2018 IL App (1st) 153558-U
Order filed: November 2, 2018

FIRST DISTRICT
Fifth Division

No. 1-15-3558



IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 14 CR 20244 |
| | ) | |
| ALFREDO GARCIA, | ) | Honorable |
| | ) | Vincent M. Gaughan, |
| Defendant-Appellant. | ) | Judge Presiding. |

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hoffman and Hall concurred in the judgment.

**ORDER**

¶ 1 *Held*: We affirmed defendant's conviction and 10-year sentence for aggravated robbery over his claims that the uncharged offense of aggravated robbery is not a lesser-included offense of the charged offense of armed robbery and that his sentence is excessive. We order the correction of the sentencing order and the fines and fees order.

¶ 2 Following a bench trial, defendant Alfredo Garcia was found guilty of aggravated robbery and sentenced to 10 years' imprisonment. On appeal, defendant argues the trial court improperly convicted him of aggravated robbery, an uncharged offense, where that offense was not a lesser-included offense of the charged offense, armed robbery with a firearm. Defendant also argues that the trial court abused its discretion in sentencing him to 10 years' imprisonment. Finally, defendant contends that the sentencing order does not accurately reflect his conviction

and challenges the fines and fees order. For the following reasons, we affirm defendant's conviction and sentence, but order the sentencing order and the fines and fees order corrected.[1]

¶ 3 I. BACKGROUND

¶ 4 Defendant and his codefendant, Keon Funches, were charged by indictment with armed robbery and aggravated unlawful restraint, with each count specifically alleging that the defendants were either in possession of or using a firearm while committing the offenses. Each count related to actions defendant and Funches had allegedly undertaken on or about March 17, 2013. The matter proceeded to a joint bench trial in October 2015.

¶ 5 For purposes of resolving this appeal, it is sufficient to note that the State's evidence included the testimony of the victim, Eduardo Renteria. Renteria testified that he was riding on a Chicago Transit Authority (CTA) train just before midnight on March 17, 2013, into the early morning of the following day. At that time, he was listening to music on an iPod music player when he was approached by the two defendants. Funches sat down across from him, and defendant sat to Renteria's left. The defendants demanded that Renteria give them the iPod, asking Renteria if he was willing to risk his life for a "material item." During this exchange, defendant discreetly displayed what Renteria believed to be a handgun—based upon his experience of holding a handgun 10-years prior—and pointed it at Renteria's hip. Renteria surrendered the iPod to the defendants, they exited the train at the next stop, and Renteria called the police shortly thereafter.

¶ 6 Renteria's testimony was corroborated by a CTA video that was introduced into evidence, which depicted a course of events consistent with Renteria's testimony. In addition, the

[1] In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order stating with specificity why no substantial question is presented.

State introduced defendant's inculpatory statement to the police. While defendant admitted taking part in the robbery in the statement, he also indicated the robbery was Funches' idea, Funches took the iPod after the robbery, and defendant received no proceeds from the robbery. Defendant also stated that what had appeared to Renteria to be a handgun was actually an unloaded "Air Soft" pellet gun defendant had received from Funches and had returned after the robbery.

¶ 7 Neither defendant entered any evidence at trial.

¶ 8 At the conclusion of the evidence, the trial court found that the State's evidence had failed to establish that either defendant had been armed with a firearm. As such, the trial court found defendants not guilty of the charged offenses. Instead, the trial court found that the State had proven that defendants were guilty of aggravated robbery and unlawful restraint, which it found to be uncharged, lesser-included offenses of the charged offenses. Further finding that the guilty verdict for unlawful restraint merged into the aggravated robbery conviction, the trial court entered a single conviction for aggravated robbery against both defendants.

¶ 9 At a subsequent sentencing hearing, each defendant was sentenced to 10 years' imprisonment. Defendant timely appealed.

¶ 10 II. ANALYSIS

¶ 11 On appeal, defendant does not challenge the sufficiency of the evidence supporting his conviction, but argues that the trial court improperly convicted him of the uncharged offense of aggravated robbery, as it was not a lesser-included offense of the charged offense of armed robbery with a firearm. Defendant also argues that the trial court abused its discretion in sentencing him to 10 years' imprisonment, given the mitigating factors presented. Finally, defendant contends that the sentencing order does not accurately reflect his conviction and

challenges the fines and fees order. We address these issues in turn, beginning with defendant's contention that his conviction for aggravated robbery was improper.[2]

¶ 12 Generally, a defendant cannot be convicted of an offense that has never been charged. *People v. Baldwin*, 199 Ill. 2d 1, 6 (2002) (citing *People v. Jones*, 149 Ill. 2d 288, 292 (1992)). "A defendant may, however, be convicted of an uncharged offense if it is a lesser-included offense of a crime expressly charged in the charging instrument [citation], and the evidence adduced at trial rationally supports a conviction on the lesser-included offense and an acquittal on the greater offense [citation]." *People v. Kolton*, 219 Ill. 2d 353, 360 (2006). A lesser-included offense "[i]s established by proof of the same or less than all of the facts or a less culpable mental state (or both), than that which is required to establish the commission of the offense charged, or * * * [c]onsists of an attempt to commit the offense charged or an offense included therein." 720 ILCS 5/2-9(a), 9(b) (West 2016).

¶ 13 Under the charging-instrument approach adopted by our supreme court, a lesser-included offense does not need to be a necessary part of a greater offense, but the facts alleged in the charging instrument must contain a "broad foundation," or "main outline" of the lesser offense. *People v. Kennebrew*, 2013 IL 113998, ¶ 30. If an element is not explicitly alleged in the charging instrument, it must be reasonably inferable from the allegations contained therein. *Id*. (citing *People v. Miller*, 238 Ill. 2d 161, 166-67 (2010)).

¶ 14 In this case, defendant and Funches were charged with armed robbery with a firearm, where they committed a robbery while they had been carrying or had been otherwise armed with

[2] Because we conclude that defendant's challenge to his conviction fails on the merits, we need not discuss the State's alternative assertions of invited error and forfeiture regarding this issue.

a firearm, under section 18-2 of the Criminal Code of 2012 (Code). 720 ILCS 5/18-2(a)(2) (West 2016). The charge specifically alleged defendant and Funches:

> "KNOWINGLY TOOK PROPERTY, TO WIT: AN IPOD, FROM THE PERSON OR PRESENCE OF EDUARDO RENTERIA, BY THE USE OF FORCE OR BY THREATENING THE IMMINENT USE OF FORCE AND THEY CARRIED ON OR ABOUT THEIR PERSONS OR WAS OTHERWISE ARMED WITH A FIREARM, IN VIOLATION OF [720 ILCS 5/18(a)(2)]." (Capitalization in original.)

¶ 15 However, defendant was convicted of aggravated robbery, which requires proof that a robbery was committed, while he indicated verbally or through his actions toward the victim that he was armed with a firearm or other dangerous weapon, even if it was later determined he was not armed with a firearm or other dangerous weapon. See 720 ILCS 5/18-1(b)(1) (West 2014).

¶ 16 Defendant contends that aggravated robbery is not a lesser-included offense of armed robbery because his indictment does not allege that he indicated to Renteria that he was armed with a firearm, nor is that element reasonably inferable from the indictment. In support of his argument, defendant relies on *People v. Jones*, 293 Ill. App. 3d 119, 128-29 (1997), *People v. McDonald*, 321 Ill. App. 3d 470, 472-74 (2001), and *People v. Kelley*, 328 Ill.App.3d 227, 232 (2002). In each of these cases, this court concluded that aggravated robbery was not a lesser-included offense of the charged armed robbery offenses because the indictments at issue in those cases did not allege that the defendant indicated to the victim that he was armed with a firearm. *Id*.

¶ 17 Crucially, however, each of these cases relied upon our supreme court's prior precedent indicating that such an allegation *could not* be reasonably inferred from a charged offense. *Id*. (all citing to *People v. Novak*, 163 Ill. 2d 93 (1994)). However, after those cases were decided,

our supreme court issued its decision in *Kolton*, wherein the court abrogated *Novak* and specifically held that a "lesser offense will be 'included' in the charged offense if the factual description of the charged offense describes, in a broad way, the conduct necessary for the commission of the lesser offense and any elements not explicitly set forth in the indictment *can reasonably be inferred*." (Emphasis added.) *Kolton*, 219 Ill. 2d at 367.

¶ 18 In response to the *Kolton* decision, this court has specifically recognized that aggravated robbery can be a lesser-included offense of armed robbery, even if the indictment does not allege that the defendant indicated to the victim that he was armed with a firearm, where that element is reasonably inferable from the indictment. *People v. Johnson*, 2015 IL App (1st) 141216, ¶ 36. In that case, the defendant was charged with taking property from the victim "by the use of force or by threatening the imminent use of force and carried on or about his person or was otherwise armed with a firearm." *Id*. This court concluded that aggravated robbery was a lesser-included offense of the charged offense of armed robbery, as "[f]rom the allegations in the information, it was reasonably inferable that defendant was presently armed with a firearm, and indicated to the victim either verbally or by his actions that he was presently armed with a firearm." *Id*.

¶ 19 The charge contained in the indictment at issue in this case is not materially different from the one contained in the information at issue in *Johnson*. Nor, as noted above, does defendant challenge the sufficiency of the evidence supporting a conviction for aggravated robbery. Pursuant to the *Kolton* and *Johnson* decisions, therefore, we conclude that the trial court properly convicted defendant of aggravated robbery, as it was a lesser-included offense of the charged offense of armed robbery.

¶ 20 We next address defendant's challenge to his 10-year sentence.

¶ 21 At the sentencing hearing, the trial court was presented with a presentence investigation report (PSI) reflecting: (1) defendant was 17 years old at the time of the offense, and had been raised in the custody of The Department of Children and Family Services (DCFS) from the age of 12 due to an absentee father and his mother's substance abuse; (2) defendant had one prior adult conviction for armed robbery, for a offense that occurred after the robbery at issue here, and was serving a 6-year prison term for that conviction at the time of sentencing; (3) defendant was working toward a GED in prison, and had some prior work history; and (4) defendant had expressed "regret" regarding his actions with regard to this incident.

¶ 22 In aggravation, the State specifically noted only defendant's prior conviction. In mitigation, defense counsel highlighted defendant's youth, his challenging upbringing in the custody of DCFS, his work history and educational efforts, and the family support he received at the sentencing hearing. Defense counsel asked for a minimum sentence. Indicating that it had reviewed the statutory factors in aggravation and mitigation, the non-statutory factors in mitigation, the information contained in the PSI, the evidence in the case, the arguments of counsel, and the possibility for rehabilitation, the trial court sentenced defendant to 10 years' imprisonment, the same sentence it had imposed on Funches.

¶ 23 The trial court has broad discretion in imposing an appropriate sentence, and a sentence falling within the statutory range will not be disturbed on review absent an abuse of discretion. *People v. Jones*, 168 Ill. 2d 367, 373-74 (1995). An abuse of discretion exists where a sentence is at great variance with the spirit and purpose of the law, or is manifestly disproportionate to the nature of the offense. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010).

¶ 24 When balancing the retributive and rehabilitative aspects of a sentence, a court must consider all factors in aggravation and mitigation including, *inter alia*, 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). However, a reviewing court "may not substitute its judgment for that of the trial court simply because it would have weighed those factors differently." *People v. Fern*, 189 Ill. 2d 48, 53 (1999).

¶ 25 Aggravated robbery is a Class 1 felony. 720 ILCS 5/18-1(c) (West 2016). The sentence for a Class 1 felony ranges from 4 to 15 years' imprisonment. 730 ILCS 5/5-4.5-30(a) (West 2016).[3] The 10-year sentence imposed on defendant falls within this statutory range, and we therefore presume it is proper. *People v. Wilson*, 2016 IL App (1st) 141063, ¶ 12.

¶ 26 Moreover, the record specifically reflects that the trial court stated that it had reviewed the statutory factors in aggravation and mitigation, the non-statutory factors in mitigation, the information contained in the PSI, the evidence in the case, the arguments of counsel, and the possibility for rehabilitation. Ultimately, the trial court determined that a sentence of 10 years' imprisonment was warranted based on its weighing of these factors.

¶ 27 On appeal, defendant first points to certain purported mitigating factors, including: defendant's age at the time of the offense; his educational efforts; his expressed regret and acceptance of responsibility; the nature of the offense; and the fact that defendant contended he followed Funches and did not profit from the crime. Many of these he specifically asked the trial court to consider during the sentencing hearing. However, it is not our function to reweigh these

[3] Below, both defense counsel and the State agreed that this was the proper sentencing range. While on appeal the State argues that defendant was actually subject to an extended sentencing range of 4 to 30 years due to his prior conviction, we reject that argument as being improperly inconsistent to the position taken by the State below. *People v. Denson*, 2014 IL 116231, ¶ 17 ("while a prevailing party may defend its judgment on any basis appearing in the record, it may not advance a theory or argument on appeal that is inconsistent with the position taken below").

same factors or independently conclude that defendant's sentence was excessive. *People v. Burke*, 164 Ill.App.3d 889, 902 (1987). Under these circumstances, we find no abuse of discretion in the sentence imposed and, therefore have no basis for disturbing that decision on appeal. *People v. Cabrera*, 116 Ill.2d 474, 493-94 (1987).

¶ 28 In so ruling, we reject two other specific arguments raised by defendant with respect to his sentence.

¶ 29 First, we reject defendant's contention that the trial court's on-the-record discussion of the manner in which the trial court balanced the retributive and rehabilitative aspects of its sentence was insufficiently specific, mandating a conclusion that the 10-year sentence is excessive. It is well recognized that the trial court is not required to specifically explain the value it assigned to each factor in mitigation and aggravation; rather, it is presumed the trial 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). We find nothing in the record to support a finding that defendant has met his burden to do so.

¶ 30 Second, we reject defendant's contention that it was improperly disparate for the trial court to impose identical 10-year prison sentences upon him and Funches. Defendant argues that such a disparity is reflected in Funches' greater culpability for this offense, and in his personal history and character, as shown by: (1) the fact that Funches was an adult at the time of the offense, with two juvenile adjudications for robbery and prior adult convictions for aggravated battery and robbery, who was eligible for an extended sentence of up to 30 years' imprisonment; (2) Funches denied culpability and did not cooperate with authorities with respect to this incident; and (3) according to defendant's statement, Funches took a lead role in the offense,

where the robbery was for his benefit, he provided the pellet gun, and he took the gun and the iPod after the robbery.

¶ 31 "[F]undamental fairness requires that similarly situated defendants not receive grossly disparate sentences." *People v. Fern*, 189 Ill. 2d 48, 58 (1999).

> "Sentencing disparity occurs when equally culpable defendants who have like backgrounds are given substantially different sentences or when equally culpable defendants with different backgrounds, ages, and criminal propensities are given the same sentence. [Citation.] A disparity between codefendants' sentences is justified and will not be disturbed if the disparity is warranted by differences in the nature and extent of each defendant's participation in the offenses or by the history and character of the defendants." *People v. Smith*, 214 Ill. App. 3d 327, 342 (1991).

Here, defendant essentially argues that identical sentences were not proper in this case because he and Funches had *both* unequal culpability *and* different backgrounds. However, he and Funches cannot be considered "similarly situated"—thus triggering concerns regarding disparity in sentencing—in light of defendant's own admission that there are differences in *both* their culpability and background.

¶ 32 Indeed, what defendant specifically argues on appeal is that he is both less culpable than Funches and has a personal history and rehabilitative potential calling for greater mitigation and leniency in sentencing, such that it was improperly disparate for the trial court to impose identical 10-year prison sentences upon him and Funches. We question whether this is actually a proper way to frame a claim of disparity under the rubric provided by our supreme court in *Smith*. Nevertheless, defendant does cite to authority holding that "[a]n abuse of discretion *might* also occur when two codefendants receive the same sentence, despite having different criminal

records or roles in the particular crime, and have different mitigating and aggravating factors." (Emphasis added.) *People v. Klimawicze*, 352 Ill. App. 3d 13, 31 (2004) (citing *People v. Stambor*, 33 Ill. App. 3d 324, 326 (1975)).

¶ 33 However, even assuming defendant is correct regarding his claim that he has a personal history and rehabilitative potential calling for greater mitigation and leniency in sentencing as compared to Funches, we disagree that the evidence established that he was less culpable than Funches in light of defendant's statement, wherein he contended: Funches took a lead role in the offense, where the robbery was for his benefit; Funches provided the pellet gun; and he took the gun and the iPod after the robbery.

¶ 34 Where a defendant's statements are contradicted by other facts and circumstantial evidence, the trier of fact need not believe the statements, even though other witnesses do not directly contradict them. *People v. Batchelor*, 171 Ill. 2d 367, 376-77 (1996). When a defendant gives statements regarding his involvement in a crime, the trier of fact is free to accept or reject as much or as little of the statements as it pleases. See *People v. Wesley*, 65 Ill. App. 3d 25, 31-32 (1978). Here, defendant admitted and the video confirmed that it was he that took the iPod from Renteria and it was he that threateningly displayed what Renteria believed to be a handgun. Thus, aside from the self-serving content contained in defendant's statement, all the other evidence suggests it was actually defendant that took the lead role in this robbery. To the extent that the trial court's sentence was based upon a conclusion defendant was *more* culpable than Funches, there is ample evidence to support that conclusion. Such differences in the nature and extent of each defendant's participation in the offense were their own justification for any sentencing disparity. *Smith*, 214 Ill. App. 3d at 342.

¶ 35 And lastly, even if defendant has established *some disparity* with respect to the sentences imposed upon Funches and himself, we do not find that he has demonstrated the *gross disparity* required to implicate concerns of fundamental fairness. *Fern*, 189 Ill. 2d at 58.

¶ 36 Next, we consider defendant's contention that his sentencing order must be corrected because it does not accurately reflect his conviction. Defendant specifically contends that the sentencing order must be corrected, because it incorrectly contains a line stating: "On Count 001 defendant having been convicted of a class ___ offense is sentenced as a class x offender pursuant to 730 ILCS 5/5-5-3(C)(8)." The State contends that there is no ambiguity in the sentencing order, as this line is not "checked off," and the sentencing order otherwise correctly indicates that defendant was "convicted of a Class 1 offense, Aggravated Robbery under 720 ILCS 5/18-3(A)." We agree with defendant that the sentencing order must be corrected.

¶ 37 First, and although neither party specifically raises the issue, while the sentencing order correctly indicates that defendant was convicted of aggravated robbery, a class 1 offense, it incorrectly identifies the relevant statutory section as being section 18-3(a) of the Code. However, that statutory section actually refers to the offense of vehicular hijacking. 730 ILCS 5/18-3(a) (West 2016). The correct statutory section under which defendant was convicted is section 18-1(b) (1).

¶ 38 Second, we find that the line stating "[o]n Count 001 defendant having been convicted of a class ___ offense is sentenced as a class x offender pursuant to 730 ILCS 5/5-5-3(C)(8)" is at best ambiguous. While the State indicates this line is not checked off, it is apparent that "Count 001" was improperly added to this line. For example, the very next line states: "On Count ___ defendant is sentenced to an extended term pursuant to 730 ILCS 5/5-8-2." Because this line of

the standard sentencing order form is simply inapplicable, "Count 001" was not added to this line.

¶ 39 Therefore, pursuant to Supreme Court Rule 615(b)(1) (134 Ill. 2d R. 615), we order the clerk of the circuit court to correct and amend the sentencing order to properly reflect a conviction of aggravated robbery pursuant to section 18-1(b)(1) the Code, and remove any reference to "Count 001" from the line indicating defendant was sentenced as a Class X offender.

¶ 40 Finally, defendant next contends that his fines and fees order must be corrected. Specifically, he argues that the order requiring him to pay $469 in fines and fees should be reduced to $319, because: (1) neither a $20 Probable Cause Fee nor a $5 Court System Fee should have been assessed; (2) presentence credit should have been applied against the imposition of a $15 "State Police Operations Fee, a $50 Court Services Fee, and a $10 Arrestee's Medical Cost Fee; and (3) the order contains a $50 mathematical error. The State concedes this issue on appeal, and we concur. Therefore, we direct the clerk of the circuit court to correct the fines and fees order to reflect these findings and impose a corrected total assessment of $319.

¶ 41 III. CONCLUSION

¶ 42 For the foregoing reasons, we affirm defendant's conviction and sentence but order the sentencing order and the fines and fees order corrected as discussed above.

¶ 43 Affirmed; fines and fees order corrected; sentencing order corrected.