2017 IL App (1st) 150643-U

SIXTH DIVISION
Order filed: November 3, 2017

No. 1-15-0643

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 09 CR 20483 (04)
	)	
KEVIN KOONCE,	)	Honorable
	)	Nicholas Ford,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the defendant's convictions and sentences for home invasion, aggravated kidnaping, and armed robbery where the trial court did not err by: (1) denying his pretrial motion to suppress inculpatory statements; (2) imposing 15-year firearm enhancements for each offense; and (3) sentencing him to a total of 40 years' imprisonment. Mittimus modified.

¶ 2 Following a jury trial, the defendant, Kevin Koonce, was convicted of two counts of home invasion, one count of aggravated kidnaping, and one count of armed robbery. He was sentenced to concurrent terms of 25 years' imprisonment plus a 15-year firearm enhancement for

each offense. On appeal, he contends that the trial court erred by: (1) denying his pretrial motion to suppress inculpatory statements; (2) imposing the firearm enhancements without a finding by the jury that he committed the offenses while armed; and (3) imposing an excessive sentence. For the reasons that follow, we affirm the defendant's convictions and sentences, but, at the State's request, modify the mittimus to reflect the offenses of which he was convicted.

¶ 3 The defendant and three codefendants, Donald Hines, Jeffrey Hollingshead, and Curtis Sanders, who are not parties to this appeal, were charged by indictment with, *inter alia*, two counts of home invasion (720 ILCS 5/12-11(a)(3) (West 2008)), one count of aggravated kidnaping (720 ILCS 5/10-2(a)(6) (West 2008)), and one count of armed robbery (720 ILCS 5/18-2(a)(2) (West 2008)), arising from an incident on October 29, 2009, involving the victims, Luis Carranza and Fernando Gutierrez. The defendant elected a jury trial, where the State proceeded on two counts of home invasion (720 ILCS 5/12-11(a)(3) (West 2008)), one count of aggravated kidnaping (720 ILCS 5/10-2(a)(6) (West 2008)), and one count of armed robbery (720 ILCS 5/18-2(a)(2) (West 2008)). Each count alleged that the defendant was armed with a firearm. The indictment also stated that the State would seek extended-term sentencing for aggravated kidnaping, armed robbery, and one count of home invasion, on the basis that Carranza "was physically handicapped at the time of the offense[s] ***."

¶ 4 Prior to trial, the defendant filed a motion to suppress inculpatory statements that he made to agents from the Federal Bureau of Investigation (FBI) following his arrest. The motion alleged, in relevant part, that he made the statements without being advised of his *Miranda* rights. See *Miranda v. Arizona*, 384 U.S. 436 (1966). On March 13, 2013, the trial court held a hearing on the motion.

¶ 5 At the hearing, the State called FBI Special Agent Matthew Alcoke, who testified that, on October 29, 2009, he was investigating Carranza's kidnapping with a taskforce of FBI agents and Chicago police officers. According to Agent Alcoke, Carranza's family received a demand to place a ransom package inside a garbage tote in an alley near Ruble and 21st Streets in Chicago. Around 12 a.m., Agent Alcoke observed a white pickup truck drive around the block several times and enter the alley with its headlights turned off. A passenger exited, looked inside a tote, and returned to the truck, which continued circling the block. At 12:15 a.m., a member of Carranza's family placed a package inside one of the totes; fifteen minutes later, a man, later identified as Hollingshead, removed the package from the tote and was arrested. The taskforce then converged on the pickup truck, arrested the two occupants—Sanders and the defendant, who was in the driver's seat—and recovered a handgun from the center console. The defendant was handcuffed and placed in Agent Alcoke's vehicle, where Agent Alcoke and Special Agent Burke identified themselves, told him that a kidnapping occurred, and asked him to "provide information to us that could help us locate the victim while he was still alive." They did not provide the *Miranda* warnings, but told the defendant that "he would be interviewed some time later about the other details related to the kidnapping."

¶ 6 According to Agent Alcoke, the defendant "immediately" provided the first name and last known location of the last person he had seen with Carranza. The taskforce identified this person as Hines. Agents Alcoke and Burke then drove with the defendant to join other members of the taskforce who were chasing a vehicle that matched the description of one seen leaving the location of the kidnapping. When that vehicle escaped, Agents Alcoke and Burke drove the defendant to Aurora, where he identified Hines' house. Next, they drove to the scene of a traffic stop in Bloomingdale, where Hines had been detained. Agent Alcoke showed Hines' driver's

license to the defendant, who confirmed that Hines was the person with whom he last saw Carranza. Afterwards, Agent Alcoke drove the defendant to a police station in Chicago. He told the defendant their destination and "what he might expect once we arrive[d]," but did not question him or engage in conversation. Agent Alcoke testified that, from the time the defendant was placed in his vehicle to the time they arrived at the police station, the defendant never stated that he wished to remain silent or that he wanted an attorney. Agent Alcoke denied telling the defendant that he would be charged with murder if he did not reveal Carranza's location, and did not hear any agents or officers threaten him in that manner.

¶ 7 Detective Gehrke testified that he met with the defendant at the police station twice during the morning of October 30, 2009. Both times, Detective Gehrke or another detective read the defendant his *Miranda* rights and, on each occasion, the defendant stated that he understood his rights and was willing to speak about the kidnapping investigation. The defendant never requested an attorney, but met with one who arrived to see him later that morning. Afterwards, the defendant declined to speak with the police.

¶ 8 The defendant testified that, prior to his arrest, he drove through the alley near Ruble and 21st Streets only once and that Sanders never left the pickup truck. Following his arrest, agents recovered a firearm from the backseat and transferred him to another vehicle, where they asked for the location of a missing person. The defendant told them that he did not know what they were talking about, but the agents stated that he would be charged with murder if he did not cooperate. The defendant felt intimidated so, when he overheard people outside the vehicle talking about a black pickup truck and a person named "Don," he repeated what he heard to the agents. He also told the agents that Don lived in Aurora because, from work, he knew a person by that name who lived there. The agents drove the defendant to Aurora, but he had never been

to Don's house and could not identify its location. Afterwards, the agents drove him to Bloomingdale and showed him a driver's license, which he identified belonging to the person he knew as Don. Detective Alcoke then drove the defendant to the police station, where, according to the defendant, he met with police officers and requested an attorney. The defendant denied receiving *Miranda* warnings at any time.

¶ 9 The trial court denied the defendant's motion to suppress his statements to Agent Alcoke, Agent Burke, and Detective Gehrke. In particular, the trial court found that his statements to Agents Alcoke and Burke were admissible under the public safety exception outlined in *New York v. Quarles*, 467 U.S. 649 (1984). The trial court noted that the agents asked the defendant "very specific questions" about Carranza's location and the last person with whom he was seen, and did not inquire about the defendant's vehicle, the firearm, or his share of the ransom. Additionally, the trial court found that the defendant's testimony was "totally unbelievable" and that "it is equally unbelievable that he was coerced in any way ***."

¶ 10 The matter proceeded to a jury trial where the evidence established that, on October 29, 2009, the defendant and Hines entered a house shared by Gutierrez and Carranza, and demanded drugs and money. The defendant pointed a gun at Carranza, who was paralyzed, went through his belongings, and, with Hines, carried him to a truck where Sanders was waiting. They drove Carranza to another location, contacted his family to demand a ransom and threatened to kill him. Later, they abandoned Carranza by a viaduct. After the offenders were arrested, police officers recovered Carranza's cell phone, bracelet, and watch from the defendant's pickup truck and another vehicle. Detective Gehrke testified that the defendant admitted his role in the kidnapping during the interviews on October 30, 2009. The defendant, however, testified that he

did not have a gun with him when he went into Carranza's house and denied making admissions at the police station.

¶ 11 Following closing arguments, the trial court delivered jury instructions. The trial court explained the elements of each offense and stated that, as to each offense, the jury could find the defendant guilty only if every element—including the fact that the defendant "was armed with *** a firearm"—was proven beyond a reasonable doubt. Additionally, the trial court instructed the jury that, to find the defendant guilty of aggravated kidnaping, armed robbery, and one of the counts of home invasion, it would have to find beyond a reasonable doubt that Carranza was "physically handicapped at the time of the offense[s]."

¶ 12 The defendant fled the courthouse during deliberations and, in his absence, the jury returned signed verdict forms finding him guilty on all counts. He was apprehended approximately two weeks later. The trial court denied his motion for a new trial and the matter proceeded to a sentencing hearing.

¶ 13 The State requested a sentence "in excess of 50 years," arguing that the defendant chose to participate in an "atrocious" crime and that his flight demonstrated an unwillingness "to take responsibility and to reform." In mitigation, defense counsel characterized the defendant as "a follower" and maintained that, in view of his job and family, a sentence "at the lower end of the spectrum would be appropriate ***." A presentence investigation (PSI) report indicated that the defendant, then age 33, had no prior convictions, lived with his wife and four of his five minor children, and was employed as a boom operator. The defendant proffered letters documenting his participation in behavior management, anti-recidivism, and educational programs while in jail. In allocution, he apologized to Carranza and expressed his belief that he was "changing for the better."

¶ 14 The trial court sentenced the defendant to concurrent terms of 25 years' imprisonment plus a 15-year firearm enhancement for each offense. In imposing sentence, the trial court stated that it considered the parties' arguments, along with: (1) the evidence presented at trial and sentencing; (2) the statutory factors in aggravation and mitigation; (3) the PSI report; and (4) the defendant's allocution. The trial court noted that the defendant "made the most of his time" while incarcerated and, per an *in camera* offer of proof by defense counsel, cooperated with the State's Attorney's office in unrelated cases. The trial court also observed that the defendant committed the offenses despite having a good job, fled during his trial, and was apprehended only after a manhunt. According to the trial court, the defendant's crimes were "very serious" and required sentences that both "reflect the fact that he had so little regard for the life of another person" and "ensure this sort of conduct is discouraged out in the general public ***." The defendant filed an "amended motion to reconsider sentence," which was denied, and this appeal followed.

¶ 15 For his first assignment of error, the defendant contends that the trial court erred by denying his pretrial motion to suppress inculpatory statements that he made to Agents Alcoke and Burke. According to the defendant: (1) his interrogation involved an improper "question first and warn later" tactic because any statement regarding Carranza's whereabouts would be incriminating; and (2) because he was continually in custody, his statements to Agents Alcoke and Burke "tainted" his later statements to Officer Gehrke, irrespective of whether Detective Gehrke advised him of his *Miranda* rights.

¶ 16 When reviewing a trial court's ruling on a motion to suppress evidence, we apply a two-part standard of review. *People v. Johnson*, 237 Ill. 2d 81, 88 (2010). Findings of fact and credibility determinations made by the trial court are accorded great deference and will be

reversed only if they are against the manifest weight of the evidence. *Id.* However, we review *de novo* the ultimate question of whether the motion to suppress should have been granted. *Johnson*, 237 Ill. 2d at 88-89. In making this determination, the reviewing court may consider testimony from both the suppression hearing and the trial. *People v. Slater*, 228 Ill. 2d 137, 149 (2008).

¶ 17 Prior to any interrogation by law enforcement officials, a person in custody must be advised of the right to remain silent and the right to counsel. *In re Christopher K.*, 217 Ill. 2d 348, 376 (2005) (citing *Miranda*, 384 U.S. at 444). If an accused invokes the right to counsel, questioning must stop unless he initiates further communication with police. *People v. Woolley*, 178 Ill. 2d 175, 197 (1997) (citing *Edwards v. Arizona*, 451 U.S. 477, 485 (1981)). If the police subsequently initiate a conversation with the accused in the absence of counsel, his statements are presumed involuntary and a motion to suppress will be granted. *Id.* at 198. Where, as here, the defendant challenges the admissibility of an inculpatory statement through a motion to suppress, the State has the burden of proving, by a preponderance of the evidence, that the statement was voluntary. *People v. Richardson*, 234 Ill. 2d 233, 254 (2009).

¶ 18 In *Quarles*, the Supreme Court held that a limited exception to the requirement of *Miranda* warnings applies when police officers encounter an immediate threat to public safety. There, officers chased a suspected rapist who was armed with a gun into a supermarket and, when they apprehended him, discovered that his holster was empty. *Quarles*, 467 U.S. at 651-52. The officers asked the suspect for the location of the gun prior to advising him of the *Miranda* rights. *Id.* at 652. The Supreme Court concluded that no *Miranda* violation occurred, as giving the warnings before asking the whereabouts of the gun might have deterred the defendant from responding and put the public at risk. *Id.* at 657. Under these circumstances, the

Supreme Court concluded that "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." *Id.*

¶ 19 In this case, we find that the public safety exception applies and, therefore, the trial court did not err in denying the defendant's suppression motion. At the hearing, Detective Alcoke testified that Carranza had been kidnapped and that his family received a ransom demand. Taskforce members apprehended a co-defendant who was trying to recover the ransom and found a gun in the defendant's vehicle. After the defendant was arrested, Agents Alcoke and Burke asked him only for information needed to help locate Carranza and ascertain the identity and whereabouts of the last person with whom he was seen; as the trial court noted, they did not ask for details about either the ransom or the firearm that they found in the defendant's vehicle. See *People v. Williams*, 173 Ill. 2d 48, 55-56, 77-78 (1996) (applying the public safety exception where the arresting officer asked a suspect in a recent shooting whether he had a gun "on him," as the question was intended to protect public safety and "not designed to elicit testimonial evidence"). Here, as in *Quarles*, Agents Alcoke and Burke were confronted with a risk to public safety and conducted an appropriately limited interrogation of the defendant in order to "neutralize the volatile situation confronting them." *Quarles*, 467 U.S. at 658. Because the public safety exception applies, the interrogation neither constituted a "question first and warn later" tactic, nor rendered inadmissible his later statements to Detective Gehrke. Consequently, there is no *Miranda* violation.

¶ 20 Next, the defendant challenges his sentencing on the basis that: (1) the trial court imposed 15-year firearm enhancements in violation of *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); and (2) his sentence is excessive. As an initial matter, the State submits that the

defendant forfeited both claims by failing to preserve them in the trial court or request plain-error review on appeal. Generally, to preserve a sentencing issue for review, a defendant must object both at the sentencing hearing and in a postsentencing motion. See *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). Likewise, if a defendant fails to argue on appeal that either of the two prongs of the plain-error doctrine is satisfied, he also forfeits plain-error review. *Id.* at 545-46. In this case, however, the record includes a transcript of the defendant's sentencing hearing, a copy of his "amended motion to reconsider sentence," and a transcript of the hearing at which that motion was denied. Consequently, we will consider his arguments on the merits.

¶ 21 Turning to the defendant's *Apprendi* claim, he argues that the trial court erred by imposing 15-year firearm enhancements without a finding by the jury that he committed any offense while armed with a firearm. In support of this position, he observes that the verdict forms did not specify whether any offense involved a firearm and, further, the trial evidence was conflicting as to whether he was armed.

¶ 22 Under the United States Constitution, the due process clause of the fifth amendment and the notice and jury trial guarantees of the sixth amendment require "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Jones v. United States*, 526 U.S. 227, 243, n.6 (1999). By way of the fourteenth amendment, the same rule applies to cases involving state statutes. *Apprendi*, 530 U.S. at 476. *Apprendi* errors present a question of law and our review is, therefore, *de novo*. *People v. Hopkins*, 201 Ill. 2d 26, 36 (2002).

¶ 23 In considering the defendant's *Apprendi* claim, *People v. Aguilar*, 396 Ill. App. 3d 43 (2009), is instructive. In *Aguilar*, the defendant claimed that a 25-year sentencing enhancement on his conviction for first degree murder violated *Apprendi* because the verdict form did not

contain a finding that he "personally discharged a firearm during the offense." *Id.* at 59. We found no error. Because the trial court instructed the jury that, in order to find the defendant guilty, it would have to find that he caused the victim's death "by personally discharging a firearm," the evidence, instructions, and signed verdict form all reflected that the jury found the enhancing factor beyond a reasonable doubt. *Id.* at 59-60; see also *Hopkins*, 201 Ill. 2d at 39 (no *Apprendi* violation where the defendant was sentenced to an extended term sentence due to the victim's age, which was included as an element of the underlying offense); *People v. Rodriguez*, 372 Ill. App. 3d 797, 801-02 (2007) (no *Apprendi* violation where the defendant received an enhanced sentenced due to being armed with a firearm, which was included as an element of the underlying offense).

¶ 24 In this case, as in *Hopkins*, *Rodriguez*, and *Aguilar*, the record demonstrates that the trial court instructed the jury as to the findings that served as grounds for the sentencing enhancements. Specifically, the trial court stated that the fact the defendant "was armed with *** a firearm" constituted an element of each of offense, and that the jury could find the defendant guilty only if each element of an offense was proven beyond a reasonable doubt. The jury returned signed verdict forms stating that it found the defendant guilty on all counts, and is presumed to follow the law as given. *People v. Taylor*, 166 Ill. 2d 414, 438 (1995). The fact of being "armed with a firearm," which enhanced the penalty for each of the defendant's offenses, was, therefore, submitted to the jury and proven beyond a reasonable doubt as required by *Apprendi*. Accordingly, there is no *Apprendi* violation.

¶ 25 To the extent the defendant suggests that his sentences were was also improper because the verdict forms did not indicate a finding as to whether Carranza was disabled, his brief on appeal offers no argument or authority in support of this position and it is, therefore, waived.

See Ill. S. Ct. R. 341(h)(7) (eff. Jan 1, 2016). Notwithstanding, this argument also fails on the merits. First, the trial court instructed the jury that, to find the defendant guilty of aggravated kidnaping, armed robbery, and one of the counts of home invasion, it would have to find beyond a reasonable doubt that Carranza was "physically handicapped at the time of the offense[s]." Second, on each count for which the indictment stated that the defendant was eligible for extended-term sentencing due to Carranza's disability, the trial court imposed a base sentence for 25 years, *i.e.*, 5 years *less* than the 30 to 60-year range available for an extended-term Class X sentence. See 730 ILCS 5/5-4.5-25(a) (West 2008).

¶ 26 Turning to the defendant's second claim of sentencing error, he argues that his 25-year base sentences were excessive due to his youth, rehabilitative potential, marriage and children, employment, and the fact that he did not "inflict*** any physical damage" during the offenses. Additionally, he argues that the trial court did not consider that he cooperated with the State's Attorney's office in certain investigations while he was incarcerated.

¶ 27 A reviewing court considers a trial court's sentencing decision under an abuse-of-discretion standard of review. *People v. Alexander*, 239 Ill. 2d 205, 212-13 (2010). The trial court has broad discretionary powers in imposing a sentence, and its sentencing decisions are entitled to great deference because the trial judge, having observed the defendant and the proceedings, is in a much better position to consider factors such as the defendant's credibility, demeanor, moral character, mentality, social environment, habits, and age. *Id*.

¶ 28 A sentence should reflect both the seriousness of the offense and the objective of restoring the defendant to useful citizenship. Ill. Const. 1970, art. I, § 11; *People v. McWilliams*, 2015 IL App (1st) 130913, ¶ 27. The trial court is presumed to consider all relevant factors and any mitigation evidence presented (*People v. Jackson*, 2014 IL App (1st) 123258, ¶ 48), but has

no obligation to recite and assign a value to each factor (*People v. Perkins*, 408 Ill. App. 3d 752, 763 (2011)). Rather, a defendant "must make an affirmative showing that the sentencing court did not consider the relevant factors." *People v. Burton*, 2015 IL App (1st) 131600, ¶ 38. A reviewing court will not substitute its judgment for that of the trial court merely because it would have weighed the factors differently. *Alexander*, 239 Ill. 2d at 213.

¶ 29 A sentence within the statutory range is presumed proper. *People v. Knox*, 2014 IL App (1st) 120349, ¶ 46. In this case, the defendant was convicted of three Class X felonies: aggravated kidnaping, home invasion, and armed robbery. 720 ILCS 5/10-2(a)(6), (b); 12-11(a)(3), (c); 18-2(a)(2), (b) (West 2008). Each offense has a minimum sentencing range of 6 to 30 years (730 ILCS 5/5-4.5-25(a) (West 2008)) and was subject to a mandatory 15-year enhancement because the defendant was armed with a firearm and used or threatened the imminent use of force. See 720 ILCS 5/10-2(b), 12-11(c), 18-2(b), (West 2008).

¶ 30 We find no abuse of discretion in the defendant's sentence. The 25-year prison term imposed on each conviction is presumed proper, as it falls well within the statutory range for a Class X sentence. The trial court acknowledged that the defendant cooperated with the State's Attorney's office in unrelated cases, and the court was apprised of his age, family ties, and employment, but was not required to lend more weight to these factors than to the seriousness of the offense. See *People v. Peoples*, 2015 IL App (1st) 121717, ¶ 117 (presuming that the trial court considered defendant's age); *Jackson*, 2014 IL App (1st) 123258, ¶¶ 52-53 (despite the defendant's employment and family ties, "the seriousness of an offense is considered the most important factor in determining a sentence"). As the trial court observed, the defendant fled during his trial and committed serious offenses that demonstrated disregard for another's life and required deterrence. See *People v. Moody*, 66 Ill. App. 3d 929, 931 (1978) (noting that the trial

court "may consider the defendant's character as demonstrated by his conduct during trial and up to the time sentence is actually imposed"). Where, as here, the trial court did not fail to consider the mitigating factors, we will not substitute our judgment by reweighing the factors on review. *People v. Lake*, 2015 IL App (3d) 140031, ¶ 26 (declining to reweigh mitigating factors considered at sentencing). Consequently, we find no abuse of discretion in the defendant's sentences.

¶ 31 Finally, the State requests this court to correct the defendant's mittimus to reflect that he was convicted of aggravated kidnaping while armed with a firearm (720 ILCS 5/10-2(a)(6) (West 2008)), not aggravated kidnaping while armed with a dangerous weapon other than a firearm (720 ILCS 5/10-2(a)(5) (West 2008)), as the mittimus currently states. The defendant did not raise this issue in his brief on appeal and did not file a reply brief in this matter. Whether the mittimus should be amended is a legal issue, which we review *de novo*. *People v. Harris*, 2012 IL App (1st) 092251, ¶ 34. In this case, our review of the record reveals that it contains the error of which the State complains. *People v. Pryor*, 372 Ill. App. 3d 422, 438 (where the mittimus "incorrectly reflects the jury's verdict," the reviewing court may "amend the order to conform to the judgment entered by the [trial] court"). Remand is unnecessary, as we may directly order the clerk of the court to correct the mittimus pursuant to our authority under Illinois Supreme Court Rule 615(b)(1) (eff. Jan. 1, 1967). See *People v. McGee*, 2015 IL App (1st) 130367, ¶ 82. Accordingly, we order the mittimus corrected to reflect the defendant's conviction for aggravated kidnaping while armed with a firearm (720 ILCS 5/10-2(a)(6) (West 2008)).

¶ 32 Based on all the foregoing, we affirm the defendant's convictions and sentences and modify the mittimus to reflect the offenses of which he was convicted.

¶ 33 Affirmed; mittimus modified.