellis testified that she saw defendant and Terry arguing on the other side of the street. Defendant went toward Terry and Terry backed up. Defendant swung his arm and continued to move forward. She could not see whether defendant was holding anything. Terry continued to back up and fell. Once Terry fell her view was blocked by a parked car. She then saw defendant walk toward his house and heard him say "I don't care if he dies." When Terry stood up and pulled his shirt off, there was blood on the shirt.

¶ 7 Jasean Smith, defendant's 13-year old stepson, testified that he heard Hamilton and defendant arguing in the kitchen. Hamilton went outside and defendant followed her. Defendant came in, went to the kitchen, got two knives and then went back outside. Smith then saw Hamilton and Terry coming back toward the house and heard Terry ask what was going on. During the subsequent argument, Smith heard defendant say he was going to kill Terry. Smith watched Terry back up as defendant came toward him. Terry then pushed defendant away. Defendant was still holding the knives. Ultimately, the men ended up in the street. At this point, Terry hit defendant in the jaw. Defendant began swinging the knives. Terry tripped on the curb and both men fell to the ground. Defendant got up and came inside. He was holding the bloody knives. Defendant said "he fittin to go to jail." When Terry got up, he was limping. Smith saw blood when Terry took off his shirt. During cross-examination, Smith testified that when Terry pushed defendant away, defendant said "don't touch me." Terry was defendant's best friend.

¶ 8 Charity Hamilton testified that she was baking for Thanksgiving while defendant, Terry and defendant's brother were in the basement. At one point, defendant came into the kitchen and

began talking about fasting for Thanksgiving and giving away their food. Defendant became "kind of agitated" that she did not want to give away the food so she walked away. When defendant followed her into the bedroom, she asked him to fix the computer. Defendant stated that she did not know how to work her "f*** computer" and an argument began. Hamilton went to the porch, sat down and began to smoke. Defendant came out. He began "hollering" that he was not "playing," that he would "f*** kill" her if she thought he was "playing," and that he had purchased the cigarettes. She gave defendant the cigarette and went inside. The argument continued when defendant came inside. Defendant stated that Hamilton was not paying attention to him and "brushing him off." He stated that she treated him like a child. Defendant "kept saying you think I'm playing with you." He then got two knives. When defendant came toward Hamilton with the knives and said that he would "f*** kill" her, she grabbed her coat, ran out of the house and went to Essie's house.[2]

¶ 9 Terry answered the door and she asked to use his cell phone to call the police. Hamilton told Terry that defendant was "tripping, acting the fool." Defendant was on the porch of their house, so Terry looked at defendant and asked "what's going on." As Terry walked toward their house, defendant walked toward him and said "f*** that b***." Terry talked to defendant to calm him down. However, when he touched defendant, defendant said "don't f*** touch me," and "you think I'm playing," before going back inside. When defendant came back outside, he had two knives.

¶ 10 As defendant walked toward them holding the knives, he said he was not "playing" that he would "f*** kill her" and not to touch him or he would "kill you too." Terry approached

[2] Hamilton refers to Essie as Regina.

defendant "to touch him to put the knives down," but then defendant came toward Terry "kind of swinging the knives." Terry began backing away. At one point, defendant "tried to launch" at Terry. Hamilton turned around and when she turned back, defendant and Terry were on the ground. Both men then got up. Defendant walked home. Hamilton asked Terry if he was "okay." When Terry took off his sweater, she saw blood.

¶ 11 Assistant Medical Examiner James Filkins testified that he performed an autopsy on Terry. A toxicology report indicated that the alcohol in Terry's system was "approximately twice the legal limit for driving in the State of Illinois." The report also indicated the presence of benzoylecgonine which is a "byproduct of the ingestion or decomposition of cocaine." Filkins noted, *inter alia,* seven stab or "incise" wounds on Terry's body. He did not observe any injuries to the hands or knuckles that would indicate that Terry hit something with force.

¶ 12 Defendant testified that Terry was his best friend and that they talked about "everything." Terry had shared that he was sentenced to 14 years in prison for home invasion, robbery and aggravated battery on a senior citizen. On November 21, 2012, they spent time in defendant's basement drinking. Terry went home because he was "kind of f*** up." At one point, Hamilton stated that she should not have had sexual intercourse with defendant that day because defendant promised to start cooking for Thanksgiving, but had spent all day in the "f*** studio." Defendant ran a music label from his basement. She went outside to "catch some air," and defendant said he would be right out because they needed to talk. He then realized that the door to the basement, where his cigarettes and keys were located, was locked. He used a knife to open the door. He got his keys and cigarettes, put the knife in his back pocket and went outside. Although he tried to explain that he had not started cooking because he had not been paid, Hamilton "wasn't really

trying to hear it." When defendant said that he did not want to cook at all because of the way she was speaking to him, she walked down the street and said she was going to call the police. Defendant stayed on the porch. Terry then came down the street followed by Hamilton. Terry wanted to know what was "going on." Defendant said to stay out of his "wife business." Hamilton began "talking crazy" and cursing. Terry was "very loud and angry" and defendant wondered what Hamilton told him.

¶ 13 When Terry got into the middle of the argument, defendant told him that he had nothing to do with it. Terry first put his hands up, then pushed defendant. Defendant was able to "stand" his ground although he "stumbled a little bit." Terry told defendant to "go the f*** on." The second time Terry pushed defendant "kind of aggressive[ly]," defendant told him to keep his hands off and that he had nothing to do with the argument. When defendant tried to step around Terry, Terry punched him in the face. Defendant than swung at Terry. They began "tussling," then tripped over the curb and fell to the ground. At this point, defendant "actually feared" for his life and stabbed Terry "in self defense."

¶ 14 Defendant explained that after Terry hit him, he was dazed. When they fell to the ground, defendant was terrified due to Terry's stories about his past, including that he had been sentenced to 14 years in prison for aggravated battery on a senior citizen. After defendant stabbed Terry and Terry let him go, he walked toward his house. He later turned himself in to the police because he "only acted in self defense." He did not intend to kill Terry.

¶ 15 During cross-examination, defendant testified that Hamilton lied about the arguments regarding fasting and the computer. She did not go back inside after they argued on the porch;

rather, she walked down the street. He denied threatening to kill Hamilton and denied that Terry tried to calm him down. He did not recall stabbing Terry seven times.

¶ 16 The defense entered into evidence a certified copy of conviction for "Michael Johnson" for home invasion and residential burglary and 14-year prison sentence in case number 90 CR 0635401.

¶ 17 The court found defendant guilty of first degree murder and that defendant did not prove, by a preponderance of the evidence, the mitigating factors for second degree murder. At sentencing, the parties presented evidence in aggravation and mitigation. Defendant's sister testified that he "is an outstanding father figure," a hard working man, and "not a murderer;" rather, defendant made a mistake. The State argued that rather than taking responsibility for his actions, defendant blamed his wife for the argument and asked for a 45-year prison term. The defense responded that defendant had no felony convictions, was a family man, and was so affected by Terry's death that he tried to commit suicide in jail. Defendant apologized to Terry's family and stated that every day he cried and prayed for Terry's family.

¶ 18 In sentencing defendant, the trial court stated that it had reviewed the evidence in aggravation and mitigation and that the court was not faced with "a cut and dry type of sentencing." The court noted that "both families were good decent people," and that it is "just a tragedy that this thing happened." The court stated that it had been considering a higher sentence, but that defendant's concern for Terry's family had "great effect" on the court. However, Terry was not armed and suffered seven stab wounds such that there was "no self defense here." The trial court sentenced defendant to 35 years in prison.

¶ 19 On appeal, defendant first contends that this court should reduce his conviction to second degree murder and remand the matter for resentencing because Terry's death was the result of defendant's actual but unreasonable belief that he had to use deadly force to protect himself. The State responds that defendant's conviction should be affirmed because defendant failed to prove, by a preponderance of the evidence, that he subjectively but unreasonably believed that he needed to use force in self defense.

¶ 20 A person commits the offense of second degree murder when he commits first degree murder and a mitigating factor is present. 720 ILCS 5/9-2(a) (West 2012). Once the State proves the elements of first degree murder beyond a reasonable doubt, the burden shifts to the defendant to establish, by a preponderance of the evidence, proof of a mitigating factor. *People v. Castellano*, 2015 IL App (1st) 133874, ¶ 154. Once the defendant proves a mitigating factor by a preponderance of the evidence, the State then has the burden to disprove it beyond a reasonable doubt. *Id.*

¶ 21 Here, defendant contends that he established, by a preponderance of the evidence, that he had the unreasonable belief that he had to defend himself against Terry. See *People v. Jeffries*, 164 Ill. 2d 104, 113 (1995) (this theory is known as "imperfect self-defense" because sufficient evidence exists that the defendant believed he was acting in self defense, but that belief is objectively unreasonable).

¶ 22 "Self defense consists of six factors: '(1) force is threatened against a person, (2) the person is not the aggressor, (3) the danger of harm was imminent, (4) the threatened force was unlawful, (5) the person actually and subjectively believed a danger existed that required the use of the force applied, and (6) the person's beliefs were objectively reasonable.' " *Castellano*, 2015

IL App (1st) 133874, ¶ 149 (quoting *People v. Washington*, 2012 IL 110283, ¶ 35). To be found guilty of second degree murder, a defendant must prove, by a preponderance of the evidence, that the first five factors existed. *Id.* (citing *Jeffries*, 164 Ill. 2d at 128-29). To sustain a charge of first degree murder after the defendant raises the issue of self defense, the State must prove beyond a reasonable doubt that at least one of the factors was not present. *Id.* (citing *Jeffries*, 164 Ill. 2d at 128).

¶ 23 Here, the trial court found defendant guilty of first degree murder, *i.e.*, the court did not find that defendant established by a preponderance of the evidence the elements of self defense. The power of a reviewing court to reduce a first degree murder conviction to second degree murder "should be used with extreme caution and only in rare instances." *People v. Hooker*, 249 Ill. App. 3d 394, 403 (1993) (the power to reduce a conviction is available when, *inter alia*, there is an "evidentiary weakness" as to an element of the offense). Whether the defendant's actions were committed under mitigating circumstances is a question of fact. *Castellano*, 2015 IL App (1st) 133874, ¶ 144. In reviewing that determination, a reviewing court will not reverse if "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the mitigating factors were not present." *People v. Blackwell*, 171 Ill. 2d 338, 358 (1996). During a bench trial, the trial court, as the trier of fact, determines the credibility of the witnesses, weighs the evidence and resolves conflicts in the evidence. *People v. Brown*, 2017 IL App (1st) 142877, ¶ 39.

¶ 24 Here, defendant contends he acted with an actual, though unreasonable, belief that he had to defend himself against Terry. Defendant argues that Terry had been drinking earlier in the day

and that he knew of Terry's "violent past" so he was scared after Terry punched him. Therefore, defendant concludes that he had no choice but to defend himself. We disagree.

¶ 25 The evidence at trial established that Hamilton left the house after she and defendant argued, and then returned with Terry. Terry asked defendant what was going on, and apparently attempted to diffuse the situation between defendant and Hamilton. Although defendant is correct that Terry pushed him several times and ultimately hit him in the face, the evidence at trial also established that Terry pushed defendant as defendant advanced toward Terry. Although it is undisputed that Terry punched defendant in the face, it is also undisputed that Terry was not armed. Additionally, Hamilton testified that Terry was trying to calm defendant down, but that defendant advanced toward Terry and told Terry not to touch him. The trial court heard defendant's version of the altercation and found defendant's version unbelievable as evidenced by the trial court's verdict. "The trier of fact is not obligated to accept a defendant's claim of self-defense; rather, in weighing the evidence, the trier of fact must consider the probability or improbability of the testimony, the circumstances surrounding the killing and the testimony of other witnesses." *People v. Rodriguez*, 336 Ill. App. 3d 1, 15 (2002).

¶ 26 Defendant has not persuaded this court that the trial court's credibility determination was wrong. In a bench trial, the court is the trier of fact and has "the responsibility of weighing the credibility of the witnesses." *Castellano*, 2015 IL App (1st) 133874, ¶ 145. " 'This court will not substitute its judgment for that of the trial court on questions involving the credibility of witnesses.' " *Id.* (quoting *In re Jessica M.*, 399 Ill. App. 3d 730, 738 (2010)). Here, defendant's response to Terry inserting himself into a domestic argument, and pushing and hitting defendant was to stab him seven times. Viewing the evidence in the light most favorable to the State, as we

must, this court cannot conclude that no rational trier of fact could have found that the evidence did not support a finding of imperfect self defense. See *Blackwell*, 171 Ill. 2d at 358.

¶ 27 We are unpersuaded by defendant's reliance on *People v. Hawkins*, 296 Ill. App. 3d 830 (1998). In that case, the victim pulled a knife on the defendant three days before the fatal encounter. The victim had also pulled a knife on the defendant on several previous occasions and had also previously hit the defendant with a brick. On the day of the stabbing, the defendant refused to loan the victim money. The victim responded by reaching into the defendant's pockets, and punching the defendant in the head causing him to fall to the floor. While the defendant was on the floor, the victim threw a brick at him. When the victim threatened to kill the defendant and used a racial slur, the defendant pulled a knife. The victim then blocked the defendant's way as the defendant tried to run away, grabbed the defendant and "swung at him with a closed fist." *Id*. at 834. The defendant stabbed the victim. At trial, the defendant testified that he was terrified and scared at the time of the stabbing.

¶ 28 On appeal, the court reduced the defendant's first degree murder conviction to second degree murder, finding he had an actual but unreasonable belief that "he had the right to use self-defense" against the victim. *Id*. at 837. The court noted the evidence that the victim had acted violently toward the defendant in the past, but that there was no evidence that the defendant had suffered any bodily harm during those previous encounters or that the victim had a weapon when he swung at the defendant with a closed fist. *Id.* at 837-38. Therefore, although the defendant's belief that he needed to use a deadly weapon was unreasonable, he did prove by a preponderance of the evidence that he believed that the circumstances justified his actions. *Id.* at 838.

¶ 29 Here, however, there is no indication in the record that Terry was ever violent toward defendant. While Terry may have been convicted of home invasion and residential burglary and sentenced to a 14-year prison sentence, that case was in 1990 and the events at issue in this case occurred in 2012, some 22 years later. Also unlike *Hawkins*, there was no evidence at trial that Terry prevented defendant from leaving the scene of their altercation as it progressed; rather, the evidence only established that Terry tried to stop defendant from going around him to Hamilton.

¶ 30 Viewing the testimony at trial in the light most favorable to the State, the trial court correctly concluded that defendant's use of force against Terry was greater than necessary to prevent any threat that Terry may have represented. Because the evidence did not establish that defendant had an actual, though unreasonable, belief that he had to act in self defense, his argument that his first degree murder conviction should be reduced must fail.

¶ 31 In the alternative, defendant contends that this cause must be remanded for resentencing because the 35-year sentence imposed by the trial court does not reflect adequate consideration of defendant's potential for rehabilitation or the constitutional mandate of restoring him to useful citizenship. Defendant also argues that the record does not reflect justification for the sentence.

¶ 32 A sentence within statutory limits is reviewed on an abuse of discretion standard, so that this court 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. So long as the trial court does not consider improper aggravating factors or ignore pertinent mitigating factors, it has wide latitude in sentencing a defendant to any term within the applicable statutory range. *People v. Jones*, 2014 IL App (1st) 120927, ¶ 56. This broad

discretion means that this court cannot substitute our judgment simply because we may weigh the sentencing factors differently. *People v. Alexander*, 239 Ill. 2d 205, 212-13 (2010).

¶ 33 When balancing the retributive and rehabilitative aspects of a sentence, a court must consider all factors in aggravation and mitigation including, *inter alia*, a defendant's age, criminal history, character, education, and environment, as well as the nature and circumstances of the crime and the defendant's actions in the commission of that crime. *People v. Raymond*, 404 Ill. App. 3d 1028, 1069 (2010). The trial court does not need to expressly outline its reasoning when crafting a sentence, and we presume that the court considered all mitigating factors absent some affirmative indication to the contrary other than the sentence itself. *Jones*, 2014 IL App (1st) 120927, ¶ 55. 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 either require a minimum sentence or preclude a maximum sentence. *Id.*

¶ 34 Here, defendant was convicted of first degree murder and was subject to a prison sentence of between 20 to 60 years. See 730 ILCS 5/5-4.5-20(a) (West 2012).

¶ 35 This court cannot say a prison term of 35 years was an abuse of discretion when defendant stabbed his unarmed friend seven times. See *Snyder*, 2011 IL 111382, ¶ 36.

¶ 36 Defendant, however, contends that the trial court failed to consider the tragic nature of this case, *i.e.*, that defendant and Terry were friends and that he deeply regretted the result of his actions. Defendant also argues that the trial court failed to consider his potential for rehabilitation or the requirement that he be restored to useful citizenship and did not adequately articulate its reasoning for the sentence.

¶ 37 It is presumed that the court properly considered the mitigating factors presented and it is the defendant's burden to show otherwise. *People v. Brazziel*, 406 Ill. App. 3d 412, 434 (2010). Here, defendant cannot meet that burden, as the trial court specially stated that it had considered imposing a higher sentence but that defendant's apology to Terry's family and concern for Terry's family had a "great effect" on the court. The court also recognized that this case was a tragedy for both families. Although the trial court did not expressly discuss defendant's potential for rehabilitation or the details of restoring defendant to productive citizenship, the court need not explicitly indicate each mitigating factor that it has considered. *People v. Halerewicz*, 2013 IL App (4th) 120388, ¶ 43. Here, defendant has not shown an affirmative indication that the trial court did not consider all factors presented in mitigation, other than the sentence itself. See *Jones*, 2014 IL App (1st) 120927, ¶ 55. Ultimately, "the mere fact that a reviewing court might have weighed the factors differently than the trial court does not justify an altered sentence" (*Raymond*, 404 Ill. App. 3d at 1069), and, consequently, defendant's argument must fail.

¶ 38 To the extent that defendant relies on the special concurrence in *People v. Bryant*, 2016 IL App (1st) 140421, ¶¶ 25-35 (Hyman, J., specially concurring), to argue that resentencing is warranted, we disagree. Although defendant is correct that the special concurrence in that case "encourage[d] sentencing courts to go beyond the precedent and as a matter of course explain to a criminal defendant the reasons behind the sentence," the *Bryant* court determined that the trial court did not abuse its discretion in imposing that defendant's sentence. See *Id.* ¶¶ 18-20, 26. With regard to defendant's reliance on *People v. Dismukes*, 2016 IL App (1st) 140730-U, ¶¶ 20-27 (Hyman, J., specially concurring), that order was filed under Supreme Court Rule 23. See Ill. S. Ct. R. 23(e)(1) (eff. July 1, 2011) ("An order entered under subpart (b) or (c) of this rule is not

precedential and may not be cited by any party except to support contentions of double jeopardy, *res judicata*, collateral estoppel or law of the case.").

¶ 39 Defendant finally contends, and the State concedes, that his mittimus must be corrected to reflect two additional days of presentence custody credit for a total of 656. We agree that defendant is entitled to 656 days of presentence custody credit when he turned himself into the police on November 23, 2012, and was sentenced on September 10, 2014. A defendant held in custody for any part of a day should be given credit against his sentence for that day (*People v. Williams*, 2013 IL App (2d) 120094, ¶ 37), excluding the day of his sentencing (*People v. Harris*, 2012 IL App (1st) 092251, ¶ 36). Pursuant to our power to correct a mittimus without remand (*People v. Rivera*, 378 Ill. App. 3d 896, 900 (2008)), we therefore direct the clerk of the circuit court to correct the mittimus to reflect 656 days of presentence custody credit.

¶ 40 Accordingly, pursuant to Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we order the clerk of the circuit court to correct defendant's mittimus to reflect 656 days of presentence custody credit. We affirm the judgment of the circuit court in all other aspects.

¶ 41 Affirmed; mittimus corrected.