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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF)	Appeal from the
ILLINOIS,)	Circuit Court of
)	Cook County.
)	
Plaintiff-Appellee,)	No. 13 CR 9116 (02)
)	
v.)	Honorable
)	James B. Linn,
DAMIEN GARZA,)	Judge, presiding.
)	
Defendant-Appellant)	

JUSTICE COBBS delivered the judgment of the court.

Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held:* The State presented sufficient evidence to prove defendant guilty of aggravated battery beyond a reasonable doubt. The trial court did not abuse its discretion in sentencing defendant to an aggregate 50-year prison sentence. Defendant forfeited his as applied challenge to the constitutionality of his sentence under the eighth amendment of the United States Constitution and the proportionate penalties clause of the Illinois Constitution.

¶ 2 Following a jury trial, defendant, Damien Garza, was convicted of first degree murder (720 ILCS 5/9-1(A)(1) (West 2012)), aggravated battery (720 ILCS 5/12-3.05 (e)(1) (West 2012)) and three counts of aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West

2012)) and sentenced to an aggregate 50 years' imprisonment. On appeal, he contends there was insufficient evidence to support his conviction for aggravated battery, his 50-year sentence is unconstitutionally disparate to his co-defendant, and his sentence violates the eighth amendment of the United States Constitution and the proportionate penalties clause of the Illinois Constitution. For the reasons that follow, we affirm.

¶ 3

I. BACKGROUND

¶ 4

The facts adduced at trial are as follows. On April 7, 2013, the victims Emily Guerrero, Pablo Juarez, Alec Esparza, Alyna Esparza, and Michael Orozco, all between the ages of 14 and 15, met at Varraga Park and decided to get ice cream. The ice cream shop was located on Cermak Road and Leavitt Street. The group of teenagers walked north on Leavitt towards Cermak. A green minivan pulled up across the street from them and stopped at the stop sign as the group approached 22nd Place. The individuals inside the minivan were Jamie Almarez, co-defendant, Javier Garza age 17 and, the driver, defendant age 19. Defendant and Javier Garza¹, both members of the Latin Saints gang, presented gang signs at the group to show disrespect to a rival gang, the Satan Disciples. In response, Michael Orozco, an associate of the Satan Disciples, stepped towards the minivan while shouting, and presented gang signs at the vehicle.

¶ 5

Javier opened the minivan's sliding side door, stepped out of the minivan, and shouted out "D.K."² He pulled out a black handgun and fired three to four shots at the group of teenagers. Emily, Pablo, Alec, Alyna and Michael all ran away from the gun fire. Javier stopped shooting, got into the minivan, and defendant drove north. Three bullets struck Michael in the back. The group of teenagers looked back and observed that Michael was on

¹ Javier Garza is not a party to this appeal and has a separate pending appeal docketed as No.1-15-2041.

² D.K. is understood to mean Disciple Killer.

the ground. Emily and Alyna called 911 and stayed with Michael. Pablo and Alec ran to Michael's house to tell Michael's family about the shooting. Michael's father and brother arrived at the scene to find Michael lying on the ground with gunshot wounds to his back. The paramedics arrived and placed Michael in an ambulance and transported him to the hospital. After the paramedics left the scene of the incident, Emily noticed she had a "piece of metal" in her leg. She pulled out the metal fragment from her leg and dropped it on the ground. When Michael's father arrived at the hospital he learned that Michael had died from his wounds.

¶ 6 Officers Manuel Hernandez and Waqar Mian were driving south on Loomis Street, approaching Cermak in an unmarked squad car when they received a call on the police radio about a shooting as well as a description of a green minivan traveling east on Cermak. The officers passed a green minivan at the corner of Cermak and Wood, made a u-turn, and activated their emergency lights and sirens, and began driving toward the minivan. The minivan accelerated and sped through traffic passing cars on the right and "squeezing in between the normal traffic and parked vehicles." Subsequently, the minivan crashed into a group of parked cars at high impact. The officers positioned the squad car against the minivan to prevent escape.

¶ 7 Officer Hernandez drew his weapon and ordered defendant to get out of the minivan with his hands up. Officer Mian approached the passenger side of the minivan, observed defendant in the driver's seat, Javier in the rear seat behind defendant, and Jamie in the front passenger seat. Officer Hernandez also observed Javier in the back of the minivan. Officer Mian removed Javier and Jamie from the minivan and found a "semiautomatic blue steel weapon underneath the driver's seat." Officer Hernandez and Officer Mian detained

defendant, Javier, and Jamie. Other police officers brought Emily and Alyna to the minivan crash site. Both teenagers identified defendant and Javier as the individuals involved in the shooting. Later, Emily's parents took her to the hospital worried that she might still have metal in her leg.

¶ 8 Pablo went to the police station where he viewed a physical lineup and identified Javier as the shooter. Alec spoke to the police about the event; however, he was unable to identify an offender from a physical lineup. Two other witnesses, Edward Dominguez, and Jessica Contreras, viewed a physical lineup. Dominguez identified Javier as the shooter based on Javier's clothes, but he indicated he had not seen Javier's face at the time of the shooting. Contreras spoke with detectives and an Assistant State's Attorney at the police station, and she identified defendant as the driver of the green minivan.

¶ 9 On April 8, 2013, Emily went back to the police station and told an assistant state's attorney about the shooting. During the conversation, the assistant state's attorney showed Emily a photograph of Javier and Emily identified him as the shooter. The assistant state's attorney also showed Emily a photograph of defendant, and Emily identified him as the driver of the minivan. A photograph of the scar on Emily's leg was taken.

¶ 10 Four discharged cartridges, two fired bullets, and several metal bullet fragments were recovered from the scene of the shooting. The gun was recovered from the minivan. A fired bullet was recovered during Michael's autopsy. A firearms examiner concluded that the discharged materials were fired from the gun recovered from the minivan. A gunshot residue test performed on Javier's right hand tested positive for gunshot residue.

¶ 11 Detective Roger Murphy, an expert on street gangs, was assigned to investigate the shooting of Michael Orozco. At trial, Detective Murphy testified about gangs in Chicago and

then identified defendant and Javier's tattoos as signifying membership in the Latin Saints street gang.

¶ 12 The jury found defendant guilty of first degree murder, aggravated battery, and three counts of aggravated discharge of a firearm. Defendant's motion for a new trial was denied. At sentencing, the State presented testimony of an assistant state's attorney, who prosecuted a case in which defendant had been a witness. The assistant state's attorney testified that in that case, defendant picked up his girlfriend from school and drove past rival gang members presenting gang signs in their direction. Defendant yelled out the window of his car at the rival gang members, and one of the gang members opened fire at defendant's car striking defendant's girlfriend. The State also presented victim impact statements from Alyna, Emily, and Michael's mother. The State argued that defendant demonstrated no potential rehabilitation because of his continued gang activity. In mitigation, defense counsel noted that defendant was supported by his family, and although he had two adult convictions he had no significant criminal background.

¶ 13 After considering defendant's pre-sentence investigation report and all relevant and proper factors in aggravation and mitigation, the trial court sentenced defendant to 40 years' imprisonment for the first degree murder conviction, a consecutive 10 years' imprisonment for the aggravated battery with a firearm conviction, and a concurrent 6 years' imprisonment for aggravated discharge of a firearm conviction. When sentencing defendant, the trial court made the following relevant statements:

"THE COURT: I'm mindful that [defendant] is not the shooter in this case; he was the driver. But what has he done? He's a very young man and he has decided to live the life of a thug. He's tattooed himself with gang tattoos all over the place, and he's living

the thug life. I saw clearly on the videotapes the way he comported himself when the detectives weren't in the room and he was talking to other people. I am questioning whether there is any potential to rehabilitate this young man. I think he is just one of these people that's out there that's chosen to be different than everybody else. I don't know that he can change himself even if he could. I don't know that he wants to. *** Frankly, [defendant] is one of the problems. He's one of the people that causes terror and havoc for everybody else in the community. It's people like him that make Chicago living as difficult as it may be from time to time. It's because he's a predator.

This is just outright urban terrorism. I cannot fathom anything else but to go purposely driving from one location into another where you know that people affiliated with some different street gang might be there, looking for people to shoot. And what happened in this case is just beyond words.

* * *

I've listened to everything in aggravation and mitigation. I will sentence him accordingly. And I'm mindful of the fact that [Javier], the shooter in this case, got a sentence that was a minimum sentence for him. [Defendant] was the driver. But I find that [defendant] is wholly culpable, and this would not have happened but for him. He does have different things that have been brought to my attention in aggravation that were brought to my attention when [Javier] was sentenced. I'm suggesting their conduct was different. And what I heard at the sentencing phases, the aggravation and mitigation as well."

¶ 14

Defendant filed a motion to reconsider his sentence which the trial court denied. This appeal followed.

¶ 15

II. ANALYSIS

¶ 16

A. Aggravated Battery Conviction

¶ 17

We note at the outset that defendant was charged with first degree murder, aggravated battery and three counts of aggravated discharge of a firearm under the accountability theory.

¶ 18

"Accountability is not a crime in and of itself but, rather, a mechanism through which a criminal conviction may result." *People v. Pollock*, 202 Ill. 2d 189, 210 (2002). A defendant is legally accountable for another person's criminal conduct when "either before or during the commission of an offense, and with the intent to promote or facilitate that commission, he or she solicits, aids, abets, agrees, or attempts to aid that other person in the planning or commission of that offense." 720 ILCS 5/5-2(c) (West 2012). To establish that a defendant intended to promote or facilitate a crime, "the State may present evidence that either (1) the defendant shared the criminal intent of the principal, or (2) there was a common criminal design." *People v. Fernandez*, 2014 IL 115527, ¶ 13.

¶ 19

"Under the common-design rule, if 'two or more persons engage in a common criminal design or agreement, any acts in the furtherance of that common design committed by one party are considered to be the acts of all the parties to the design or agreement and all are equally responsible for the consequences of the further acts.'" *Id.* (quoting *In re W.C.*, 167 Ill. 2d 307, 337 (1995)).

¶ 20

Defendant now challenges the sufficiency of the evidence for the count of aggravated battery in which Emily was injured by Javier's knowing discharge of a firearm. Defendant argues that the State did not prove beyond a reasonable doubt that the piece of metal Emily removed from her leg was a bullet fragment fired during the incident. Defendant contends that Emily did not describe the bullet fragment's color, shape, texture, or size and the State

presented no medical evidence that Emily's wound could have been from a bullet fragment. Defendant further asserts that the photograph depicting Emily's wound does not establish that the wound was caused by a gunshot. The State contends that evidence presented was more than sufficient to support defendant's conviction for aggravated battery because the evidence showed that the metal in Emily's leg was a piece of a bullet fired from the gun.

¶ 21 The critical inquiry on review of a sufficiency of the evidence claim 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. Cunningham*, 212 Ill. 2d 274, 278 (2004). This standard applies to all criminal cases, "regardless of the nature of the evidence." *People v. Mccaby*, 378 Ill. App. 3d 1095, 1097 (quoting *Cunningham*, 212, Ill. 2d at 279). In a challenge to the sufficiency of evidence, a reviewing court will not retry the defendant, substitute its judgment for that of the trier of fact, or reverse a conviction if any rational trier of fact could have reached the same conclusion based on the evidence viewed in the light most favorable to the prosecution. See *e.g., People v. Adair*, 406 Ill. App. 3d 133, 137 (2008).

¶ 22 To sustain a conviction of aggravated battery, the State must prove that a defendant, in committing a battery, knowingly discharged a firearm and caused injury to another person. 720 ILCS 5/12-305(e)(1) (West 2012). Here, defendant concedes that a gun was discharged. The evidence demonstrated that metal fragments from bullets fired from the gun were found at the scene of the shooting. Emily testified that she saw Javier open the green minivan's door, step out, pull out a black handgun and start shooting. She stated she "felt something hot go into [her right] leg" before she started running. When she was able to look at her leg, she noticed a "piece of metal" in it. Taken together, after viewing the evidence in the light most

favorable to the State, a fact finder could reasonably infer that Emily's wound came from a metal bullet fragment discharged from the gun fired by Javier. We will not substitute our judgment for that of the jury, therefore, defendant's conviction for aggravated battery stands.

¶ 23

B. Excessive Sentencing

¶ 24

Defendant argues that his sentence should be reduced. He contends that although he was convicted under the accountability doctrine, he was sentenced above the sentence of 41 years' imprisonment and Javier who was the principal offender received the minimum. He contends that his sentence is unconstitutionally disparate as compared to Javier's sentence because (1) he was the driver and not the shooter, and (2) he and Javier have similar criminal backgrounds and rehabilitative potential. We will address each argument in turn.

¶ 25

1. Unconstitutionally Disparate Claim

¶ 26

First, defendant argues his 50-year sentence is unconstitutionally disparate to Javier's 51-year sentence. Specifically, defendant contends that the trial court sentenced him to an additional nine years in prison above the minimum sentence of 41 years' imprisonment to hold him accountable for all of Javier's charges including Javier's personal discharge of a gun. The State responds that defendant's sentence was not disparate because it reflected the seriousness of the offense.

¶ 27

Under Illinois Supreme Court Rule 615(b)(4) a reviewing court may reduce the punishment imposed by the trial court. Ill. S. Ct. R 615(b)(4). However, where a trial court's sentencing determination is within the statutory range of a criminal offense, a reviewing court has the power to disturb the sentence only if the trial court abused its discretion in the sentence imposed. *People v. Jones*, 168 Ill. 2d 367, 373-74 (1995).

¶ 28 Generally, an arbitrary and unreasonable disparity between the sentences of co-defendants who are similarly situated is impermissible. *People v. Caballero*, 179 Ill. 2d 205, 216 (1997). Although similarly situated defendants should not receive grossly disparate sentences, a mere disparity in the sentences is not sufficient to constitute a violation of fundamental fairness. *People v. Spriggle*, 358 Ill. App. 3d 447, 455 (2005).

¶ 29 We presume that a sentence which falls within the statutory guidelines is proper and will be overturned only by an affirmative showing that it greatly departs from the spirit and purpose of the law or is manifestly contrary to constitutional grounds. *People v. Boclair*, 225 Ill. App 3d 331, 335 (1992). A sentence promotes the spirit and purpose of the law when it reflects the seriousness of the offense and gives adequate consideration to the defendant's rehabilitative potential. *Id.* A sentencing decision that falls within the statutory range is entitled to great deference. *People v. Hill*, 408 Ill. App. 3d 23, 29 (2011).

¶ 30 Here, defendant faced a sentencing range of 35 years to 75 years for first degree murder. (730 ILCS 5/5-4.5-20 (West 2012); 730 ILCS 5/5-8-1(a)(d)(I) (West 2012)). Defendant faced a sentencing range of 6 to 30 years for aggravated battery (720 ILCS 5/12-3.05(e)(1)(West 2012)); (730 ILCS 5/5-4.5-25 (West 2012)); and 4 to 15 years for aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2)(West 2012)). However, Javier faced a sentencing range of 45 to 85 years for first degree murder because Javier was found guilty of personally discharging a firearm that proximately caused death during the commission of first degree murder. 730 ILCS 5/5-4.5-20 (2013); 730 ILCS 5/5-8-1(a)(1)(d)(iii)(2013). Javier faced sentencing range of 6 to 30 years for aggravated battery (720 ILCS 5/12-3.05(e)(1)(West 2012)); (730 ILCS 5/5-4.5-25 (West 2012)); 4 to 15 years for aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2)(West 2012)).

¶ 31 To be sure, defendant was convicted under the accountability doctrine and therefore, his convictions afford the same penalties as Javier, the principal offender, except the mandatory firearm enhancement because that enhancement applies only to the offender who personally discharged the firearm. We have carefully reviewed the trial judge's comments during sentencing. Defendant was the adult driver of the vehicle and the court admonished defendant during sentencing stating that he engaged in "urban terrorism" and took part in a brutal murder. At the time of the offense, Javier was still a juvenile and the trial court found defendant's conduct to be different than Javier's based on defendant's participation in the offense and other circumstances. Defendant's sentence was intentionally dissimilar based on the court's consideration of both mitigating and aggravating factors. However, defendant's sentence is not constitutionally disparate compared to Javier's sentence. Further, there is nothing in the record that indicates the trial court improperly applied the mandatory firearm enhancement to defendant's sentence. Defendant's sentence was not equal to or more harsh than the sentence that Javier received. In fact, defendant's sentence of 50 years' imprisonment is not greater than Javier's sentence of 51 years' imprisonment. Defendant's sentence was not arbitrary and unreasonably disparate, and therefore there is no violation of fundamental fairness with respect to defendant's sentence and Javier's sentence.

¶ 32 In the alternative, defendant claims the trial court punished defendant for exercising his right to a jury trial by adding an additional nine years to his sentence. There is no evidence in the record that shows that the trial court harbored animus towards defendant because he elected to exercise his right to a jury trial over a bench trial.

¶ 33 Again, defendant faced a sentencing range of 35 years to 75 years for first degree murder (730 ILCS 5/5-4.5-20 (West 2012); 730 ILCS 5/5-8-1(a)(d)(I) (West 2012)). Defendant faced

articulate its consideration of mitigating factors nor is it required to make an express finding that defendant lacked rehabilitative potential. *Id.* The most important factor a court considers is the seriousness of the offense. *People v. Spencer*, 229 Ill. App. 3d 1098, 1102 (1992).

¶ 37 At sentencing, the trial court examined defendant's presentence investigation report. The report indicated that defendant has adult convictions: a felony escape and a misdemeanor domestic violence. The trial court also received victim impact statements. Furthermore, the trial court considered the testimony of an assistant state's attorney who testified that defendant was a witness in a case that involved a shooting. The assistant state's attorney testified that defendant picked up his girlfriend from school and drove past rival gang members presenting gang signs in their direction. Defendant yelled out the window of his car at the rival gang members, and one of the gang members opened fire at defendant's car striking defendant's girlfriend. Given the seriousness of the offense and the other factors presented, the sentence suggests that the trial court did not act arbitrarily in determining defendant's sentence. The trial court properly weighed the appropriate aggravating and mitigating factors in reaching its decision. Thus, we cannot find that the trial court abused its discretion in sentencing defendant to 40 years for first degree murder, 10 years for aggravated battery, and 6 years for aggravated discharge of a firearm.

¶ 38 C. Constitutionality of Sentence

¶ 39 Defendant argues that the sentencing scheme as applied to him violates the eighth amendment of the United States Constitution and the Illinois proportionate penalties clause. Defendant contends that the mandatory firearm enhancement, the consecutive sentencing statute, and the truth-in-sentencing statute deprive the trial court discretion in sentencing. The State responds that defendant's as applied challenge is improper because he failed to first

raise his constitutional challenge at the trial court and therefore has forfeited review of his claim. The State cites *People v. Thompson*, 2015 IL 118151 as support. Defendant replies that although he did not raise the issue in the trial court, a review of his as-applied challenge here is proper.

¶ 40 In *Thompson*, the court first distinguished between as-applied challenges and facial challenges to statutes. *Id.* ¶ 36. Specifically, the court noted that an as-applied constitutional challenge is dependent on the facts and particular circumstances of the challenging party. *Id.* The court concluded that such a challenge requires that the record be sufficiently developed in terms of those facts and circumstances for the purposes of appellate review. The court found that factual development necessary to adequately address a defendant's as applied challenge is best suited for the trial court. See *id.* ¶ 38. The court held that because defendant failed to present his issue in the trial court, the issue was deemed to have been forfeited. *Id.* ¶ 39.

¶ 41 Following the guidelines set forth in *Thompson*, we as a reviewing court are in no better position here to decide defendant's as-applied challenge than was our supreme court in *Thompson*. Defendant presents in great detail information concerning the relevant studies on brain development, actuarial tables about the life span of prisoners, and offers case law in support of his as-applied claim. As a reviewing court, however, we have no means by which to weigh this evidence in the context of the facts and circumstances of this case. In this situation, "the trial court is the most appropriate tribunal for the type of factual development necessary to adequately address defendant's as-applied challenge in this case." *Thompson*, 2015 IL 118151, ¶ 38. We take no position on the merits of defendant's claims and in any case, the matter is forfeited.

¶ 42

III. CONCLUSION

¶ 43

For the foregoing reasons, we conclude that the State presented sufficient evidence to prove defendant guilty of aggravated battery beyond a reasonable doubt. The trial court did not abuse its discretion in sentencing defendant. Finally, Defendant's "as applied" challenge to the constitutionality of his sentence under the eighth amendment and the Illinois proportionate penalties clause, raised for the first time, is forfeited. Accordingly, we affirm the decision of the circuit court of Cook County.

¶ 44

Affirmed.