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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 08 CR 20203
)	
JAMES WILLIAMS,)	Honorable
)	John J. Moran, Jr.,
Defendant-Appellant.)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Justice Karnezis concurred with the judgment. Justice Hall dissented with the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion in imposing the maximum sentence for armed robbery; any error in imposing an enhanced sentence did not rise to the level of plain error.

¶ 2 Following a jury trial, defendant, James Williams, was convicted of armed robbery. He was sentenced to 30 years in prison plus an additional 15 years pursuant to a mandatory firearm-sentence enhancement, for a total of 45 years in prison. On appeal, defendant contends he could not legally be sentenced to an additional 15 years' imprisonment for armed robbery where the jury did not expressly find he used a gun during the offense. Defendant further contends the trial court abused its discretion in imposing the maximum sentence. For the reasons that follow, we affirm.

¶ 3 Defendant's conviction arises from the October 10, 2008, robbery of Kyle Cotsones in Chicago. At trial, Mr. Cotsones testified that, between approximately 1 a.m. and 2 a.m. on the date in question, he was on a Chicago Transit Authority (CTA) Blue Line train, heading home from

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visiting friends, when he noticed defendant riding in the same car. Defendant was with another man and a woman, later identified as Larry Jenkins and Amber Moye. Mr. Cotsones got off the Blue Line train at the Jackson Boulevard stop and walked through the pedway to transfer to a Red Line train. Defendant, Mr. Jenkins and Ms. Moye followed him and boarded the same train car. When Mr. Cotsones got off the train at Addison Avenue, he noticed defendant and his companions follow him off the train.

¶ 4 Mr. Cotsones testified he exited the station and began walking home down Addison Avenue. Defendant was on the other side of the street, walking the same direction. After Mr. Cotsones crossed the street and turned onto a side street, he looked over his shoulder and saw defendant running up behind him with a gun in his hand. Mr. Cotsones immediately stopped, took off his headphones, and raised his hands. When asked why he raised his hands, Mr. Cotsones explained he could "very clearly see a gun in [defendant's] right hand." Defendant came up behind Mr. Cotsones, told him to be quiet, said he was not going to hurt him, and that he needed to feed his family. Defendant then took Mr. Cotsones' wallet, cell phone, iPod, headphones, and book bag, which contained a calculator.

¶ 5 Defendant directed Mr. Cotsones to a space near the alley and told him to wait 45 seconds. Mr. Cotsones went toward the alley, however, instead of waiting, he jumped the fence, went to his apartment, and used a roommate's cell phone to call the police. When the police arrived a short time later, Mr. Cotsones told them what happened and gave them a description of defendant. The police left, but returned about 10 minutes later. At that time, Mr. Cotsones accompanied the police to a nearby street corner, where he identified defendant as the man who robbed him. In court, Mr. Cotsones identified a gun as "the gun [defendant] had in his hand when he robbed me."

¶ 6 Ms. Moye testified that on the evening of October 9, 2008, defendant was at the house she shared with Mr. Jenkins. Defendant, who had a gun, said he wanted to rob someone on the train, so the group took a bus to the CTA Green Line train and then the Blue Line train. According to Ms.

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Moye, defendant had a gun with him when he left the house, when he was on the bus, and when he was on the Green Line train. On the Blue Line train, defendant drew Ms. Moye's attention to a man wearing headphones. Defendant stated he wanted the headphones and was going to get them. When the man with the headphones switched from the Blue Line train to the Red Line train, defendant, Ms. Moye, and Mr. Jenkins followed him. The group followed the man off the train, but only defendant followed the man as he turned down the side street.

¶ 7 Ms. Moye lost sight of defendant and the man with the headphones while they were on the side street. After approximately one minute, defendant came back around the corner with a bag and the man's headphones. At that point, Ms. Moye, defendant, and Mr. Jenkins got back on the Red Line train, which they took to the Belmont Avenue stop. There, Ms. Moye saw a police officer coming up the stairs. Defendant ran and the officer chased him. Ms. Moye and Mr. Jenkins left the scene, but were stopped by police shortly thereafter.

¶ 8 Chicago police Sergeant Evangelos Hitiris testified that, in response to a call of an armed robbery, at approximately 2:45 a.m. on October 10, 2008, he went to the CTA elevated Belmont Avenue stop. As he started up the stairs to the train platform, he saw two men and a woman fitting the description of the offenders described in the call. Sergeant Hitiris made eye contact with one of the men, later identified as defendant, at which point defendant ran. As Sergeant Hitiris pursued defendant, he saw defendant clutching at his side. Thinking defendant was reaching for a weapon, Sergeant Hitiris took his gun out of its holster and yelled for defendant to freeze. Defendant continued to run, with Sergeant Hitiris following. A few seconds later, at the opening of an alley, Sergeant Hitiris saw defendant throw a gun to the ground. Defendant ran down the alley. Because of the number of people in the area, Sergeant Hitiris stayed with the gun until another officer arrived at the scene, less than one minute later. After directing the other officer to stay with the gun, Sergeant Hitiris continued his pursuit. He saw other officers apprehend defendant and recover a pair of headphones and a calculator from him. Sergeant Hitiris went back to the alley and recovered the

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gun, which was loaded. He identified the gun in court.

¶ 9 Following instructions and argument, the jury returned a general verdict, finding defendant guilty of armed robbery. The trial court entered judgment on the verdict.

¶ 10 At sentencing, defense counsel argued for mitigation based on defendant's age—27—and the fact he is a father of four children. Counsel argued defendant was abused as a child and placed in the services of the Illinois Department of Children and Family Services (DCFS), but noted defendant's father was, nevertheless, present in court to provide what support he could. Counsel noted defendant's lack of violent criminal history and observed defendant did not commit any violence against Mr. Cotsones. Defense counsel asked the court to impose the minimum sentence of six years' imprisonment. Defendant personally requested the trial court not view him as a bad person because of his "history with DCFS or mental health."

¶ 11 The presentence investigation report revealed defendant's criminal record, which consisted of: a 2000 conviction for possession of a narcotic substance for which he received a three-year sentence; a 2000 conviction for possession of a stolen motor vehicle for which he received probation; a 2001 conviction for receiving a stolen motor vehicle for which he received a four-year sentence; a 2003 conviction for burglary for which he received a six-year sentence; a 2007 bond-forfeiture warrant finding for which he received a one-year sentence; a 2007 conviction for resisting a peace officer for which he received a 15-day sentence; and a 2008 bond-forfeiture warrant finding. In aggravation, the State argued defendant had a lengthy criminal history that had escalated. The State reviewed the facts of the case and stated defendant was "terrorizing" people on public transportation and highlighted defendant's use of a gun and flight from the police. The State asked for the maximum sentence.

¶ 12 The trial court sentenced defendant to 30 years' imprisonment with an additional 15-year add-on sentence based on the armed robbery having been committed while defendant was armed with a firearm.

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¶ 13 On appeal, defendant's first contention is that legally, he could not be sentenced to an additional 15 years' imprisonment for armed robbery because the jury signed a general verdict form and did not make a factual finding that he used a "firearm," as opposed to a "dangerous weapon," during the offense. He argues the imposition of the additional 15 years' imprisonment violates the principle articulated in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Defendant also argues that, any fact other than a prior conviction that elevates the range of a defendant's punishment beyond the maximum that could otherwise be imposed, must be proven to the trier of fact beyond a reasonable doubt. See 725 ILCS 5/111-3(c-5) (West 2008).

¶ 14 As an initial matter, we note the State's argument that because defendant did not object at the sentencing hearing or tender an alternative verdict form, his *Apprendi* challenge is forfeited. See *People v. Parker*, 223 Ill. 2d 494, 508 (2006). The State also asserts the argument may not be reached via plain-error analysis, as no error occurred. See *People v. Nitz*, 219 Ill. 2d 400, 416 (2006).

¶ 15 We disagree with the State that no error occurred in this case. In Illinois, armed robbery may be committed with either a dangerous weapon or a firearm. 720 ILCS 5/18-2(a)(1), (2) (West 2008). When it is committed with a firearm, 15 years is added to the term of imprisonment imposed by the trial court. 720 ILCS 5/18-2(a)(2), (b) (West 2008). The law requires, a fact that increases the penalty for an offense beyond the statutory maximum, must be submitted to the trier of fact and proved beyond a reasonable doubt. *Apprendi*, 530 U.S. at 476; 725 ILCS 5/111-3(c-5) (West 2008). In the instant case, the jury was given two instructions that touched upon the elements of armed robbery. First, the jury was given the following instruction, based on Illinois Pattern Jury Instructions, Criminal, No. 14.05 (4th ed. 2000):

"A person commits the offense of armed robbery when he, while carrying on or about his person, or while otherwise armed with a firearm, knowingly takes property from the person or presence of another by the use of force or by threatening

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the imminent use of force."

Based on Illinois Pattern Jury Instructions, Criminal, No. 14.05 (4th ed. 2000), the jury was instructed:

"To sustain the charge of armed robbery, the State must prove the following proposition:

First: That the defendant knowingly took property from the person or presence of Kyle Cotsones; and

Second: That the defendant did so by the use of force or by threatening the imminent use of force; and

Third: That the defendant carried on or about his person a dangerous weapon or was otherwise armed with a firearm weapon at the time of the taking."

Finally, the jury was given a general verdict form, allowing it to find defendant guilty of armed robbery, but not specifying whether the crime was committed while armed with a firearm.

¶ 16 The instructions provided to the jury did not specifically submit to it the issue of whether defendant was armed with a firearm. In order to ensure compliance with *Apprendi*, the State could have submitted a special interrogatory to obtain a sentence enhancement. See *People v. Reed*, 396 Ill. App. 3d 636, 645 (2009); *People v. Jackson*, 372 Ill. App. 3d 605, 610 (2007) (noting several cases have used special interrogatories to comply with *Apprendi*). The State did not submit such an interrogatory to the jury. Accordingly, in light of the issues instruction which mentioned a "dangerous weapon," we cannot say, unequivocally, the jury made a finding, beyond a reasonable doubt, defendant used a firearm during the armed robbery.

¶ 17 Nevertheless, we find the error does not rise to the level of plain error. In general, two categories of plain error exist: prejudicial errors, which may have affected the outcome in a closely balanced case; and presumptively prejudicial errors, which must be remedied although they may not have affected the outcome. *Nitz*, 219 Ill. 2d at 415 (citing *People v. Herron*, 215 Ill. 2d 167, 185

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(2005)). However, an *Apprendi* violation is not a presumptively prejudicial error that must be remedied regardless of its effect on a trial's outcome. *Id* at 415. Thus, the second prong of plain-error analysis is inapplicable in this case, and defendant must prove the evidence was closely balanced. *Id.* at 415-16.

¶ 18 Here, there was no suggestion defendant was armed with anything other than a gun. The indictment charged defendant with robbing Mr. Cotsones while armed with a firearm. At trial, Mr. Cotsones testified clearly and credibly that defendant used a gun during the robbery. Not only did he state he could "very clearly see a gun in [defendant's] right hand," but he also identified a gun in court as "the gun [defendant] had in his hand when he robbed me." Additionally, Sergeant Hitiris saw defendant throw a gun to the ground and recovered it. Defendant's suggestions that he may not have had a gun at the time of the robbery, but simply obtained one from Ms. Moye or Mr. Jenkins between the time of the robbery and his arrest, are purely speculative. The uncontradicted evidence in this case indicates defendant was armed with a firearm at the time he robbed Mr. Cotsones. Defendant cannot meet his burden of proof that the evidence was closely balanced as to this issue. Thus, the error in not submitting the enhancement issue to the jury is not plain error.

¶ 19 Defendant's second contention on appeal is the trial court abused its discretion in imposing the maximum sentence. He argues the trial court considered an improper factor in aggravation, namely, he used a gun during the commission of the armed robbery. Defendant argues, since this fact was an element of the offense itself, it should not have been considered as a factor in aggravation. Defendant further argues he should not have received the maximum sentence because he had no violent prior offenses and there was no evidence he actually would have used the weapon he was holding to hurt Mr. Cotsones.

¶ 20 Sentencing decisions are entitled to great deference on appeal because the trial court is in a superior position to fashion an appropriate sentence based on firsthand consideration of relevant sentencing factors, including the defendant's credibility, demeanor, moral character, mentality, social

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environment, habits, and age. *People v. Fern*, 189 Ill. 2d 48, 53 (1999). We will not disturb a sentencing determination absent an abuse of discretion. *People v. Hauschild*, 226 Ill. 2d 63, 90 (2007). Sentences within the permissible statutory range may be deemed the result of an abuse of discretion only where they are "greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *People v. Stacey*, 193 Ill. 2d 203, 210 (2000).

¶ 21 Defendant is correct that, in general, a sentencing court may not consider a factor that is implicit in an offense as an aggravating factor. *People v. Shick*, 318 Ill. App. 3d 899, 909 (2001). Thus, for example, a court may not consider the fact that a defendant was armed with a dangerous weapon as a factor in aggravation of an armed robbery which may only be committed with a dangerous weapon. *Id.* However, a trial court may properly consider the degree of harm threatened by an armed robbery. *Id.* Here, in the course of reviewing all the sentencing factors, the trial court stated: "the facts of this case obviously are aggravated by their very nature, sticking a gun on a person and taking their property at night." In our view, by making this statement, the trial court was considering the degree of harm threatened during the offense. Accordingly, we reject defendant's argument that the court improperly considered defendant's use of a gun as a factor in aggravation.

¶ 22 We have reviewed the record and find the trial court was well aware of the sentencing factors identified by defendant, as well as the other sentencing factors relevant in this case. In the course of pronouncing sentence, the trial court stated it had considered the nature, circumstances, and seriousness of the offense—the presentence investigation report; counsels' arguments; and defendant's statement. The trial court noted it had considered the statutory factors in aggravation and mitigation, including but not limited to: defendant's history, age, and character; his rehabilitative potential; and the need to protect society and deter defendant and others. The trial court observed defendant already had been convicted of felonies on five prior occasions; noted the robbery was planned and calculated; stated defendant stalked his victim like prey; and concluded defendant had numerous

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opportunities where he could have reconsidered what he planned to do, but did not. Given the trial court's thorough attention to the relevant sentencing factors, we cannot find an abuse of discretion. Defendant's argument that his sentence is excessive fails.

¶ 23 For the reasons explained above, we affirm the judgment of the circuit court of Cook County.

¶ 24 Affirmed.

¶ 25 JUSTICE HALL dissenting:

¶ 26 I respectfully dissent. I believe the trial court erred under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), when it imposed an enhanced term of 15 years' imprisonment based on defendant's use of a firearm during the commission of the armed robbery where the use of a firearm was an element of the offense that was not found beyond a reasonable doubt by the jury. The trial court then compounded the error when it considered defendant's conduct as an aggravating factor in sentencing him to an enhanced sentence for the armed robbery.

¶ 27 Armed robbery by definition pertains to conduct involving the use or threat of force. *People v. Carmack*, 103 Ill. App. 3d 1027, 1037 (1982). However, it does not necessarily follow that a threat of serious harm is always involved in an armed robbery. *Id.* "The amount of harm sustained by a victim in a given situation varies from case to case. It is not a constant but one of degree. Its consideration depends not on the classification of the offense but the peculiar conduct of the actor, which is an ever-changing variable." *People v. Lampton*, 108 Ill. App. 3d 41, 47 (1982).

¶ 28 In order for an aggravating factor to be properly applied in sentencing, the risk or threat of harm posed by the perpetrator must be greater than that inherent in most offenses of the type under consideration. *People v. Allen*, 97 Ill. App. 3d 38, 40 (1981). In this case, I do not believe that defendant's conduct in robbing Mr. Cotsones was sufficiently threatening to warrant consideration as an aggravating factor in enhancing his sentence for armed robbery.

¶ 29 Mr. Cotsones testified that he put his hands in the air when he saw defendant coming toward him with a gun in his hand. According to Mr. Cotsones, defendant told him to be quiet and that he

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was not going to hurt him and that he just needed to feed his family. Defendant did nothing to indicate that he intended to use the firearm. After defendant finished robbing Mr. Cotsones, he told him to walk into a nearby alley and wait 45 seconds.

¶ 30 Defendant's conduct was unlike the conduct of defendants in other cases where the trial court determined that serious harm was threatened. See *People v. Griffin*, 117 Ill. App. 3d 177, 185 (1983) (firearm pointed at victim, who after relinquishing portion of money, was grabbed by the arm and directed to give up more money); *Carmack*, 103 Ill. App. 3d at 1037 (firearm stuck in victim's back while being threatened with death).

¶ 31 I would vacate defendant's sentence and remand the cause to the trial court for a new sentencing hearing.