2018 IL App (3d) 150680-U

Order filed March 26, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-15-0680
v.	)	Circuit No. 14-CF-760
	)	
JOHN EDWARD ALLEN JR.,	)	Honorable Kevin W. Lyons,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Presiding Justice Carter and Justice Lytton concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Evidence was sufficient to prove the defendant guilty beyond a reasonable doubt of aggravated battery; (2) circuit court did not abuse its discretion in sentencing the defendant to concurrent terms of 22 years' imprisonment; (3) circuit court did not fail to consider evidence in mitigation; and (4) remand is required so that the circuit court may inquire into the defendant's posttrial *pro se* claims of ineffective assistance of counsel.

¶ 2 The defendant, John Edward Allen Jr., was found guilty on two counts of aggravated battery and a single count of resisting a peace officer. After merging the conviction for resisting a peace officer, the circuit court sentenced the defendant to two concurrent terms of 22 years'

imprisonment. On appeal, the defendant argues: (1) the evidence was insufficient with respect to one of the two aggravated battery convictions; (2) his sentence was excessive; (3) the circuit court erred in failing to consider the defendant's mental health when imposing sentence; and (4) the circuit court failed to conduct a proper inquiry into his posttrial *pro se* claims of ineffective assistance of counsel.

¶ 3 FACTS

¶ 4 The State charged the defendant with two counts of aggravated battery (720 ILCS 5/12-3.05(d)(4) (West 2014)) and two counts of resisting a peace officer (*id.* § 31-1(a-7)). Each of the aggravated battery charges alleged that the defendant committed a battery against a peace officer in the performance of their official duties. The State later dropped the second charge for resisting a peace officer.

¶ 5 At trial, Jeffrey Hall of the Peoria County Sheriff's Department testified that he was working at the courthouse on October 1, 2014. While on duty, he was called to courtroom 321, where officer Melinda Brownell informed him that an arrest warrant had been issued for the defendant. Hall recognized the defendant's name, as he had known him for 35 or 36 years. Hall went into the hallway where the defendant was located and, after some small talk, informed the defendant that he was there to arrest him. Hall testified that the defendant began to yell and pace, but eventually went with Hall to a conference room.

¶ 6 Hall took him to the conference room so that the defendant could calm down. Hall testified that he did this as a courtesy, and, had he not known the defendant, he would have initiated the arrest immediately. Hall arrested the defendant, handcuffing the defendant's hands in front of his body. Hall testified that he would normally arrest a person by handcuffing them behind their back, but he allowed the defendant to keep his hands in front of his body as a

courtesy. Hall took the defendant through the courtroom to a holding cell. Meanwhile, the defendant remained upset, referring to the situation as "bullshit" and calling Hall "you motherfucker."

¶ 7 Hall reentered the courtroom to retrieve the arrest warrant, at which point he could still hear the defendant screaming from the holding cell. Hall next escorted the defendant to an elevator on the way to the ground floor holding area. Hall testified that, upon arriving at the elevator, the defendant "was very animated, and he kind of shoved me." Hall did not take the shove personally, and the defendant eventually entered the elevator. The defendant continued to yell at Hall.

¶ 8 After exiting a second elevator, the defendant remained, in Hall's words, "very upset." At that point, Hall testified: "[The defendant] shoved me again." The shove did not injure Hall or knock him down. The prosecutor asked Hall if he found the contact to be insulting or provoking. Hall replied:

> "At that point, I was because we have a long history of knowing each other. He's never done that before. I was a little, I'm like, this is ridiculous. I need to get control of this now."

Hall was particularly concerned because the defendant's hands were in front of him. He sprayed the defendant with pepper spray "[t]o get control of the situation."

¶ 9 Other officers came to Hall's assistance. They took the defendant into a nearby restroom to decontaminate him. A number of officers attempted to place the defendant in a restraint chair. Hall explained that a restraint chair is used "[t]o stop a person from being aggressive and kind of put an end to *** what was going on."

¶ 10 Brownell, also of the Peoria County Sheriff's Department, testified that she was assigned to courtroom 321 on October 1, 2014. She informed Hall that the defendant was to be arrested. She could not make the arrest herself because a jail inmate was in the courtroom. She could hear the defendant arguing from the holding cell while she was in the courtroom.

¶ 11 Later, Brownell escorted the inmate from courtroom 321 to the ground floor. Upon placing that inmate in a holding cell, Brownell could hear the defendant yelling. Brownell assisted the defendant into the restraint chair. She tried to secure the straps on the chair, but the defendant "was moving around quite a bit, *** making it very difficult to get him hooked in." The defendant was yelling. Brownell was in front of the defendant, trying to strap his left foot to the chair. Brownell testified: "[The defendant] pulled his foot back and very fast *** his foot came towards me, and I turned my head to keep from getting kicked in the head, and it hit me in the shoulder, and then I got it again in the wrist." After the defendant had kicked her twice, she put her arm against his leg "to keep him from being able to kick [her] a third time."

¶ 12 Brownell received an x-ray on her wrist and was diagnosed with a sprain. She wore a brace for approximately five weeks. She also had surgery on her shoulder. She testified that her shoulder still hurts when the weather changes. Brownell had not previously had any shoulder injuries.

¶ 13 Kimberly Jones of the Peoria County Sheriff's Department also assisted in securing the defendant to the restraint chair. She saw the defendant make a kicking motion that struck Brownell in the wrist. Brownell responded by slapping the defendant's leg, at which point Jones saw the defendant kick Brownell in the shoulder.

¶ 14 The State played a surveillance video capturing the altercation between Hall and the defendant after exiting the second elevator. Though the video recording has no sound, Hall can

be seen pointing for the defendant to proceed around a corner. The defendant does not do so. Instead, he appears to be yelling at Hall while gesticulating with his hands. The defendant steps closer to Hall, but Hall turns slightly away. The defendant thrust his hands to Hall's chest briefly, then pulls them away. Immediately after, the defendant puts his cuffed hands to Hall's chest with even greater force. Hall takes a step back upon the second contact, but it is unclear if the step was caused by the contact or not. Hall then pepper sprays the defendant.

¶ 15 A second video was recorded by Captain Douglas Gaa of the Peoria County Sheriff's Department. He arrived at the scene and began recording just as the defendant was being placed into the restraint chair. The video shows four Peoria County Sheriff's officials attempting to restrain the defendant in the chair while the defendant yells. Brownell can be seen crouching in front of the defendant, attempting to restrain his left leg. The video is shot from behind the defendant, and Brownell is partially obscured by Jones. At one point, the restraint chair jerks back, and Brownell can be heard yelling, "Oh, you fucker." The defendant then kicks even more forcefully at Brownell as he yells, "Bitch." In the aftermath, the defendant exclaims, "No, she kicked me first." Brownell replies, "How am I going to kick you first when I'm on the floor?" The defendant continues to struggle as officers attempt to calm him. The defendant shouts: "You said 'You fucker,' then you kicked me. Then I kicked your ass back, bitch."

¶ 16 The jury found the defendant guilty on all counts.

¶ 17 Prior to sentencing, the defense counsel filed a motion to withdraw. In the motion, counsel averred that the defendant had made allegations of ineffectiveness. Counsel later withdrew that motion, indicating that the defendant and his family now wished counsel to continue representing the defendant.

¶ 18 A presentence investigation report (PSI) was introduced at sentencing. The PSI indicated that the defendant accrued 15 felony convictions in the years between 1985 and 2013. Those convictions included three prior convictions based on the aggravated battery of a peace officer: one Class 2 conviction and two Class 3 convictions. He was also convicted of a Class 3 aggravated battery to a medical assistant engaged in her duties. The defendant's remaining felony convictions included Class 2 unlawful delivery of a controlled substance, Class 3 theft, three Class 4 convictions for domestic battery, and conviction for Class 4 mob action.

¶ 19 The defendant's record also included at least 31 misdemeanor convictions, including: aggravated assault of a police officer, resisting a peace officer (4), domestic battery (3), battery (2), aggravated assault, and assault (2). The defendant also had six Illinois ordinance violations for disorderly conduct.

¶ 20 The PSI indicated that he had been diagnosed at the Peoria County jail with mood disorder not otherwise specified and post-traumatic stress disorder and had been prescribed a number of psychotropic medications. The defendant also believed that he suffered from intermittent explosive disorder. The PSI also indicated a previous diagnosis of bipolar disorder. A letter from the Peoria County jail mental health provider indicated that the defendant had completed an anger management curriculum at the jail, and that he had since exhibited behaviors suggesting he had learned from the curriculum. The letter also included a recommendation that the defendant receive a psychiatric evaluation.

¶ 21 A letter from the defendant was included in the PSI. In the letter, the defendant stated that he had been "in and out of jail/prison" because of mental disorders he had since childhood. He also stated that he harbored a lot of anger, and suggested that a stay in a mental health facility could help him "learn how to control that anger." The defendant expressed a desire to get better.

The PSI also contained letters of support from the defendant's fiancé and mother, each referencing the defendant's deteriorated mental health. The defendant's mother also testified at the sentencing hearing. She testified that the defendant's behavior was caused by head injuries resulting in mental health issues. She had been told when the defendant was eight years old that he needed to see a psychiatrist.

¶ 22 The defendant made a statement in allocution. The record reflects that the circuit court interrupted the defendant frequently when it believed the defendant was straying into irrelevant topics. The defendant asserted that he had character witnesses in the courtroom that had not been called to testify in mitigation. The following colloquy ensued:

> "THE DEFENDANT: *** First of all, my attorney has been ineffective. He knows it. I know it. He's tried to withdraw twice. I didn't ask him—I didn't threaten him to write the [Attorney Registration and Discipline Commission] not once.
>
> THE COURT: [The defendant], keep your remarks to relevant issues about your sentencing.
>
> THE DEFENDANT: Okay. Well, I feel like you should of allowed him to withdraw because I feel like in all honesty I could have done a better job of this myself, but since I couldn't—
>
> THE COURT: Keep your remarks to things that are relevant to your sentencing."

The defendant continued his allocution, but the circuit court eventually removed him from the courtroom when he refused to yield. The court commented: "[T]his is not *** the time that we're

going to simply stand on the planet and speak until your voice goes dry. It's not the time for filibuster."

¶ 23 The defendant returned to the courtroom and indicated that he had completed his allocution. The parties agreed that the defendant was subject to Class X sentencing because of his prior convictions. The court merged the conviction for resisting a peace officer with the aggravated battery convictions and sentenced the defendant to two concurrent terms of 22 years' imprisonment. The court noted that it had considered, among other things, the PSI and the defendant's history and character. In closing, the court commented: "He says, I've never been to a psychiatrist, [but] that's been belied by his mother and others. This man had had more psychiatric evaluations than most communities put together, and his is a menacing, dangerous, mean person."

¶ 24 ANALYSIS

¶ 25 The defendant raises three issues on appeal. First, he argues that the State failed to prove beyond a reasonable doubt that his contact with Hall was of an insulting or provoking nature.[1] Next, he argues that the circuit court's sentence of 22 years' imprisonment was excessive and grossly disproportionate to the nature of the offense, and that the court failed to consider his mental health when imposing sentence. Finally, he argues that the circuit court erred when it failed to conduct an inquiry into his *pro se* posttrial claims of ineffective assistance of counsel. We address those arguments *seriatim*.

¶ 26 I. Sufficiency of the Evidence

¶ 27 When a challenge is made to the sufficiency of the evidence at trial, we review to determine whether any rational trier of fact could have found the essential elements of the crime

[1]Defendant does not challenge the sufficiency of the evidence with respect to his other aggravated battery conviction, that was committed against Brownell.

beyond a reasonable doubt. *People v. Baskerville*, 2012 IL 111056, ¶ 31; *People v. Collins*, 106 Ill. 2d 237, 261 (1985). In making this determination, we review the evidence in the light most favorable to the prosecution. *Baskerville*, 2012 IL 111056, ¶ 31.

¶ 28 It is not the purpose of a reviewing court to retry a defendant. *People v. Milka*, 211 Ill. 2d 150, 178 (2004). Instead, great deference is given to the trier of fact. See, *e.g.*, *People v. Saxon*, 374 Ill. App. 3d 409, 416-17 (2007). All reasonable inferences from the record in favor of the prosecution will be allowed. *People v. Bush*, 214 Ill. 2d 318, 326 (2005). " 'Where evidence is presented and such evidence is capable of producing conflicting inferences, it is best left to the trier of fact for proper resolution.' " *Saxon*, 374 Ill. App. 3d at 416 (quoting *People v. McDonald*, 168 Ill. 2d 420, 447 (1995)). The trier of fact is not required to accept or otherwise seek out any explanations of the evidence that are consistent with a defendant's innocence; nor is the trier of fact required to disregard any inferences that do flow from the evidence. *People v. Sutherland*, 223 Ill. 2d 187, 233 (2006); see also *Saxon*, 374 Ill. App. 3d at 416-17.

¶ 29 Initially, the defendant disputes this standard of review. He urges that where the facts are undisputed, the question of whether those undisputed facts prove guilt is one this court should review *de novo*.

¶ 30 Even where the facts are not in dispute, if reasonable persons could draw conflicting inferences from those facts, it is left to the trier of fact to decide those questions. *People v. Brown*, 345 Ill. App. 3d 363, 366 (2003) (citing *Jackson v. TLC Associates, Inc.*, 185 Ill. 2d 418, 424 (1998)). This court has recently rejected the very argument here proffered by the defendant, commenting that "*De novo* review does not apply in every case where the facts are not in dispute." *People v. Ford*, 2015 IL App (3d) 130810, ¶ 16.

¶ 31 The parties' briefs in this case demonstrate that the inferences to be drawn from the facts are very much in dispute. For example, the defendant repeatedly refers to the contact between him and Hall as pressing or placing his hands against Hall's chest. He also refers to it as a "minimal and brief physical contact" and a "momentary contact *** of *** little force." He repeatedly stresses that the contact was "*de minimis*." Hall, of course, described the contact as a shove.[2] The State employs the term "shove" as well, also describing the contact more objectively as "a stronger forward movement with [the defendant's] arms." Because the inferences to be drawn from the facts are clearly in dispute, we find the appropriate standard of review to be the *Collins*' standard, in which we defer to the fact finders' inferences.

¶ 32 To sustain a conviction on the aggravated battery charge, the State was obligated to prove beyond a reasonable doubt that the defendant made "physical contact of an insulting or provoking nature" with a peace officer performing his official duties. 720 ILCS 5/12-3(a)(2) (West 2014); *id.* 12-3.05(d)(4). The defendant does not dispute that he made contact with Hall, or that Hall was a peace officer engaged in performing his official duties. He only contends that the evidence failed to show beyond a reasonable doubt that the contact was insulting or provoking.

¶ 33 Hall testified that the defendant shoved him. The defendant's insistence that his contact with Hall was *de minimis* is belied by the video, which shows a forceful thrust of his hands into Hall's chest. Hall testified that he found the contact insulting or provoking. From this evidence, a jury could reasonably conclude that the defendant made contact of an insulting or provoking nature with Hall. See *People v. Nichols*, 2012 IL App (4th) 110519, ¶ 43 (finding that contact of an insulting or provoking nature is an inference that may be made by the jury).

[2]Meanwhile, the defendant in his brief refers to "the alleged 'shove,' " a characterization that clearly implies the defendant is disputing Hall's testimony.

¶ 34 The defendant maintains that the context in which the defendant made contact with Hall demonstrates that the contact was not insulting or provoking. In support, the defendant relies primarily on *People v. DeRosario*, 397 Ill. App. 3d 332 (2009). In that case, the defendant sat in a chair behind the victim, with one knee touching the victim's back and another knee touching her hip. Prior to the incident, the defendant and victim had a relationship that had deteriorated, after which the defendant had begun to stalk the victim. The court found that the relatively benign contact rose to the level of a battery because of the context surrounding the contact. *Id*. at 334-35.

¶ 35 The defendant's reliance on *DeRosario* is misplaced. In that case, the benign contact was elevated to battery based on the surrounding circumstances. The defendant is essentially arguing for the opposite here, as a shove is not a benign contact. A shove is, by its nature, an act of aggression—akin to a punch, slap, push, or kick—from which one could infer an insulting or provoking nature. See *Nichols*, 2012 IL App (4th) 110519, ¶ 43 (Finding, of liquids flung at corrections officers: "[J]uries are nevertheless generally permitted to infer the insulting or provoking nature of those obviously repulsive contacts.").

¶ 36 While one can certainly envision situations where such aggressive acts are not insulting or provoking, the context in the present case supports a conclusion that the contact was insulting or provoking. The defendant was argumentative, loud, belligerent, and uncooperative with Hall. He remained that way even after the shove. Hall testified that the shove compelled him to utilize his pepper spray to regain control of the situation. See *People v. Wrencher*, 2011 IL App (4th) 080619, ¶ 55 ("[T]he trier of fact can make that inference from the victim's reaction at the time."). Because a rational trier of fact could have found beyond a reasonable doubt that the

defendant made contact with Hall of an insulting or provoking nature, we affirm the defendant's conviction.

¶ 37 II. Sentencing

¶ 38 A. Excessive Sentence

¶ 39 In Illinois, criminal penalties are determined according to the seriousness of the offense and the objective of restoring the offender to useful citizenship. Ill. Const. 1970, art. I, § 11. The nature of the offense itself and the history and character of the defendant are the key factors in determining rehabilitative potential. *People v. Flores*, 404 Ill. App. 3d 155, 159 (2010).

¶ 40 The circuit court has broad discretion in imposing a sentence, and we give great deference to the sentencing decisions of the circuit court. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010).

> " 'The trial judge has the opportunity to weigh such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. [Citations.] Consequently, the reviewing court must not substitute its judgment for that of the trial court merely because it would have weighed these factors differently. [Citation.]' " *Id.* at 213 (quoting *People v. Stacey*, 193 Ill. 2d 203, 209 (2000)).

"[A] sentence within statutory limits will be deemed excessive and the result of an abuse of discretion by the trial court where the sentence is greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *Stacey*, 193 Ill. 2d at 210.

¶ 41 The form of aggravated battery for which the defendant was convicted is a Class 2 felony. 720 ILCS 5/12-3.05(h) (West 2014). Ordinarily, the sentencing range for a Class 2 felony is between three and seven years' imprisonment. 730 ILCS 5/5-4.5-35(a) (West 2014). Under the

recidivism provisions of the Unified Code of Corrections (Code), when a person is convicted of a Class 2 felony, having been twice previously convicted of Class 2 or higher felonies, he is subject to a Class X sentencing range. *Id.* § 5-4.5-95(b). The sentencing range for a Class X felony is between 6 and 30 years' imprisonment. *Id.* § 5-4.5-25(a). Having been previously convicted of Class 2 aggravated battery and Class 2 unlawful possession of a controlled substance, the defendant was subject to a Class X sentence.

¶ 42 The defendant argues the factors that led to such a severe sentence "had little to do with the harm caused." He points out that ordinary battery of an insulting or provoking nature is a Class A misdemeanor, and that his convictions rose to a Class 2 felony only because the victims were peace officers. Further, he points out that he was eligible for Class X sentencing not because of the seriousness of his offense, but because of his prior record. He concludes that his conduct "while serious, was not so severe that the penalty for it should be in the range of sentences for first degree murder convictions."

¶ 43 Much of the defendant's argument seems to be one for the legislature. The General Assembly has reasoned that, as a matter of public policy, battery of a peace officer is a more serious offense than ordinary battery, and should be punished more severely. Further, the recidivism provisions found in the Code reflect the General Assembly's reasoned judgment that repeat offenders have inherently less rehabilitative potential. More specifically, they reflect the judgment that persons who commit three Class 2 felonies—regardless of which felonies they are—should be subject to a Class X sentencing range.

¶ 44 The defendant insists that even within that Class X range, the offense itself called for a sentence low in that range. He points out that his two prior Class 2 felony convictions cannot be considered in aggravation, as they were already used to elevate the sentencing range. He also

compares his case to that in *People v. Busse*, 2016 IL App (1st) 142941. In *Busse*, the defendant stole $44 in change from a vending machine, was subject to Class X sentencing because of other factors, and was eventually sentenced to a term of 14 years' imprisonment. *Id*. In finding that sentence excessive, the appellate court stated: "We feel confident that the legislature created Class X sentencing to protect the public from murderers and rapists, not penny-ante pilferage." *Id*. ¶ 31.

¶ 45 Of course, *Busse* is an imperfect comparison for the defendant. The defendant's battery of two peace officers is far from "penny-ante pilferage." Such a battery is a serious offense in the absence of any prior convictions, as it is a Class 2 felony. The defendant here angrily and aggressively kicked Brownwell twice. Defendant's actions required Brownwell to wear a brace on her wrist for five weeks and to undergo surgery on her shoulder.

¶ 46 Further, insofar as the *Busse* court implied that Class X sentencing was only intended to apply to rapists and murderers, we reject that position, as it is clearly belied by the recidivism provisions. Finally, even without consideration of the two predicate Class 2 felonies, the defendant had 13 other felony convictions that could be considered in aggravation, including three Class 3 aggravated batteries—two against peace officers and one against a medical assistant. In this context, the circuit court's sentence which was in the middle of the Class X sentencing range was not an abuse of discretion.

¶ 47 B. Mitigation

¶ 48 The defendant also argues that the circuit court was dismissive of his mental health problems. While the defendant includes this argument under the excessive sentence heading, we construe it as a stand-alone argument relating to the failure to consider mitigating circumstances.

¶ 49 Where mitigating evidence is presented to the sentencing court, a reviewing court presumes the lower court took that evidence into account, absent explicit evidence to the contrary. *People v. Gordon*, 2016 IL App (1st) 134004, ¶ 51. Here, the PSI was replete with information pertaining to the defendant's mental health, and the court affirmatively stated that it considered the PSI.

¶ 50 Further, the court's explicit reference to the defendant's mental health makes it abundantly clear that the court considered his mental health, but determined that it was not a mitigating factor. Indeed, information relating to a defendant's mental health is not inherently mitigating. *People v. Tenner*, 175 Ill. 2d 372, 382 (1997). Our supreme court has pointed out: "At sentencing, a judge or jury considering evidence of this nature might view the information as either mitigating or aggravating, depending, of course, on whether the individual hearing the evidence finds that it evokes compassion or demonstrates possible future dangerousness." *Id*.

¶ 51 The defendant's argument here is, essentially, that the circuit court should have afforded mitigating weight to his mental health problems. As a reviewing court, however, we will not engage in the reweighing of sentencing factors. *People v. Cagle*, 277 Ill. App. 3d 29, 32 (1996). Accordingly, we affirm the sentence imposed by the circuit court.

¶ 52 III. Posttrial Claims of Ineffective Assistance of Counsel

¶ 53 Finally, the defendant argues that the circuit court erred when it failed to conduct any inquiry into his posttrial claims of ineffective assistance of counsel. He maintains that where a defendant makes a posttrial allegation of ineffective assistance of counsel, the circuit court must conduct a preliminary inquiry into the factual matters underlying that claim, pursuant to *Krankel*. The State confesses error, conceding that no inquiry was conducted and that the matter should be remanded for such an inquiry.

¶ 54 It is well-settled that a circuit court must examine the factual matters underlying a posttrial claim of ineffective assistance of counsel. *People v. Ayres*, 2017 IL 120071, ¶ 11. The remedy for the court's failure to conduct such an inquiry is remand so that the inquiry may be conducted. *E.g.*, *People v. Moore*, 207 Ill. 2d 68, 79 (2003). It is undisputed that the defendant made multiple claims of ineffective assistance of counsel during his allocution. It is similarly undisputed that the circuit court made no inquiry into those claims. Accordingly, we accept the State's confession of error and remand the matter so that a preliminary inquiry into the defendant's claims may be conducted.

¶ 55 CONCLUSION

¶ 56 The judgment of the circuit court of Peoria County is affirmed in part and remanded with directions.

¶ 57 Affirmed and remanded with directions.