2017 IL App (1st) 162104-U

FIRST DIVISION
December 29, 2017

No. 1-16-2104

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	Cook County.
	)	
v.	)	No. 14 CR 14936
	)	
ROGER GOMEZ,	)	Honorable
	)	Stanley Sacks,
Petitioner-Appellant.	)	Judge Presiding.

JUSTICE MIKVA delivered the judgment of the court.
Presiding Justice Pierce and Justice Harris concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's convictions for financial institution fraud, wire fraud, and forgery are affirmed because sufficient evidence existed identifying him as the perpetrator and showing that he possessed the requisite intent for the offenses. The trial court did not abuse its discretion in barring certain testimony and the defendant's mandatory six-year sentence was not unconstitutionally disproportionate.

¶ 2 Following a bench trial, defendant Roger Gomez was convicted of financial institution fraud, wire fraud, and forgery. The trial court sentenced Mr. Gomez to six years' imprisonment on the financial institution fraud count, and two years on each of the other two counts, all to be

served concurrently. On appeal, Mr. Gomez contends that (1) the State failed to present sufficient evidence to support his convictions; (2) the trial court abused its discretion in barring certain testimony; and (3) his sentence violates the proportionate penalties clause of the Illinois Constitution. For the reasons that follow, we affirm.

¶ 3 BACKGOUND

¶ 4 After depositing a $56,948.85 check made payable to Alex Orthopaedics LLC into his own account, Roger Gomez was charged with two counts of theft—both of which were nol-prossed before trial—one count of financial institution fraud, one count of wire fraud, and one count of forgery. On June 10, 2016, after a bench trial, the trial court found Mr. Gomez guilty on the three remaining counts and, on July 1, 2016, Mr. Gomez was sentenced to six years' imprisonment pursuant to the habitual offender enhancement provisions in the Unified Code of Corrections (Code). 730 ILCS 5/1-1-1 *et seq.* (West 2012).

¶ 5 Before trial, the State filed a motion *in liminie* to bar testimony regarding the character of Dr. Peter Snitovsky, who conducted his practice as Alex Orthopaedics. This included testimony that Dr. Snitovsky permitted employees to write and sign his name to, among other things, checks, prescriptions, and medical reports, and to notarize documents on which Mr. Gomez had signed Dr. Snitovsky's name. It also included testimony that the doctor was only present in the office two days a week and essentially allowed his employees to run his practice. The State also sought to bar testimony of Dr. Snitovsky's accountant, who would testify about wire transfers Dr. Snitovsky made to a company in Mexico in order to "buy patients."

¶ 6 The trial court granted the State's motion, in part, for allowing the testimony that Dr. Snitovsky permitted employees to sign checks. The court denied Mr. Gomez's motion to reconsider.

¶ 7 The State presented four witnesses to describe the deposit of the $56, 948.85 check that had been made out to Alex Orthopaedics into an account controlled by Mr. Gomez. At trial, Anna Wasyliw, a bank manager at the Park Ridge branch of BMO Harris, testified that, on April 12, 2012, the bank was presented with a $56,948.85 check from Cool Systems, Inc., made out to Alex Orthopaedics and dated April 9, 2012. The check was endorsed for deposit into a BMO Harris account held by RIG Enterprises and the memo section read "Alex Orthopaedics, Attn: Rodger Gomez." Alex Orthopaedics did not have an account at BMO Harris. The two signatories on the RIG Enterprises account were those of Mr. Gomez and his sister.

¶ 8 The risk control department at the bank advised that the deposit should be put on hold, while Ms. Wasyliw obtained additional documentation, including an affidavit and endorsement stating that Mr. Gomez had authorized the check to be deposited into the RIG account, an affidavit of endorsement from Dr. Snitovsky on behalf of Alex Orthopaedics, an agreement between RIG Enterprises and Alex Orthopaedics, and a tax identification letter from the Internal Revenue Service (IRS).

¶ 9 Ms. Wasyliw testified that, on April 14, 2012, BMO Harris received an "Affidavit of Endorsement" from Mr. Gomez, notarized by Sandra L. McNeela—a personal banker at BMO Harris. Ms. Wasyliw testified that she called Alex Orthopaedics and asked to speak with Dr. Snitovsky and, when someone came to the phone identifying himself as Dr. Snitvosky, she told him that she needed a notarized affidavit of endorsement from him in order to release the funds. Ms. Wasyliw testified that when she spoke to the man she believed to be Dr. Snitovsky, she did not recall anything unusual about his speech pattern. While Dr. Snitovsky was testifying, the trial court observed, on the record, that Dr. Snitovsky had a speech impediment. The bank received additional documents the following week from a fax number belonging to Alex Orthopaedics.

These included a Management and Billing Services Agreement signed by Roger Gomez and Peter Snitovsky and an IRS document dated November 27, 2006, which assigned an employer identification number and listed both Dr. Snitovsky and Mr. Gomez as members of Alex Orthopaedics, and a notarized affidavit of endorsement. Based on the documents provided, BMO Harris released the funds into the RIG account.

¶ 10 Rosalia Roudies testified that she was working as a teller at the time the check was deposited. When asked to identify Mr. Gomez in the courtroom, she was unable to do so. Ms. Roudies confirmed Ms. Wasyliw's testimony about the additional documents and the phone call to Alex Orthopaedics.

¶ 11 Dr. Snitovsky testified that he is the sole owner of Alex Orthopaedics. He stated that Alex Orthopaedics has a bank account at Chase Bank and that he and his wife are the only authorized signatories on the account. He testified that Mr. Gomez, whom he identified in court, was his office manager from November 2011 to November 2013. Dr. Snitovsky testified that he never received the check at issue in this case, which was a refund check from Cool Systems, Inc., and that he never authorized anyone to endorse it. Dr. Snitovsky testified that Mr. Gomez is not listed as a member of Alex Orthopaedics in the 2006 letter from the IRS containing the company's employer identification number. Dr. Snitovsky also testified that he did not make any changes to that document nor did he authorize anyone to add their name to it. Dr. Snitovsky also testified that he did not receive a call or speak to anyone from BMO Harris regarding the check at issue, nor did he engage in any written communication with the bank authorizing the check to be deposited.

¶ 12 On cross-examination, Dr. Snitovsky acknowledged that he and Mr. Gomez agreed to share some business costs, but testified that they never reduced their agreement to writing.

Counsel for Mr. Gomez questioned Dr. Snitovsky regarding lawsuits in California and Illinois over transactions Mr. Gomez had made. Although counsel elicited testimony as to the fact of the lawsuits, the trial court sustained the State's objection to further questioning regarding the nature of the lawsuits. Dr. Snitovsky claimed that he did not give Mr. Gomez authority to sign checks drawn from Alex Orthopaedics's account but, when presented with checks that Mr. Gomez had signed on his behalf, he testified that he had never complained about the checks that Mr. Gomez had written to pay business expenses.

¶ 13 According to Dr. Snitovsky, about nineteen months after the check at issue was deposited, his wife returned to act as his office manager and Mr. Gomez was terminated. He testified he first learned of the check in January or February of 2014 and went to the police station that day to complain about it.

¶ 14 Edward McMahon, an employee of the Chicago police department's financial crimes unit, testified that when he investigated the check in August 2014, he reviewed bank statements and activity concerning the RIG account. He testified that only Mr. Gomez and his sister, Irma Gomez, were signatories on the RIG account and that the account had a negative balance on April 1, 2012. However, he admitted on cross-examination that the balance was positive on April 12, 2012, when Mr. Gomez first attempted to deposit the check made out to Alex Orthopaedics.

¶ 15 The defense called Nathan Gray, who testified that he supplied medical equipment to Alex Orthopaedics through his business Gray Medical. Mr. Gray testified that, on March 27, 2012, he had a meeting with Dr. Snitovsky and Mr. Gomez about purchasing a cold compression ice machine. He wrote Dr. Snitovsky a check for $56,948.85 for the machine, which Dr. Snitovsky had agreed to purchase on behalf of Gray. On cross-examination, Mr. Gray testified

that he did not know whether a refund check was subsequently issued to Dr. Snitovsky from Cool Systems, Inc. for this same amount.

¶ 16 The defense also called several witnesses who worked at Alex Orthopaedics. Medical assistant Maria Hernandez testified that she was responsible for paying some office expenses with a copy of Dr. Snitovsky's credit card and that Mr. Gomez would also get blank checks from Dr. Snitovsky to pay expenses. She also testified that she regularly notarized documents containing Dr. Snitovsky's signature that were placed on her desk, despite not seeing Dr. Snitovsky sign them, and that Dr. Snitovsky never complained about it. On cross-examination, Ms. Hernandez acknowledged that she notarized the affidavit of endorsement that was presented to BMO Harris, although Dr. Snitovsky was not, in fact, present and she did not see him sign it.

¶ 17 Armando Barrera testified that he provided transportation services to patients of Alex Orthopaedics. He stated that he routinely invoiced Alex Orthopaedics for services provided and that those expenses were often paid by check. According to Mr. Barrera, he dealt exclusively with Mr. Gomez regarding payment for his transportation services. Mr. Barrera testified that Mr. Gomez pad for those services with checks from both the Alex Orthopaedics account and his own RIG account.

¶ 18 Alexander Aguayo, Dr. Snitovsky's assistant from February 2012, to December 2013, testified that Dr. Snitovsky typically kept his checkbook in his car. He confirmed that when an office expense required payment by check, either Dr. Snitovsky would make the check out himself or he would give a blank check to Mr. Gomez to use to pay the expense. Mr. Aguayo stated that, while working at Alex Orthopaedics, he never heard Dr. Snitovsky complain about Mr. Gomez writing unauthorized checks. On cross-examination, Mr. Aguayo testified that he had no knowledge of a refund check from Cool Systems, Inc. or whether Mr. Gomez was authorized

to sign and deposit it into the RIG account. He stated that, if the check were sent to Alex Orthopaedics in the mail, Dr. Snitovsky would not have known about it, unless someone in the office brought it to his attention.

¶ 19 Mr. Gomez elected not to testify.

¶ 20 The trial court found Mr. Gomez guilty on all three counts. The judge noted that Dr. Snitovsky did not "run exactly the greatest business, professional business" because he "relied on people who he should not have relied on to do different things, occasionally." He then concluded that:

> "The evidence shows circumstantial no question that it was [Mr. Gomez]. No question in my mind that it was [Mr. Gomez]. The evidence circumstantially showed it was [Mr. Gomez] went to the bank with the check payable to Dr. Snitovsky's corporation. And that he ultimately in order to get that money deposited into his account, his being [Mr. Gomez's] account, he signed the name of Dr. Snitovsky to the so-called certification, that it was Dr. Snitovsky's signature. The bank told him that we need your signature notarized. Which he did.
>
> And then they asked him, well, we need Dr. Snitovsky's [signature] also. [Mr. Gomez] doesn't say at that point well I signed his name before I'll sign it for you. I'll have it notarized in front of you that I signed on his behalf. He goes back to his business, whatever his business was at that time, wherever it was at that time, and he comes up with a signature which he has another employee, arguably a terrific employee, the notarized documents. Doesn't even see the Doctor sign it. We're not talking about a few dollars here and there, some other stuff she might have signed before. Talking about fifty-

> six thousand dollars. A lot of money. Not exactly chump change, fifty-six thousand dollars.
>
> [Ms. Hernandez] admitted the Doctor was not there. So she's signing—she notarized a documented which was obviously signed, in my opinion, [Mr. Gomez], notarizing, saying it was Dr. Snitovsky's signature."
>
> * * *
>
> "The evidence circumstantially is clear that [Mr. Gomez] got that big check, fifty-six thousand dollar plus check, and deposited it ultimately in his own account, without the permission or authorization of Dr. Snitovsky."

¶ 21 At sentencing, the State offered certified documents of Mr. Gomez's two prior Class 2 felony convictions—theft in 1991 (for which Mr. Gomez received four years' probation) and theft by deception in 2005 (for which Mr. Gomez also received four years' probation). The State then explained that the prior convictions made Mr. Gomez "Class X mandatory" which, for the financial institution fraud conviction, carried a mandatory minimum sentence of six years.

¶ 22 The trial court characterized Mr. Gomez as "a very intelligent man who does a lot of good things for people in the community, people he knows, his family, his kids, [and his] wife." The judge further noted that if he had the authority to sentence Mr. Gomez to something less than the mandatory minimum, he "might do it." The court then sentenced Mr. Gomez to the minimum six years' imprisonment based on his prior offenses.

¶ 23 JURISDICTION

¶ 24 The trial court sentenced Mr. Gomez on July 1, 2016, and he timely filed his notice of appeal in this matter on July 27, 2016. Accordingly, we have jurisdiction pursuant to article VI, section 6, of the Illinois Constitution and Illinois Supreme Court Rules 603 and 606, governing

appeals from final judgments of conviction in criminal cases. Ill. Const. 1970, art. VI, § 6; Ill. S. Ct. Rs. 603, 606 (eff. Feb. 6, 2013).

¶ 25 ANALYSIS

¶ 26 A. Sufficiency of the Evidence

¶ 27 We first consider Mr. Gomez's challenges to the sufficiency of the State's evidence to support his convictions. To sustain a conviction of a criminal offense, the State must prove every element of the alleged offense beyond a reasonable doubt. *People v. Lucas*, 231 Ill. 2d 169, 178 (2008). When a criminal defendant challenges the sufficiency of the evidence, the function of the reviewing court is not to retry the defendant. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). Rather, the reviewing court must "carefully examine the evidence while giving due consideration to the fact that the [trier of fact] saw and heard the witnesses." *People v. Smith*, 185 Ill. 2d 532, 541 (1999). The relevant question 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." (Internal quotation marks omitted.) (Emphasis in original.) *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011). A conviction will not be reversed by a reviewing court "unless the evidence is so unreasonable, improbable or unsatisfactory that it raises a reasonable doubt of defendant's guilt." *People v. Evans*, 209 Ill. 2d 194, 209 (2004).

¶ 28 Mr. Gomez argues that there were four ways in which the evidence presented against him was insufficient to affirm his convictions. The State argues that some of these arguments are forfeited, because Mr. Gomez does not cite the record in support of these arguments. However, since much of Mr. Gomez's argument is based on what he argues is missing from the record, and, because the factual section of Mr. Gomez's brief is replete with citations to the record, we do not find his citations inadequate. However, we do not agree with Mr. Gomez that the evidence

was insufficient in any of the respects he argues on appeal.

¶ 29 1. Identity

¶ 30 Mr. Gomez first argues that, because Ms. Roudies was unable to identify him in court and no one was able to testify that they saw him at the bank, there was a lack of evidence to physically place him at BMO Harris bank or otherwise establish that he was the wrongdoer in this transaction.

¶ 31 It is well-settled that the identity of an accused may be established by circumstantial evidence. *People v. Darrah*, 18 Ill. App. 3d 1018 (1974). The circumstantial evidence here was strong. The check came to Mr. Gomez's place of employment. The funds went into an account on which Mr. Gomez was one of two signatories. While Mr. Gomez is correct that he was not the only person who had access to the check or to the documents that were faxed from Alex Orthopaedics to BMO Harris, his name was on many of the documents and he is the only person who could have obtained the refund check and falsified the documents and who also would have profited from the deposit of the check into the RIG account.

¶ 32 2. Intent to Defraud

¶ 33 Mr. Gomez next argues next that the State's evidence was insufficient to prove that he had a specific intent to defraud, which is an element of each of the crimes for which he was convicted, because there was no proof that either the bank or Dr. Snitovsky suffered financial loss. According to Mr. Gomez, although Dr. Snitovsky paid for the equipment, he was repaid by Nathan Gray, for whom he was acting as a strawman. While it is unclear whether there was an actual loss to a victim, the intent to defraud can also be shown by the fact that there was a gain to Mr. Gomez. *People v. Tepper*, 2016 IL App (2d) 160076, ¶ 18. Intent can either be shown by proof or presumed by delivery of the forged documents. *People v. Hunter*, 331 Ill. App. 3d 1017,

1026 (2002). From Mr. Gomez's delivery of the fraudulent documents arises a presumption that he intended to defraud BMO Harris. No evidence existed to rebut that presumption.

¶ 34 3. Authorization to Sign Documents

¶ 35 Mr. Gomez also argues that the trial court acted unreasonably in convicting him of forgery because it did not consider evidence that Mr. Gomez had authorization to sign financial documents on Dr. Snitovsky's behalf. There was certainly some evidence that Mr. Gomez was authorized to sign checks to pay for medical expenses. However, the check at issue was not endorsed to pay medical expenses. The trial court, as the fact-finder, was in the best position to weigh evidence and assess credibility, including any evidence of the doctor's past practices and the doctor's credibility in testifying that he never authorized Mr. Gomez to endorse this check. We do not find the evidence insufficient in this regard.

¶ 36 4. Financial Institution Fraud

¶ 37 Finally, Mr. Gomez argues that that the State's evidence was insufficient to sustain his conviction for financial institution fraud because the funds at issue were not "owned by" or in the "custody or control" of BMO Harris. A person commits financial institution fraud when he or she knowingly executes or attempts to execute a scheme or artifice to: (1) defraud a financial institution; or (2) obtain any of the moneys, funds, credits, assets, securities, or other property owned by or under the custody or control of a financial institution, by means of pretenses, representations, or promises he or she knows to be false. 720 ILCS 5/17–10.6(c) (West 2014).

¶ 38 BMO Harris had custody or control of the funds at issue here when the bank placed a hold on them. The evidence was that Mr. Gomez presented false documents in order to convince BMO Harris to release that hold. That was sufficient evidence to sustain this conviction on the basis that he obtained money under the "custody and control" of the bank. In addition, the

evidence showed that he sent false documents to the bank so the conviction could also be upheld on the basis that he defrauded the bank.

¶ 39 B. Barred Testimony

¶ 40 Mr. Gomez also argues that the trial court abused its discretion by barring testimony necessary to his defense. "Generally, evidentiary motions, such as motions *in limine*, are directed to the trial court's discretion." *People v. Harvey*, 211 Ill. 2d 368, 392 (2004). A trial court abuses its discretion only when (1) its decision is arbitrary, fanciful, or unreasonable, or (2) no reasonable person would take the view adopted by the court. *People v. Donoho*, 204 Ill. 2d 159, 182 (2003). Again, the State counters that Mr. Gomez forfeited some of these arguments by not complying with Rule 341(h)(7) regarding appropriate citations to the record in appellate briefs. However, as noted above, we find that Mr. Gomez's citations in his statement of facts are sufficiently clear to allow us to reach the merits of the trial court's evidentiary rulings.

¶ 41 Mr. Gomez argues first that the trial court should have allowed evidence regarding the day-to-day operations of Alex Orthopaedics. Specifically, he asserts that had he been allowed to introduce evidence regarding Dr. Snitovsky's lax business practices it would have shown that Mr. Gomez had a good faith belief that he was entitled to use Dr. Snitovsky's signature freely. He concludes that acting with a good faith belief is a complete defense to any charge requiring the intent to defraud because it negates a specific intent to defraud.

¶ 42 Mr. Gomez relies on *U.S. v. Martin-Trigona*, 684 F.2d 485, 492 (7th Cir. 1985), construing federal law, for the proposition that a trial court errs in excluding relevant evidence of good faith in a fraud case. In *Martin-Trigona*, the appellate court agreed with the defendant that the trial court erred in not instructing the jury on the defense theory which was that the defendant acted in good faith because he thought that he had equitable title to the property on which he was

alleged to have obtained a fraudulent mortgage. *Id.* This case does not support Mr. Gomez's argument. Under the logic employed in *Martin-Trigona*, Mr. Gomez would have been entitled pursue a theory that he thought, in good faith, that he had permission to deposit the check at issue into his own account. But none of the evidence that the court excluded directly supported this good faith belief. The trial court did not abuse its discretion in finding that evidence that Mr. Gomez had the authority to sign prescriptions, medical reports, and other documents, unrelated to the check at issue here, were too far removed from that defense theory to be relevant.

¶ 43 Second, Mr. Gomez argues that the trial court abused its discretion by barring testimony regarding Dr. Snitovsky's bias against him. Specifically, Mr. Gomez contends that the trial court should have allowed evidence of a civil lawsuit pending against Dr. Snitovsky in California, a civil lawsuit in Illinois where Dr. Snitovsky is suing Mr. Gomez. Mr. Gomez also argues that the trial court improperly would not even let him make an offer of proof on these issues. Mr. Gomez emphasizes that Dr. Snitovsky did not report the deposit of the check to the police until two years after it happened and argues that this report was made because of the doctor's growing bias towards Mr. Gomez based on all of these things.

¶ 44 We note that the trial court did permit Mr. Gomez's attorney to cross-examine Dr. Snitovsky to ask whether he was suing Mr. Gomez in civil court for monetary damages. We do not think the trial court's refusal to allow more evidence on the doctor's alleged bias against Mr. Gomez, however was an abuse of discretion. The evidence, including Dr. Snitovsky's testimony, was that Dr. Snitovsky was not aware of this check when it was deposited into the RIG account and, soon after learning about it, he reported it to the police. Facts about an allegedly deteriorating relationship between Mr. Gomez and Dr. Snitovsky were, at best, collateral to the issues before the court. While we agree with Mr. Gomez that the trial court should have allowed

his counsel to make an offer of proof, if the specifics of such an offer were essential for us to understand this issue, Mr. Gomez should have offered them in a post trial motion or taken appropriate action to make them part of the record.

¶ 45 Finally, Mr. Gomez argues that he should have been allowed to present testimony from Dr. Snitovsky's accountant regarding Dr. Snitovsky's practice of paying for patient referrals from Mexico and Mr. Gomez's knowledge of this practice. However, again, we cannot say this was an abuse of discretion since this evidence has no direct connection to the question of whether Mr. Gomez had the authority to deposit the check at issue into the RIG account. As with some of the other excluded evidence, this evidence appeared to be directed at undermining Dr. Snitovsky's professional ethics, which really had nothing to do with this case.

¶ 46 C. Proportionate Penalties Clause

¶ 47 Mr. Gomez's final argument is that his six-year sentence as a Class X offender is unconstitutional under the proportionate penalties clause of the Illinois Constitution, as applied to his case. Ill. Const. 1970, art. VI, § 11. That clause mandates that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." *Id.* A challenge to a sentence based on the proportionate penalties clause "contends that the penalty in question was not determined according to the seriousness of the offense." *People v. Sharpe*, 216 Ill. 2d 481, 487 (2005). Such a penalty violates the proportionate penalties clause if it is "so cruel, degrading, or disproportionate to the offense that the sentence shocks the moral sense of the community." *People v. Ligon*, 2016 IL 118023, ¶ 10. All statutes, including sentencing statutes, carry a "strong presumption of constitutionality." *Sharpe*, 216 Ill. 2d at 487. "The legislature's discretion in setting criminal penalties is broad, and courts generally decline to overrule legislative determinations in this area

unless the challenged penalty is clearly in excess of the general constitutional limitations on its authority." *Id.*

¶ 48 The State argues Mr. Gomez forfeited his as-applied challenge because he did not raise this argument in the trial court and therefore the record below was not sufficiently developed for appellate review. The State cites *People v. Thompson*, 2015 IL 118151, ¶ 36, where our supreme court distinguished an "as-applied" constitutional challenge from a "facial" challenge and held that, because an as-applied challenge "is dependent on the particular circumstances and facts of the individual defendant or petitioner * * * it is paramount that the record be sufficiently developed in terms of those facts and circumstances for purposes of appellate review." *Id.* ¶ 37. However, Mr. Gomez is correct that his challenge is based solely on facts which were already fully developed in the record—the remoteness of his prior convictions and the nature of those felony offenses. We will address Mr. Gomez's arguments on the merits.

¶ 49 The trial court sentenced Mr. Gomez to the statutory minimum of six years' imprisonment as a Class X offender under the habitual offender enhancement provision of the Code. 730 ILCS 5/5-4.5-95(b) (West 2012). This provision contains two sentencing regimes. Subsection (a) mandates a sentence of natural life imprisonment for any defendant adjudged an "habitual criminal." 730 ILCS 5/5-4.5-95(a)(5) (West 2012). This finding applies to a defendant twice convicted of either a Class X felony or three enumerated violent felonies (criminal sexual assault, aggravated kidnapping, or first degree murder) who is later convicted of a third Class X or enumerated felony. 730 ILCS 5/5-4.5-95(a)(1) (West 2012). The provision does not apply unless certain requirements are met, including that the "third offense was committed within 20 years of the date that judgment was entered on the first conviction." 730 ILCS 5/5-4.5-95(a)(4) (West 2012).

¶ 50 Subsection (b), which applies to Mr. Gomez, has a similar structure, mandating that a defendant over the age of 21 be sentenced as a Class X offender when, if twice convicted of a Class 1 or Class 2 felony, he is later convicted of a third Class 1 or 2 felony. 730 ILCS 5/5-4.5-95(b) (West 2012). Subsection (b) lists requirements for its application, which do not include the 20-year tether between first and third convictions found in subsection (a). 730 ILCS 5/5-4.5-95(b)(1-3) (West 2012).

¶ 51 Mr. Gomez argues that his sentence is unconstitutionally disproportionate because his two prior convictions were both distant in time from the third—roughly 25 and 20 years ago, respectively. He also argues that his six-year term is disproportionate because the predicate felonies were both non-violent Class 2 offenses, the lowest levels possible to trigger the habitual offender provision.

¶ 52 The legislature specifically drafted subsection (b) to allow for non-violent felonies to serve as predicates for Class X enhancement, without the temporal limitation of subsection (a). The legislature exercised its "[broad] discretion in setting criminal penalties," and the fact that this is a severe penalty does not mean that the legislature acted "in excess of the general constitutional limitations on its authority." *Sharpe,* 216 Ill. 2d at 487.

¶ 53 The parties both cite to *Fernandez,* 2014 IL App (1st) 120508, where this court affirmed a natural life sentence under the habitual criminal provision of the Code, notwithstanding that the defendant's three Class X felonies were all non-violent drug offenses. *Id.* ¶ 65. In *Fernandez*, we distinguished *Miller,* in which our supreme court found a mandatory life sentence unconstitutional as applied to a juvenile offender. *Id.* ¶¶ 51-54 (citing *Miller,* 202 Ill. 2d at 343). We affirmed the conviction for the defendant in *Fernandez* because, unlike *Miller*, the defendant in *Fernandez* was not a juvenile and therefore "lack[ed] the degree of rehabilitative potential

inherent in the *Miller* defendant's youth." *Id*. ¶ 54. Second, the defendant was not convicted as an accomplice, as in *Miller*, but acted as the principal offender. *Id.* Finally, the *Fernandez* defendant's involvement in the crime was distinguishable in that it "was not a spontaneous decision," but rather "followed careful planning." *Id.* We note that the same three attributes used to distinguish the conduct in *Fernandez* apply to Mr. Gomez as well. He committed his felonies as an adult, acted primarily and not as an accomplice, and utilized careful planning. We cannot find this statute unconstitutional, as applied to these facts.

¶ 54 CONCLUSION

¶ 55 In sum, we affirm Mr. Gomez's conviction for financial institution fraud, wire fraud, and forgery.

¶ 56 Affirmed.