2018 IL App (1st) 152990-U

No. 1-15-2990

THIRD DIVISION
September 19, 2018

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. 12 CR 18113
	)	
SHELLEY GASTON,	)	Honorable
	)	Frank G. Zelezinski,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice McBride and Justice Gordon concurred in the judgment .

ORDER

¶ 1 *Held*: Affirmed. the State did not misstate the evidence during closing argument. Defendant's 53-year sentence for first degree murder did not constitute an abuse of discretion.

¶ 2 Following a jury trial, defendant Shelley Gaston was convicted of first degree murder in the shooting death of Erika Ellison and sentenced to 53 years in prison. On appeal, defendant contends that (1) the State misstated the evidence in closing argument by stating a witness saw defendant shoot the victim and (2) his 53-year sentence is excessive due to his limited criminal history, age and medical condition. We affirm.

¶ 3 BACKGROUND

¶ 4 At trial, Premier Gaston, defendant's daughter, testified that in June 2012, she was living with defendant at the Versailles Apartments in Hazel Crest. Premier had known Ellison for several years and said she and defendant saw Ellison and her children every weekend.

¶ 5 Premier testified that one night in August 2012, she, defendant and Ellison were at Ellison's apartment. At some point, Premier and defendant left because defendant was upset and wanted to purchase concert tickets for September 2 to help "get Erika back."

¶ 6 At about 5 p.m. on September 2, defendant left for the concert. Premier went to bed between 11 p.m. and midnight. At some point, she was awakened by Ellison's voice in the kitchen. According to her, Ellison sounded "upset" with defendant. Premier listened for about five minutes and went back to sleep. Later, Premier awoke to the sound of five "popping noises" outside. However, she thought the sound was firecrackers, so she went back to sleep.

¶ 7 At 5 a.m. the next morning, September 3, Premier received a phone call from Rufus Jones Jr., a friend of defendant. Based on their conversation, Premier packed a bag with defendant's clothing and medicine. Defendant was not home. Premier looked out the window to the parking lot and saw "yellow tape and police officers." Defendant's van, which he used in his carpet cleaning business, was not in the parking lot. Several police officers entered the apartment and asked if Premier knew where defendant was. In addition, Premier viewed surveillance footage from Pro's Sports Bar and Grill and identified defendant and Ellison from the footage. On cross-examination, Premier said Ellison had never come to defendant's apartment when defendant was not there.

¶ 8 The parties then stipulated that officers with the South Suburban Major Crimes Task Force showed Bradley Theron, the owner of Pro's Sports Bar and Grill, photographs of

defendant and Ellison. Theron would testify that he believed defendant and Ellison had been in the bar in the early morning hours of September 3 playing pool and dancing. Theron would further testify that a video from the bar's surveillance system taken on September 3 between 12:26 a.m. and 2:18 a.m. depicted defendant and Ellison.

¶ 9 Hazel Crest police officer Pennington testified that at about 3:12 a.m., he was patrolling the parking lot of the Versailles Apartments at 181st Street and Kedzie Avenue in Hazel Crest. At that time, Officer Pennington saw two people sitting in a gold Chrysler minivan—a light-skinned heavyset female was sitting in the passenger seat, and a skinny black make was sitting in the driver's seat. Officer Pennington testified that the van had "a logo on both sides" and tinted windows. Officer Pennington left. Around 3:45 a.m., he returned to the parking lot and saw that no one was in van or the parking lot.

¶ 10 At 4:10 a.m., Officer Pennington returned to the parking lot in response to a dispatch reporting shots fired "with a female down on the ground." Upon arrival, Officer Pennington parked directly behind where he had seen the van parked initially. He saw a female face down on the ground, bleeding and struggling to breathe. He identified photographs of the van and of Ellison as the shooting victim.

¶ 11 Hazel Crest police officer Beard arrived at the scene at 4 a.m. and recovered a purse on the ground in the parking lot that contained Ellison's state identification card and a cell phone. Ellison's identification listed her address as apartment 103 in the complex. Officer Beard searched Ellison's phone and observed several text messages. Using a reverse search, Officer Beard learned that one of the last text messages on Ellison's phone was sent to defendant, and that defendant and Ellison had the same address in the apartment complex. Officer Beard then

went to apartment 103, where he had a conversation with Premier. According to Officer Beard, Premier told him that defendant had been out with Ellison that night.

¶ 12 Deidre Harrison testified that she lived in the apartment complex. On the morning of September 3 around 4:10 a.m., Harrison was awakened by the sound of gunfire in the apartment's parking lot. Harrison looked out the window and saw a woman lying on the ground and a light-colored minivan driving away. Harrison testified the woman had light or fair skin and was "gasping or trying to breathe." Harrison called 911. The State then showed Harrison a photograph of defendant's van. Harrison testified that the van in the photograph looked like the van she saw in the parking lot.

¶ 13 Rufus Jones Jr. testified that he lived with his son, Rufus Jones III (Rufus), and that they are friends of defendant. At about 4 a.m. on September 3, Jones Jr. was sleeping when he woke up and went to the kitchen to get a glass of water. There, Jones Jr. saw defendant standing at the door "as if he'd just walked in." Defendant and Rufus were talking, and Jones Jr. returned to bed. About 20 minutes later, Jones Jr. got up to make sure the doors were locked, and defendant and Rufus were gone. Between 8 and 8:30 a.m., Rufus returned alone. Police officers arrived shortly thereafter.

¶ 14 Jones Jr. identified a photograph of a gold Chrysler van as defendant's vehicle and also identified a photograph of his son's car. The State entered into evidence certified documents indicating defendant owned a 2005 Chrysler van and Rufus owned a 1996 white Buick Riviera.

¶ 15 Juanita Gray, Rufus's former girlfriend, testified that at about 5:15 a.m., Rufus knocked on her bedroom window and asked for help with something important involving defendant. Gray went outside and spoke to Rufus and defendant, and the three went into Gray's apartment. Gray

gave defendant blankets to sleep on the couch and returned to bed. When she left for work at 10 a.m., defendant was still there.

¶ 16 Officers from other jurisdictions soon joined the investigation as part of the South Suburban Major Crimes Task Force. At 9 a.m. on September 3, Palos Park Detective Barry Churin went to Rufus's home in Markham to look for defendant. Rufus's car and defendant's van were parked outside. After Detective Churin knocked on the door, Jones Jr. answered and consented to a search of the premises. Rufus was present but defendant was not. The police impounded Rufus' car and defendant's van.

¶ 17 Palos Hills Detective Williams testified that defendant's cell phone was traced to an area around 95th Street and State Street in Chicago that has a Greyhound bus station and Chicago Transit Authority bus and train stops. Around 10:40 a.m., Detective Williams went to that area and saw a man who looked like defendant. Defendant was arrested after identifying himself to the officer.

¶ 18 Cook County criminal investigator Michael Raab testified that on the morning of September 3, he went to the Versailles Apartment complex and began processing the crime scene. Raab explained that he saw several cigarette butts on the ground that matched an open pack of Marlboro cigarettes that he found in Ellison's purse. In addition, Raab saw Ellison's car parked in the lot, a trail of blood leading to Ellison's car, an earring near her car, and one of Ellison's sandals sitting in a pool of blood. Raab also collected gunshot residue (GSR) test samples from defendant's van and Rufus's car.

¶ 19 Ellen Chapman, an Illinois State Police forensic scientist, testified that she analyzed the GSR samples and discovered the presence of GSR on samples that were taken from (1) the

exterior of the driver's side door of defendant's van, (2) the van's steering wheel cover, and (3) the passenger side interior of Rufus' car.

¶ 20 Dr. Adrienne Segovia, an assistant Cook County medical examiner, testified that Ellison's body had three entrance wounds. A gunshot wound on the top of Ellison's head was surrounded by soot, indicating the gun was fired close to her head. A gunshot wound on her left cheek was fired within 16 inches of her face, as evidenced by gunpowder on her skin. A third gunshot wound on her back also was fired at close range. Dr. Segovia testified the cause of Ellison's death was multiple gunshot wounds and the manner of death was homicide.

¶ 21 The defense did not present evidence. After closing arguments, the jury found defendant guilty of the first-degree murder of Ellison. The jury additionally found that defendant personally discharged a firearm during the commission of the offense that proximately caused death or great bodily harm.

¶ 22 At defendant's sentencing hearing, the court noted its receipt of a presentence investigation (PSI) report and heard victim impact statements from Ellison's mother and aunt. In mitigation, defense counsel asked the court to consider defendant's medical condition, along with his "lack of criminal background, his lack of violence." After hearing defendant's statement in allocution, the court sentenced defendant to 53 years in prison. This appeal followed.

¶ 23 ANALYSIS

¶ 24 We first consider defendant's claim that he is entitled to a new trial because the State misstated the evidence during closing argument. Specifically, defendant maintains that during the colloquy which we quote below, the State misstated Harrison's testimony by implying that Harrison saw defendant in the parking lot when she looked out her window after she heard

gunfire. Our review is for plain-error only because defendant failed to raise this issue in his posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988).

¶ 25 Under the plain-error doctrine, this court may review unpreserved errors that affect the defendant's substantial rights if the error is clear or obvious and (1) the evidence is so closely balanced that the error alone could have affected the outcome of the case or (2) the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Hood*, 2016 IL 118581, ¶ 18. The defendant bears the burden of persuasion to show both that an error occurred and that the evidence was closely balanced or the error affected the fairness of his trial. *People v. Sargent*, 239 Ill. 2d 166, 189-90 (2010). Defendant argues both prongs of plain error. But our first step is determining whether error occurred in the first place. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 26 "A prosecutor has wide latitude in making a closing argument and is permitted to comment on the evidence and any fair, reasonable inferences it yields." *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). It is improper for a prosecutor to argue inferences or facts not based upon the evidence in the record. *People v. Moody*, 2016 IL App. (1st) 130071 ¶ 60 (citing *People v. Johnson*, 208 Ill. 2d 53, 115 (2003)). A closing argument "must be viewed in its entirety, and the challenged remarks must be viewed in their context." *Glasper*, 234 Ill. 2d at 204. A prosecutor's statements during closing argument will constitute plain error only if they were so inflammatory that the defendant could not have received a fair trial or so flagrant as to threaten deterioration of the judicial process. *People v. Boling*, 2014 IL App (4th) 120634, ¶ 126.

¶ 27 In closing argument, the State recounted Harrison's testimony as follows:

"ASSISTANT STATE'S ATTORNEY: Deidre Harrison, she's looking out of her window after she hears the shots. And you know she hears the shots about 4:10 in the morning. She's in the living area, she's on the couch. She hears the shots, she goes out, she looks out that window. And you will be able to see these exhibits. You're going to have them when you deliberate and you will see that the crime scene is over to this location.

So she's looking out of her window and she sees Erika lying, taking her last breath, gasping for air.

ASSISTANT PUBLIC DEFENDER: Objection, Judge.

THE COURT: Objection overruled.

ASSISTANT STATE'S ATTORNEY: Gasping for air. *She told you she testified to [sic]. She sees Erika. And she tells you she sees Erika again who's going to her car, going to be leaving when she was shot by this defendant* [indicating] *and she sees the van.*

ASSISTANT PUBLIC DEFENDER: Objection, Judge.

ASSISTANT STATE'S ATTORNEY: A van. She sees a van.

THE COURT: Objection overruled now.

ASSISTANT STATE'S ATTORNEY: And she describes the van. And she describes the van. And mind you this [is not] a location on the lower level, she's on the higher level and she's looking down and she tells you she sees a light-colored minivan. Now, she can't say, yeah, that

> actually is the van. But look at where she is, look at her description. She sees the van. And she sees the van because the defendant has gotten in his van and he started to get away and leaves because he knows what he has done. And this is corroborated by—and again she's shown the photographs. Actually she said it looks like the van. It was a light-colored minivan. And sure enough, it's a light-colored minivan. And it's corroborated by Pennington. Look where Pennington marks where the van is parked. Look where the [evidence technician] marked where the cigarette butts are. Cigarette butts. Van parked. And look where she sees the van. All corroborating Deidre Harrison, that she sees the van, the defendant's van leaving. Consider those circumstances." (Emphasis added.)

¶ 28 We do not agree with defendant that the prosecutor stated that Harrison saw defendant in that parking lot. The prosecutor said that Harrison saw (1) Erika, lying on the ground, gasping for air and (2) a van. The first time the prosecutor mentioned Harrison seeing Erika, it was crystal clear that the prosecutor was referring to Harrison seeing Erika lying prone—"she sees Erika lying, taking her last breath, gasping for air." It is true that the second time the prosecutor described Harrison seeing Erika, she referred to Erika as someone who was "going to her car, going to be leaving when she was shot by" defendant. But we do not read that statement as suggesting that Harrison *saw* Erika going to her car, leaving, when she was shot by defendant. Rather, the prosecutor was arguing the fact that Erika was shot by defendant while headed to her car as an inference from the evidence as a whole.

¶ 29 We would agree that the prosecutor's statement was a bit confusing. It would have been preferable for the prosecutor to stick to what Harrison saw and *then* argue inferences about defendant having shot Erika, so as not to confuse the two things. But we cannot say that the prosecutor, as a technical matter, misstated the evidence. And when we put that statement in the context of the prosecutor's statements that preceded and followed this statement (*Glasper*, 234 Ill. 2d at 204), it is clear that the prosecutor was not trying to claim that Harrison saw defendant shoot Erika. We find no error here, and certainly not one so "clear or obvious" (*Thompson*, 238 Ill. 2d at 613) that plain-error relief is warranted.

¶ 30 And for that reason, defendant's alternative ineffective-assistance-of-counsel claim also fails. Defendant maintains that counsel was deficient for failing to preserve this issue, but that claim, too, must fail because the State's comment was not error in the first instance.

¶ 31 Next, we consider defendant's argument that his 53-year sentence should be reduced in light of his lack of criminal history, age and medical condition. Pointing out he will be 93 years old when his sentence is fully served, defendant emphasizes he has had organ transplants that require medication, the cost of which will be borne by the State during his incarceration. He also argues his prison term should be reduced because he and the victim were in a relationship and the shooting represented a "crime of passion."

¶ 32 At the outset, defendant's 53-year sentence is within the statutory limits for this offense. Generally, a defendant convicted of first-degree murder is subject to a sentence of between 20 and 60 years in prison. 730 ILCS 5/5-4.5-20(a) (West 2012). However, because the jury found that defendant personally discharged a firearm that proximately caused the victim's death, the court was required to add 25 years or up to a term of natural life to defendant's sentence. 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2012). Under those statutes, defendant was subject to a sentence

of between 45 years and natural life in prison. His 53-year sentence fell comfortably within that range.

¶ 33 A sentence within the applicable range is presumed to be valid and is not "deemed excessive unless it is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense." *People v. Fern*, 189 Ill. 2d 48, 54 (1999). The trial court's sentencing decision is entitled to great deference and will not be disturbed absent an abuse of discretion. *People v. Latona*, 184 Ill. 2d 260, 272 (1998). The trial court is not required to set out the exact process by which it determines its sentence or articulate how it considered the mitigating evidence. *People v. Powell*, 2013 IL App (1st) 111654, ¶ 32.

¶ 34 At sentencing, victim impact statements were read on behalf of Ellison's family. The State argued in aggravation that defendant and Ellison had a long relationship, and he shot her several times at close range. In mitigation, defense counsel noted the court had been informed of several medical conditions of defendant in an earlier request to reduce bond and asked the court to consider those conditions. Defense counsel also noted defendant's "lack of criminal background, his lack of violence." The defendant addressed the court in allocution, referring to God and asking forgiveness.

¶ 35 The trial court reviewed the jury's findings that defendant was guilty of first degree murder and personally discharged a firearm that proximately caused Ellison's death. The court noted the PSI report, victim impact statements, the parties' argument in aggravation and mitigation, and defendant's statement to the court.

¶ 36 The court stated that defendant has a family and "has issues for that matter." However, the court noted in aggravation "the manner in which the death occurred," namely that three shots were fired at close range, indicating defendant's intent to kill Ellison. The court noted that

defendant had "some criminal background, minor matters," namely one year of conditional discharge for illegally carrying a firearm, which the court stated took place "a long time ago." The court also noted defendant's prior felony conviction for possession of a controlled substance with intent to deliver and his sentence of probation that ended in 1995. Stating it was required to consider "both the defendant as well as what has occurred" in arriving at a sentence, the court noted that even though "there may not be great aggravation in the form of convictions," the crime itself was "aggravating as to the manner and form and how this occurred, two people who knew each other, and something deadly happened that evening."

¶ 37 The court then made the following specific remarks before imposing defendant's sentence:

> "This case comes here as a case in which the defendant killed the unarmed victim putting three bullets into her body which caused her death, two into her head, one at the top of her head, one in the face, and the third in her back as they were in a parking lot where both of them had their cars after a night of going out to have a good time.
>
> They did enjoy having a good time as the video presented to the court indicated them at a bar dancing[,] looking like people who were out enjoying themselves.
>
> And by all means for the video that I saw of Miss Ellison and Mr. Gaston hours before this ugly incident that had occurred, no one I don't think ever could have presumed what would occur from the two happy people that the court saw in that video earlier that evening.

> But the evidence has shown what did in fact occur and Miss Ellison lost her life, as the jurors have found, at the hands of Mr. Gaston.
>
> There's various factors in mitigation presented to the court. Those facts do include for the most part there's no serious background of any violent crimes previously committed by Mr. Gaston."

¶ 38 The court further stated:

> "The court has to also look at the mitigation of really nothing violent or within recent time by Mr. Gaston.
>
> I do note again his physical conditions as well, too, his medical conditions, but regardless, I look at the nature of the incident and aggravation as well as mitigation."

¶ 39 The record establishes the trial court expressly mentioned two of the mitigating factors that defendant cites on appeal. The court noted that defendant's prior offenses did not involve violence and were not of recent vintage. According to defendant's PSI report, in addition to the possession of a controlled substance and firearm offenses, defendant was convicted of driving with a revoked license in 1999 and petty theft in 2006. The court's remarks indicated its consideration of the non-violent nature of defendant's more recent crimes. In addition, the court mentioned defendant's medical conditions, having been reminded by defense counsel that those details were set out in a prior motion. And even though the court did not mention defendant's age, the trial court is presumed to have considered the defendant's age, which was included in the PSI report. See *People v. Harris*, 2013 IL App (1st) 120498, ¶ 42 ("[T]he trial court is presumed to have considered defendant's age and criminal history in making its sentencing determination, both of which were in the presentence investigation report.").

¶ 40 Defendant further contends his crime was an isolated incident, noting it took place after he and Ellison were heard arguing. He points out that where a defendant's "criminal conduct was the result of circumstances unlikely to recur," that is a factor is a mitigation of a sentence. 730 ILCS 5/5-5-3.1(a)(8) (West 2012). At sentencing, the court acknowledged defendant's relationship with Ellison but also noted the grave nature of the crime. The trial court is not required to give greater weight to mitigating factors than to the seriousness of an offense. *People v. Flores*, 404 Ill. App. 3d 155, 157-58 (2010); see also *People v. Lewis*, 89 Ill. App. 3d 15, 21 (1980) (the fact that a defendant "is not likely to repeat his failures is a factor to be considered by the trial court, but it is not a conclusive factor"). Defendant's sentence was not an abuse of discretion.

¶ 41 CONCLUSION

¶ 42 We affirm defendant's conviction and sentence.

¶ 43 Affirmed.