2020 IL App (1st) 182397-U

No. 1-18-2397

Order filed December 4, 2020

Fifth Division

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. 16 CR 5125
	)	
REGGIE DANIEL,	)	Honorable
	)	Carol M. Howard,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justices Hoffman and Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm defendant's conviction and sentence for first degree murder over his contention that the court failed to consider the crux of his defense. Defendant's claim that the court improperly considered a factor inherent in the offense as aggravation at sentencing is without merit.

¶ 2 Following a bench trial, defendant Reggie Daniel was found guilty of first degree murder (720 ILCS 5/9-1(a)(1) (West 2014)) and sentenced to 50 years in prison.[1] On appeal, he contends the circuit court denied him a fair trial when it failed to consider the "crux" of his defense that the shooting resulted from an unreasonable belief that deadly force was justified. Defendant further contends that the court improperly considered a factor inherent in the offense as aggravation at sentencing. We affirm.

¶ 3 Following his arrest, defendant was charged with five counts of first degree murder arising from the shooting death of Darrin Joss on March 2, 2016. Both men lived in an apartment complex on the 500 block of West Kinzie (the building) in Chicago.

¶ 4 During opening statements, the defense argued that Joss was "disgusted" that defendant lived in the building pursuant to a Chicago Housing Authority (CHA) voucher, and that Joss's verbal threats, which began in July 2014, escalated to physical attacks. Consequently, defendant, who was confined to a wheelchair, believed that he had to defend himself.

¶ 5 Initially, a building employee and Chicago police detective testified that the building had a video surveillance system and the police were given access to the system to download certain footage from March 2, 2016, including from the eighth floor fitness area and the east garage.

¶ 6 Salvador Raya-Custodio, who worked as a concierge at the building in March 2016, testified that the eighth floor contained the sauna, gym, lounge, and theater. Raya-Custodio knew Joss, who was around 6'2" tall and overweight, moved slowly, and had knee issues. He saw Joss enter the lounge around 6:30 p.m. on March 2, 2016. Raya-Custodio's coworker, Kerry McCullor, was eating and showing a video to defendant, who was sitting with her. Raya-Custodio could smell

[1] Although the common law record states that defendant's family name is "Daniels," defendant's signature on his jury waiver and the notice of appeal state "Daniel."

the alcohol defendant was drinking. Joss, who was getting water, asked McCullor something. Raya-Custodio then walked away.

¶ 7 When Raya-Custodio returned, Joss and defendant were arguing. After five minutes, Joss left. Although defendant followed him and continued the argument, Joss "shoo[ed]" him away. Raya-Custodio approached and asked if everything was alright. Defendant told him to back off, then returned to the lounge and looked into the room where Joss was exercising. Raya-Custodio again asked defendant if everything was okay. Defendant, who seemed "focused and determined," told him to watch his back and left. When defendant returned, he approached Joss, who was on a stationary bike, drew a silver firearm, and shot him twice.

¶ 8 The State published footage from the surveillance camera in the exercise room. The footage, which is contained in the record on appeal, shows defendant enter an exercise room, approach Joss, and discharge a firearm.

¶ 9 During cross-examination, Raya-Custodio testified that he did not see Joss shouting at defendant. He told a detective that the argument was about Joss's girlfriend, but did not recall stating the argument concerned the fact that Joss's girlfriend flirted with defendant and defendant "took advantage of that fact."

¶ 10 McCullor testified that defendant sat with her as she ate on March 2, 2016. When Joss approached the table to ask her about a video she and Joss previously watched, defendant said, "all that mother*** could do is roll his eyes." Defendant and Joss began to argue. After five minutes, Joss walked away, but defendant followed and continued the argument. McCullor told Raya-Custodio to break up the argument and he approached the men. Defendant returned to the table and looked toward Joss for five to seven minutes. Defendant was angry. McCullor asked if he was okay, but he said she could get back to work. When defendant left, she followed him and again

asked if he was okay. He answered no, but that he would be. Defendant returned five to six minutes later and did not answer when she called to him. She saw defendant say something, draw a firearm, and shoot Joss in the head.

¶ 11 During cross-examination, McCullor initially could not remember what defendant and Joss argued about. She then acknowledged telling the grand jury that defendant told Joss "why don't you say what you said then, we got witnesses," and Joss responded that defendant was a "lowlife" who "got good people fired." Both men yelled during the argument, but she characterized it as "bickering."

¶ 12 Jonathan Swanagain, who was present for the argument, testified that Joss told defendant to stay away from him and his girlfriend. Defendant followed Joss and continued the argument. Swanagain saw defendant leave and then return shortly thereafter. He then heard a pop or bang and saw defendant leave the area.

¶ 13 Building resident John Retzloff testified that he was in the gym when he saw defendant in his peripheral vision, heard gunfire, and watched Joss fall off a stationary bike.

¶ 14 The State entered a stipulation that Joss's autopsy revealed gunshot wounds to the right side of the head and chest and that he died from these wounds. The defense entered a stipulation that Joss's peripheral blood and urine tested positive for the presence of opiates, but negative for heroin.

¶ 15 Defendant testified that he moved into the building in July 2014, and the majority of his rent was paid by a CHA voucher. When a building employee revealed to other residents that defendant had a voucher, he contacted the building's management and the employee was fired. Following that incident, Joss commented about the voucher and defendant having the employee fired. In August 2014, Joss's girlfriend Gloria invited herself to defendant's apartment for a drink

and asked whether he could still engage in sexual intercourse. When he answered yes, she asked how much he would pay for sexual intercourse. Defendant stated he did not pay. Gloria said Joss was texting her and she needed to leave. After that encounter, defendant's interactions with Joss changed.

¶ 16 In April 2015, Joss and defendant were in the parking garage when Joss grabbed defendant by the collar, lifted him from his wheelchair, and threatened to kill him if he did not stop "f***" with Gloria. Joss was angry, and defendant felt helpless and scared. In May 2015, each time Joss saw defendant, he would call defendant a bum and tell him to stay away from Gloria. By June 2015, defendant began avoiding Joss. In winter 2015, defendant and Joss were in an elevator when Joss slapped defendant and tried to push him out of his wheelchair. Joss asked if defendant was still "here" and said he did not "deserve to live." Defendant was terrified. A few days before the shooting, defendant entered an elevator with Joss. Joss grabbed defendant in a "choke hold" and lifted him from the wheelchair. Joss again said defendant did not deserve to live. Because their interactions had gotten "worse," defendant believed Joss "actually" would kill him. He did not contact the police because he had a "special kind of voucher" and was trying to end his lease and "get away."

¶ 17 Around 6 p.m. on March 2, 2016, defendant was at a vending machine on the eighth floor when Joss approached and said if he caught defendant at the right time, he would kill defendant. Defendant "felt" for his life. Joss then approached the table where defendant was sitting with McCullor and told defendant to stay away from his girlfriend. Defendant told Joss to repeat what he said "[t]wo minutes ago." Although there was an argument, Joss did not threaten defendant's life. After a few minutes, Joss entered an exercise room. He then left the room twice, "screaming and hollering" at defendant. Eventually, defendant followed Joss into an exercise room to "plead"

to be left alone because he was afraid for his life. Defendant left the room, returned to the table, and then left the floor. He thought about everything he had done to escape the situation, such as emailing the CHA and building management about Joss's actions. He also thought that Joss would kill him. He then returned to the gym and shot Joss with a firearm he began carrying after Joss choked him. Defendant left the building, but later went to a police station to tell his story.

¶ 18 During cross-examination, defendant testified that once Joss knew he had a housing voucher, Joss made comments which hurt his feelings. When Gloria approached him, they had not been introduced, but he knew she was Joss's girlfriend. Defendant knew how to contact the building's management to report problems, but did not report Joss for fear of further enraging him. Although defendant liked the building, he tried to end his lease because of the "stuff" he experienced.

¶ 19 Defendant testified that when he entered the gym, he told Joss that he had nothing to do with Gloria and asked to be left alone. When Joss shooed him away, defendant "backed up." He then sat and thought about all the times that Joss threatened and assaulted him, and that he could not defend himself because he was in a wheelchair. He did not remember McCullor asking if he was alright or telling her that he "will be." He went to his floor and sat in the hallway thinking that he lived in the building, deserved to be on the eighth floor, and should not run away. When defendant approached Joss in the exercise room, Joss was on a machine and did not move toward defendant or threaten him. Defendant shot Joss in the head but did not remember how many times he fired or if he spoke. At the time of the shooting, defendant felt that Joss would kill him the next time Joss "caught" him, but not that Joss would kill him right then.

¶ 20 In rebuttal, the State presented the building's manager, Andrea Bosco, who testified that she met defendant in February 2016 during his lease renewal process. Defendant was upset that

his rent was increasing because his voucher would not cover the difference. Although defendant asked her to reduce the rent, he did not say he wanted to break his lease or leave the building.

¶ 21 In closing argument, the State posited that Joss walked away from the confrontation, but defendant left the floor, returned, drew a firearm, and shot him. The State concluded that defendant did not act in self-defense because there was no imminent threat of death or great bodily harm at the time of the shooting. Trial counsel replied that Joss bullied and assaulted a defenseless man in a wheelchair. Trial counsel agreed that this was not a case of self-defense, but argued that defendant committed second degree murder when he believed the circumstances warranted defending himself although that belief was unreasonable, or that he acted under a serious and intense provocation.

¶ 22 The court stated that a "problem" with a theory of provocation was that defendant left and then returned to the scene before shooting Joss, such that it was unclear what provocation existed immediately before the shooting. Trial counsel responded that there is no limit for the "cooling off" period and everything from August 2014 to March 2, 2016, including the choking incident a few days earlier and Joss threatening defendant's life just before the shooting, had to be considered when deciding whether a finding of second degree murder was proper.

¶ 23 The trial court noted that defendant had the burden to prove "either mitigating factor" by a preponderance of the evidence to support a finding of second degree murder. The court stated:

> "I guess my problem, again, and I'll restate the *** question. At the time of the killing, [Joss] was on the exercise bike and the defendant just wheeled in and shot him. Even if I believe the defendant's version of the facts, *** I can't see anything based on all the evidence in this case, that would justify him wheeling back into the room and shooting him."

¶ 24 Trial counsel responded that the defense was not arguing that defendant's actions were justified, but rather that a mitigating factor had been proven by a preponderance of the evidence, that is, defendant had an unreasonable belief that he had to defend himself. The court then asked whether the State had rebutted that evidence beyond a reasonable doubt. Trial counsel answered no, and asked the court to consider the events between August 2014 and March 2, 2016, and what defendant believed when he shot Joss. While defendant's fear that Joss would kill him may not have been reasonable, defendant could not defend himself, was desperate, and had "no place to seek refuge." When the trial court stated that defendant could have talked to the building's management or the police, trial counsel replied that defendant was vulnerable and did not want to further enrage Joss.

¶ 25 In rebuttal, the State argued that in order to establish second degree murder, all the elements of self-defense needed to be present and threats alone did not justify the use of deadly force. Here, according to the State, defendant was the aggressor. The trial court then asked for a response to the defense's provocation argument. The State replied that none of the legally recognized provocations were present, and even if defendant had a subjective belief of danger, Joss walked away and defendant continued to engage him. The State concluded that defendant acted out of pride when he escalated the situation rather than reporting it because a person who complained about a building employee disclosing his voucher status would certainly report a person choking him.

¶ 26 The circuit court found defendant guilty of first degree murder, noting that defendant shot Joss after their argument ended and defendant initially left the room. Therefore, "as a self[-]defense case, there was no justification for the shooting." The court added:

> "If you view it as a provocation case and you are trying to get to second degree under a provocation theory, *** once the State establishes beyond a reasonable doubt that the defendant committed the acts which caused the victim's death, the burden would shift to the defense to establish that at the time of the shooting ***, the defendant was acting under sudden and intense passion resulting from serious provocation by the victim.
>
> At the time of the shooting, the argument had ended. The defendant had left the floor and he later returned, so I can't say that at the time of the shooting, the victim had engaged in actions that could rise to sudden and intense passion, so I do not think that the defense has met their burden for second degree under a self-defense theory or under a provocation theory."

¶ 27 The defense filed a motion for new trial alleging, in pertinent part, that the court erred when it did not find defendant guilty of second degree murder based on an unreasonable belief in self-defense or provocation where defendant testified at length about the circumstances preceding the shooting, including bullying, intimidation, harassment, and physical assaults. In denying the motion, the trial court noted that defendant acknowledged that he left the floor where Joss was exercising, then returned and fired at Joss, and that those facts did not support a finding of second degree murder "under either theory."

¶ 28 At sentencing, the State argued that the trial court could consider whether defendant's actions caused serious harm through a "trickle effect" in that Joss's murder affected his mother, siblings, friends, and employees. The State presented the victim impact statements of Joss's brothers, mother, and best friend. The defense objected to the victim impact statement of the friend, but after the State argued the friend was "like a sister" to Joss, the trial court permitted it.

¶ 29 The defense called defendant's sister, who testified that he was the "protector" of his siblings and a good person who was sorry for what happened. In allocution, defendant stated that if he had to "go away for a long time" for defending himself, he had to accept it. However, he wanted Joss's family to know that he was sorry.

¶ 30 Trial counsel then argued that defendant acted under a strong provocation and there were "substantial grounds" to excuse or justify his actions although the circumstances did not establish a defense. The defense further noted defendant's minimal criminal background, age, and paralysis. The defense concluded that although the manner in which Joss treated defendant did not justify murder, Joss acted that way and defendant was confined to a wheelchair. Because defendant was 51 years old and any sentence was "essentially a life sentence," the defense asked for the minimum of 45 years in prison.

¶ 31 When imposing sentence, the court stated that it had considered the aggravating factors, including that defendant "left after an argument," retrieved a firearm, and returned to shoot Joss "point blank." While Joss said "cruel things" to defendant, "there was no justification" for defendant's conduct. In mitigation, the court noted that defendant only had one "drug conviction" from 1989, lived a law-abiding life, and was paralyzed. The court sentenced defendant to 50 years in prison, comprising 25 years for first degree murder and a 25-year sentencing enhancement because a firearm was used in the commission of the offense. The defense filed a motion to reconsider sentence alleging, in pertinent part, the court improperly considered in aggravation matters that were implicit in the offense. The court denied the motion and defendant's motion for a new trial based upon evidentiary issues.

¶ 32 On appeal, defendant first contends that he was denied a fair trial when the court failed to "fairly" consider the defense theory of unreasonable self-defense, and instead focused on self-

defense and second degree murder based on serious provocation. Defendant contends that this denial of due process is an issue of law that warrants *de novo* review.

¶ 33 The State maintains that defendant's argument on appeal is a "thinly-veiled" reasonable doubt argument "disguised" as a due process violation in order to invoke a more advantageous standard of review. The State argues that the court's decision was well-grounded in the facts adduced at trial and not against the manifest weight of the evidence. In his reply brief, defendant expressly states that he does not challenge the sufficiency of the evidence; rather, he contends that the court did not give "fair or reasonable" consideration to the imperfect self-defense theory of second degree murder.

¶ 34 A trial court must consider all matters in the record before deciding the case. *People v. Bowie*, 36 Ill. App. 3d 177, 180 (1976). Accordingly, a "trial court's failure to recall and consider testimony crucial to [a] defendant's defense [will result] in a denial of [his] due process rights." *People v. Mitchell*, 152 Ill. 2d 274, 323 (1992). "Where the record affirmatively indicates that the trial court did not remember or consider the crux of the defense when entering judgment, the defendant did not receive a fair trial." *People v. Simon*, 2011 IL App (1st) 091197, ¶ 91. Whether a defendant's due process rights have been violated is an issue of law subject to *de novo* review. *People v. Williams*, 2013 IL App (1st) 111116, ¶ 75.

¶ 35 That said, when conducting a bench trial, "the trial court is presumed to have considered only competent evidence in reaching its verdict, unless that presumption is rebutted by affirmative evidence in the record." *Simon*, 2011 IL App (1st) 091197, ¶ 91. Moreover, as the trier of fact in a bench trial, the trial court has the responsibility to weigh the evidence, resolve conflicts, and draw reasonable inferences, and the State has the benefit of all reasonable inferences. *People v. Moon*, 2019 IL App (1st) 161573, ¶ 36. When the "trial court's 'minor misstatement' of the evidence did

not affect the basis of the ruling, it does not violate due process." *People v. Williams*, 2017 IL App (1st) 150795, ¶ 39 (quoting *People v. Schuit*, 2016 IL App (1st) 150312, ¶ 107).

¶ 36 In the case at bar, as defendant concedes, the trial court discussed self-defense, second degree murder based upon serious provocation, and "second degree under a self-defense theory" when rendering judgment. However, defendant concludes that because the trial court "analyzed" self-defense and second degree murder based upon serious provocation and "expressly articulated" its reasons for rejecting those theories, but only made a "conclusory statement at the end" rejecting second degree murder based upon self-defense, the court failed to consider whether defendant subjectively believed that the use of force was justified. We disagree.

¶ 37 The trial court, as trier of fact in a bench trial, "is not required to mention everything—or, for that matter, anything—that contributed to its verdict." *People v. Curtis*, 296 Ill. App. 3d 991, 1000 (1998) (although "it may be desirable for the trial court to explain its decision," the court's choice not to comment or specifically mention certain testimony "does not permit a defendant on appeal to claim that those portions not mentioned played no role in the court's determination"). While it is true that the trial court discussed two of the defense theories in more detail than the third, this is not a case where the trial court forgot or misremembered one of the defense's arguments. To the contrary, as defendant admits, the trial court mentioned imperfect self-defense. Defendant only highlights the trial court's decision not to explain its reasons for rejecting that theory in the same detail as it did with the others.

¶ 38 During closing argument, the trial court noted its "problem" with the defense's provocation theory and questioned trial counsel and the State about provocation. The court also asked trial counsel whether the State rebutted evidence that defendant unreasonably believed that he had to defend himself and listened as counsel explained the defense's position. The fact that the court did

not spend as much time discussing imperfect self-defense when rendering judgment might reflect that its questions were answered during closing argument or that it wanted to explain its conclusion regarding its earlier "problem" with a theory of provocation. In any event, we cannot agree with defendant's conclusion that the mere fact that the court explained its rejection of certain defense theories in more detail than others affirmatively indicates that the court did not remember or consider the crux of his theory of imperfect self-defense. See *Simon*, 2011 IL App (1st) 091197, ¶ 91.

¶ 39 We are unpersuaded by defendant's reliance on *Bowie* and *Williams* for the proposition that the record in this case shows a "mistake" in the trial court's decision making process. In *Bowie*, the defendant was found guilty of, among other charges, battery and resisting a police officer following conflicting testimony from the defendant and a police officer regarding who struck the first blow. *Bowie*, 36 Ill. App. 3d at 178-79. Specifically, the defendant testified that he was beaten over the head with a police club, causing his head to bleed. *Id.* at 179. During closing argument, when trial counsel mentioned the defendant's testimony that he was injured and bleeding, the trial court stated it " 'heard nothing about * * * the defendant stating * * * that he was bleeding, strike that out.' " (Emphasis omitted). *Id*. at 180. On appeal, this court reversed and remanded, finding the record affirmatively indicated the trial court did not properly consider the crux of the defendant's defense when entering judgment and the defendant was therefore denied a fair trial. *Id*.

¶ 40 In *Williams*, where the issue at trial was identification, a swab from bloody gloves found at the crime scene revealed a mixture of DNA indicating "at least three different people had worn the gloves." *Williams*, 2013 IL App (1st) 111116, ¶¶ 4-5, 39. Although the State's expert opined that the sample matched the defendant's DNA profile, the defendant's expert opined that an

identification was impossible and "all that could be concluded was that [the] defendant could not be excluded as a possible contributor." *Id*. ¶¶ 7-8, 59. In finding the defendant guilty, the trial court stated that during cross-examination the defense expert " 'indicate[d] that certainly *** the defendant *** was one of the individuals whose DNA was on those gloves.' " *Id*. ¶ 65. On appeal, the defendant argued that he was denied due process because the trial court based its finding of guilt on a mistaken recollection of the defense expert's testimony. This court agreed and found that "the trial court's failure to recall crucial [DNA] testimony from the only defense witness was a due process violation." *Id*. ¶¶ 85-86.

¶ 41 Here, unlike in *Bowie* and *Williams*, the record does not contain "affirmative evidence" that the trial court misstated any of the evidence or misunderstood defendant's defenses. Defendant points to nothing in the record demonstrating that the court misunderstood or forgot the defense theory of imperfect self-defense; rather, he contends that the court only paid "lip service" to it. Accordingly, we find no denial of due process based on the court's statements.

¶ 42 Defendant next contends that the "only" sentencing factors the court considered in aggravation were the facts of the offense itself, that is, the same facts it considered when finding him guilty of first degree murder.[2]

¶ 43 It is normally within a trial court's discretion to impose a sentence, and there is a strong presumption that the court based its sentencing determination on proper legal reasoning. *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 8. At sentencing, the trial court may consider the nature

[2] Although defendant raised this issue in a postsentencing motion, he did not object during the sentencing hearing. See *People v. Hillier*, 237 Ill. 2d 539, 544 (2010) ("to preserve a claim of sentencing error, both a contemporaneous objection and a written postsentencing motion raising the issue are required"). Accordingly, defendant has failed to preserve this claim of sentencing error. *Id*. However, the State does not argue that defendant forfeited this claim and has therefore forfeited any forfeiture argument. *People v. Williams*, 193 Ill. 2d 306, 347-48 (2000).

and extent of each element of the offense as committed by the defendant, but it generally may not rely on a factor implicit in the offense as an aggravating factor in sentencing. *People v. Sanders*, 2016 IL App (3d) 130511, ¶ 13. In other words, a single factor cannot be used both as an element of an offense and as a basis for imposing a harsher sentence than might otherwise have been imposed. *Abdelhadi*, 2012 IL App (2d) 111053, ¶ 9. The prohibition against "double enhancements" is based on the rationale that the legislature already considered that fact when setting the range of penalties and it would therefore be improper to consider it again as a reason for a harsher sentence. *Id.*

¶ 44 A defendant has the burden to affirmatively show that his sentence was based on improper considerations. *People v. Dowding*, 388 Ill. App. 3d 936, 943 (2009). When analyzing whether a trial court relied on proper aggravating and mitigating factors in imposing sentence, the reviewing court should consider the record as a whole, rather than focusing on a few words or statements. *Id*. In those cases where a reviewing court cannot determine the weight the trial court gave to an improper factor, the cause must be remanded for resentencing. *Sanders*, 2016 IL App (3d) 130511, ¶ 13. However, remand is unnecessary if the reviewing court can determine, based upon the record, that the trial court placed insignificant weight upon the improper aggravating factor. *Id*.; see also *People v. Heider*, 231 Ill. 2d 1, 21-22 (2008) ("A sentence based on improper factors will not be affirmed unless the reviewing court can determine from the record that the weight placed on the improperly considered aggravating factor was so insignificant that it did not lead to a greater sentence."). We presume the trial court based its sentence on proper legal reasoning, and a defendant has the burden to establish the sentence was based on an improper consideration. *Dowding*, 388 Ill. App. 3d at 942-43. Whether the trial court relied upon an improper factor when

imposing a sentence is a question of law reviewed *de novo*. *Abdelhadi*, 2012 IL App (2d) 111053, ¶ 8.

¶ 45 Here, the court's comments at sentencing regarding defendant's actions were part of the court's proper discussion of the nature, circumstances, and context of the offense. See *People v. Sauseda*, 2016 IL App (1st) 140134, ¶ 15 (a trial court's commentary on the nature and circumstances of a defendant's crimes does not necessarily result in improperly using as aggravation the elements of the offense). When imposing sentence, the trial court noted that after the argument ended defendant left, then returned with a firearm and shot Joss. The court then stated that no matter what "cruel words" were used during the argument, those words did not provide justification for defendant's actions.

¶ 46 *People v. Beals*, 162 Ill. 2d 497 (1994), is instructive. In that case, the defendant was found guilty of first degree murder. At the sentencing hearing the trial court stated:

> " 'In aggravation the first guideline indicated in the statute is "whether the conduct of the defendant caused or threatened serious harm." Well, we all know that your conduct caused the ultimate harm. It caused the loss of a human life.' " *Id.* at 508-09.

The defendant argued on appeal that he was denied a fair sentencing hearing because the trial court improperly relied on the victim's death as an aggravating factor when the death of the victim was implicit in the offense of first degree murder. *Id*. at 509.

¶ 47 Our supreme court, however, disagreed because "the record suggest[ed] that the trial court statement was simply a general passing comment based upon the consequences of the defendant's actions" (*id*.), and concluded that the trial court did not consider the victim's death as an aggravating factor. The court then determined that even construing "the trial court's comment *** in the manner that the defendant suggests," it would still affirm his sentence because the record

indicated that the trial court had placed little weight on the fact that his conduct caused the victim's death and had relied on other aggravating factors. *Id*. at 509-10. The supreme court noted that in sentencing the defendant, the trial court relied on the youth of the victim, the fact that the offense was drug related, and the need to punish and deter the defendant and to protect society. *Id*. at 510. Therefore, the court rejected the argument that the cause should be remanded for resentencing. *Id*.

¶ 48 Similarly, in *People v. Brewer*, 2013 IL App (1st) 072821, the trial court noted the applicable factors in aggravation and mitigation when sentencing the defendant for first degree murder. When discussing aggravation, the trial court stated that " 'the defendant's conduct did cause or threaten serious harm, the ultimate serious harm, murder.' " *Id.* ¶ 56. The court then discussed the applicability of the other statutory aggravating factors. *Id.* On appeal, the defendant contended that the trial court erred when it emphasized a factor inherent in the offense. *Id.* ¶ 54.

¶ 49 We disagreed, finding that the record did not indicate that the trial court emphasized a factor inherent in the offense at sentencing. *Id.* ¶ 57. Rather, the fact that the defendant's "conduct threatened or caused serious harm is not a factor inherent in the crime itself but is a proper aggravating factor to be considered during sentencing even in cases where serious bodily harm is implicit in the offense." *Id.*

¶ 50 Here, likewise, the court's reference to Joss's death was within the context of discussing the result of defendant's reaction to an argument. The court's comments were a necessary part of its discussion of the nature and circumstances of the offense. See *Sauseda*, 2016 IL App (1st) 140134, ¶ 15 ("a sentencing hearing is likely the only opportunity a court has to communicate its views regarding the defendant's conduct and thus we do not agree that a trial judge's commentary on the nature and circumstances of a defendant's crimes necessarily results in improperly using elements of the offense as factors in aggravation"). Reading the transcript of the sentencing hearing

in its totality, the record indicates that the court was merely stating the degree of harm caused by defendant's conduct, which is an aggravating factor that it may consider during sentencing. *People v. Saldivar*, 113 Ill. 2d 256, 269, 271-72 (1986) (the nature and circumstances of the offense and the physical manner in which the death occurred are appropriate considerations in aggravation). Defendant has therefore failed to establish that his sentence was based on the improper consideration of a factor in aggravation (*Dowding*, 388 Ill. App. 3d at 942-43), and his claim must fail.

¶ 51 For these reasons, we affirm defendant's conviction and sentence.

¶ 52 Affirmed.