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2012 IL App (3d) 100791-U

Order filed October 23, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 14 th Judicial Circuit,
Plaintiff-Appellee,)	Rock Island County, Illinois,
)	
v.)	Appeal No. 3-10-0791
)	Circuit No. 09-CF-428
)	
TORRIE T. ROBERTS,)	Honorable
)	Walter Braud,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justices Holdridge and Carter specially concurred.

ORDER

¶ 1 *Held:* The evidence showed that the defendant committed the three acts of aggravated battery as alleged in the State's petition to revoke his probation and thus, the trial court's finding that the defendant violated his probation was not against the manifest weight of the evidence. However, because the court improperly considered the defendant's conduct underlying his probation violation and also discussed the improper factor of the defendant's race when it sentenced him, we remand the cause for a new sentencing hearing.

¶ 2 Pursuant to a plea agreement, the trial court sentenced Torrie Roberts, the defendant, to a 30-month term of probation. The State subsequently filed an amended petition to revoke the

defendant's probation, alleging that he committed three acts of aggravated battery. The trial court found that the defendant violated his probation and sentenced him to a 12-year term of imprisonment. The defendant appeals, contending that the trial court: (1) erred when it revoked his probation because the evidence was insufficient to show that the defendant cut the victim with a knife; and (2) abused its discretion when it imposed the instant 12-year term of imprisonment by improperly considering (a) the defendant's race and (b) the conduct underlying the probation revocation rather than the original offense. We affirm the court's finding that the defendant violated his probation, but remand the cause for a new sentencing hearing.

¶ 3

FACTS

¶ 4 On July 24, 2009, the defendant pled guilty to one count of unlawful possession with the intent to deliver a controlled substance (720 ILCS 570/401(c)(2) (West 2008)). In exchange for his guilty plea, the court imposed a 30-month term of probation. The court also ordered the defendant to undergo a drug and alcohol evaluation and to follow any recommendations.

¶ 5 Thereafter, on February 17, 2010, the State filed an amended petition to revoke the defendant's probation, alleging that the defendant committed three acts of aggravated battery. The State specifically alleged that the defendant: (1) hit Mario Veasey, Sr. (Mario Sr.), in the banquet hall of the Holiday Inn, a place of public accommodation; (2) hit Mario Veasey, Jr. (Mario Jr.), over the head with a bottle while at the same location; and (3) used a knife to cut Mario Jr. around the neck. 720 ILCS 5/12-4(b)(1), (8) (West 2008).

¶ 6 The court conducted a hearing on the State's petition. Mario Sr. testified that he was at the Holiday Inn in downtown Rock Island on February 14, 2010, for a party with members of his extended family, including the defendant. On that night, Mario Sr. engaged in a verbal

altercation with the defendant because Mario Sr. had heard that the defendant "had choked his girl out." During the verbal altercation, around approximately 11 p.m., some of the defendant's close family members approached the two men and, according to Mario Sr., began cursing at him. At some point, Tobias Mayfield, the defendant's brother, threw the first punch and then "[e]veryone started fighting." Another person named Dontay began throwing bottles around the room.

¶ 7 Mario Sr. and his brother attempted to break up the fight and partially succeeded. At that time, however, Mario Sr. saw that the defendant had his son, Mario Jr., "choked out on the ground." Mario Sr. ran over to them, pulled the defendant off of Mario Jr., and the defendant fled from that area. Before he pulled the defendant off of Mario Jr., the defendant had his hands around Mario Jr.'s neck, but Mario Sr. did not notice if Mario Jr. was cut or bleeding at that time. Thereafter, Jasper Mayfield, another of the defendant's brothers, attempted to completely remove the defendant from the physical altercation. Before Jasper succeeded at doing so, the defendant struck Mario Sr. in the face two times.

¶ 8 After the defendant struck him, Mario Sr. went to the parking lot to look for Mario Jr. At some point, the defendant also came into the parking lot and "ran up" to Mario Sr., but Mario Sr. hit the defendant before the defendant could say or do anything to him. Approximately 20 minutes after Mario Sr. entered the parking lot, he heard someone screaming his name so he went back inside the Holiday Inn. After Mario Sr. went upstairs, he saw that Mario Jr. was bleeding from his neck. Mario Sr. did not see how Mario Jr. got cut, but believed that it may have been from broken glass.

¶ 9 Mario Jr. testified that he was currently 18 years old and a senior in high school. On the

night of the incident, he saw the defendant punch his father in the face, so he walked over to the men to ascertain the problem. At that time, Tobias punched Mario Jr. in the back of the head and then ran over to the defendant. Mario Jr. followed, and the defendant started punching Mario Jr. Mario Jr. did not "remember really" what happened next, but he and the defendant were "fighting for awhile[.]"

¶ 10 Mario Jr. physically fought with the defendant for a "good amount of time," that evening, but acknowledged that other people were stepping in to fight with him too. During their fight, the defendant "had [Mario Jr.] by the neck[.]" and Mario Sr. removed the defendant from Mario Jr. Mario Jr. acknowledged that he did not see the defendant at that point, but his father "reassured" him that it was the defendant who had physically assaulted him.

¶ 11 At another point during their physical altercation, the defendant tackled Mario Jr. to the ground, was behind Mario Jr., and "had [him] choked up, like around [his] neck," so Mario Jr.'s uncle Kenneth Keith pulled the defendant off of Mario Jr. Mario Jr. then "got up, and [he] noticed [he] was bleeding a lot from his neck[.]" so he looked behind him to see the person who Kenneth "ripped off of [him]," and it was the defendant. Mario Jr. did not see a knife in the defendant's hands; however, between the time Kenneth pulled the defendant from him and when Mario Jr. noticed he was bleeding, no one but the defendant touched his neck. Someone also hit Mario Jr. over the head with a bottle, which caused a cut on his forehead, but he believed this injury occurred before the defendant cut his neck. He could not recall if it was the defendant who hit him on the head with a bottle.

¶ 12 Saresa Keith testified that she was Mario Sr.'s sister and Mario Jr.'s aunt. According to her, on the night of the incident, she saw the defendant and one of his brothers "attacking" Mario

Jr. At that time, Thomas Veasey grabbed the defendant and attempted to calm him. She then approached the defendant, who told Saresa that he was leaving. However, Tobias swung a chair at Mario Jr., and the defendant reentered the room, at which point "they start[ed] all fighting again." Thomas and Mario Sr. tried to stop the fight, and they ultimately were able to push the others away from Mario Jr.

¶ 13 Nonetheless, the defendant "followed [Mario Jr.] the whole night, constantly hitting [him,]" and at some point, the defendant "attacked [Mario Jr.] again." Mario Jr. was on the ground with "six dudes surrounding him[,]" during which time the defendant was behind Mario Jr. and had grabbed Mario Jr. by the neck. Saresa attempted to grab the defendant but Kenneth, her husband, ultimately pushed the defendant off of Mario Jr.

¶ 14 As Mario Jr. stood up, Saresa saw that he was bleeding from his neck. According to her, "no time at all" passed between the time the defendant's hand left Mario Jr.'s neck to the time she saw Mario Jr. bleeding. She acknowledged, however, that she never saw anything in the defendant's hands after Kenneth pulled the defendant off of Mario Jr. She confirmed that Mario Sr. appeared on the scene sometime after Mario Jr. had been cut.

¶ 15 Prior to receiving the cut to his neck, Saresa noticed that Mario Jr. had also been cut on his forehead and there was blood coming from this area. Also, after Mario Jr.'s neck had been cut, he was walking to the kitchen with a tablecloth around his neck, and Saresa saw the defendant run up to Mario Jr. and hit him over the head with a bottle.

¶ 16 Rock Island police officer Craig Smith testified that he took the defendant's clothes from him after the incident. According to Smith, there was some suspected blood on the defendant's jeans, but there were no confirmatory tests performed on the jeans. There was also some

apparent blood on the defendant's white t-shirt, with blood specifically "all over the back and both shoulders[,] " with the majority of the blood on the right side of the shirt. No confirmatory tests were performed on the defendant's t-shirt. Smith noticed that the defendant was bleeding from his ear, but he could not recall if the blood was coming from the defendant's right or left ear. At the time Smith saw the defendant, the blood was dried and was on his neck and shoulder.

¶ 17 Jasper Mayfield, the defendant's brother, testified on the defendant's behalf. According to Jasper, the defendant was not involved in an incident with Mario Sr. at the Holiday Inn on the night in question. Rather, the defendant engaged in an altercation with his girlfriend, and thus, other people at the party were "trying to get in the [defendant's] business[.]" Jasper told these people to back away from the defendant, but they kept coming towards him, so he "guess[ed] it looked like an altercation[.]" and, ultimately, "the whole thing *** broke out." Jasper was able to remove the defendant from the building, but when he returned to the building, there was commotion and people began throwing bottles. Jasper saw many people were fighting, but he did not see either the defendant or Mario Sr. fighting.

¶ 18 The court found that the State had proven all three allegations in its amended petition to revoke. The court specifically found that the defendant struck Mario Sr. two times, that the defendant fought with Mario Jr., had grabbed Mario Jr. from behind and cut him across the neck, and that the defendant hit Mario Jr. on the head with a bottle after he cut him. In reaching this conclusion, the court made the following findings. Mario Sr. and Saresa were credible. The count involving the knife was more problematic than the others, but when it considered the circumstantial evidence in conjunction with the rest of the evidence, it believed that the State proved that the defendant committed that offense. The court also noted the testimony indicating

blood coming from Mario Jr.'s neck immediately after Kenneth removed the defendant from Mario Jr. The defendant was in a position to deliver the Mario Jr.'s wound, which it saw in court and which was consistent with the testimony of the witnesses as to the positions of the defendant and Mario Jr. Also, the blood on the defendant's clothing was likely Mario Jr.'s blood due to the volume of it.

¶ 19 In preparation for the sentencing hearing, the State filed a Pre-Sentence Investigation report (PSI). This report indicated that the defendant was 27-years-old and had a prior criminal history, including juvenile convictions for battery and cruelty to animals, and adult convictions for theft, assault, assault of a peace officer, possession of cannabis, and the underlying conviction for possession of a controlled substance with the intent to deliver. The defendant reported that he had worked for the past 15 years remodeling his grandfather's houses, but the author of the PSI was unable to verify this information. The defendant consumed a six-pack of beer every two days and a "dime bag" of marijuana every day, but also reported that he had not consumed illegal drugs in the last eight or nine months. The defendant did not believe that he had a drug or alcohol problem, and he did not want drug or alcohol treatment.

¶ 20 At the outset of the sentencing hearing, the State indicated that the charges alleged in the amended petition to revoke would be dismissed because the witnesses no longer wanted to testify. Neither the State nor the defendant presented formal evidence, but the defendant offered an allocutory statement where he apologized for his actions. The State asserted that the court should impose a 10 to 15 year term of imprisonment, the maximum possible for the original offense. The defendant, on the other hand, agreed that he was to be sentenced for the offense of unlawful possession with the intent to deliver, but argued that the court should impose

conditional discharge and order drug and alcohol treatment.

¶ 21 Before the court pronounced its sentencing determination, it made the following findings. Only seven months had passed between the defendant's conviction on the original offense and the revocation conduct. As part of the defendant's probation, the court had ordered him to undergo a drug and alcohol evaluation and follow the recommendations, but the defendant had not done so, nor did he want to seek help for these issues.

¶ 22 The court continued by stating that "if you had read in the paper that a man attacked another man at a party and he stabbed him in such a way that it is pretty close to a miracle that that person is living," and the court subsequently sentenced the offender to a term of imprisonment:

"everybody would say, boy, that judge did the right thing, that's what ought to happen, we can't have these kinds of disturbances at the Holiday Inn. People [would] be afraid to come there. ***. Then they find out adding to the story that all the people were black people. Now, does that change the story?

Unfortunately, it does, because people who already have a bad idea about black people whether they should have such a bad idea or not many people have bad ideas about it and they would say, my God, we can't go to the Holiday Inn in Rock Island, those people are going to be there. They stab people there."

¶ 23 The court expressly considered its duty to protect the public, which meant that it had to protect the public to keep it "safe from [the defendant, and also] safe from the idea that certain places in our community are not safe." The court believed that the public "would be very upset if they found out that somebody could stab somebody and have a brawl, tear up the place, scare

people to death, ruin the reputation of – of the public, of the Holiday Inn, and downtown Rock Island, altogether cast a terrible image on citizens, particularly African-American citizens, and the Judge said it's ok. It would be awful." The court believed that the public should be able to go to downtown Rock Island and have a nice affair.

¶ 24 The court also found the defendant had a prior criminal history, including the conviction of a Class 1 felony when he pled guilty to possession with intent to deliver. This conviction was a serious conviction, and the defendant was given a chance with a sentence of probation. The defendant would not be able to repay for the damage he did to the community, or to Mario Jr., as Mario Jr. had a scar that would never go away and had almost died. Thus, the defendant exhibited such a character that he would commit future offenses because he responded to a perceived threat of violence with violence, and therefore, a sentence of imprisonment was necessary to deter others from committing the same offense.

¶ 25 The court did not understand why the defendant would "use a knife" or "hit somebody over the head with a bottle." The court believed that "at a family meeting where it should be love and kisses and sugar and cookies it turn[ed] into this [incident]." The court could not excuse the defendant's actions, and imposed a 12-year term of imprisonment. After admonishing the defendant about his appellate rights, the court stated "one more thing for the record in case this record [arose] somewhere. [Its] references to race, that is to the African-American nature of the defendant and the people at the party, the judge is African-American."

¶ 26 The defendant filed a motion to reconsider his sentence, asserting, among other things, that the court sentenced him for the revocation conduct and not the original offense. After a hearing, the court denied this motion, finding that it "did the best [it] could to make the right

decision." The defendant appealed.

¶ 27

ANALYSIS

¶ 28 (A) Probation Revocation

¶ 29 The defendant first contends that the trial court erred when it found that he violated his probation because the State's evidence was insufficient to show that the defendant cut Mario Jr. with a knife. The State contends that overall, the evidence indicated that the defendant committed the three acts of aggravated battery as alleged in its amended petition to revoke.

¶ 30 The State must prove that a defendant violated his probation by a preponderance of the evidence. 730 ILCS 5/5-6-4(c) (West 2008). A preponderance of the evidence essentially means that a proposition is more probably true than not. *People v. Love*, 404 Ill. App. 3d 784 (2010). As the trier of fact in a probation revocation proceeding, it is the duty of the trial court to weigh the evidence, assess the credibility of the witnesses, and draw reasonable inferences from the testimony presented. *People v. Williams*, 303 Ill. App. 3d 264 (1999). A reviewing court gives great deference to the trial court's factual findings and credibility determinations. *People v. Galarza*, 391 Ill. App. 3d 805 (2009). "In a case based on circumstantial evidence, each link in the chain of circumstances does not need to be proved by a preponderance of the evidence if all the evidence considered collectively satisfies the trier of fact by a preponderance of the evidence that the defendant is guilty." *Love*, 404 Ill. App. 3d at 788.

¶ 31 A reviewing court will reverse the court's judgment revoking a defendant's probation only if the judgment is against the manifest weight of the evidence. *People v. Colon*, 225 Ill. 2d 125 (2007). A trial court's decision is against the manifest weight of the evidence when the opposite conclusion is readily apparent, or when the judgment is arbitrary, unreasonable, or not based on

the evidence. *People v. Urdiales*, 225 Ill 2d 125 (2007). We may not reverse the judgment merely because we might have reached a different conclusion, and "[t]hus, even where the State's evidence is slight, we must affirm the revocation of a defendant's probation as long as the opposite conclusion is not clearly evident." *Love*, 404 Ill. App. 3d at 787.

¶ 32 Here, the defendant does not challenge the trial court's finding that the State proved the first two allegations in its amended petition—specifically that the defendant violated his probation by committing aggravated battery in that he hit Mario Sr. in the face and Mario Jr. over the head with a bottle while at the Holiday Inn. Thus, we make no comment on these offenses.

¶ 33 Rather, the defendant asserts that the State did not sufficiently prove that he committed aggravated battery by cutting Mario Jr.'s neck with a knife. The defendant asserts that no one saw him with a knife, and that it is "possible" that Mario Jr.'s injury occurred accidentally due to the broken glass in the room. Pursuant to section 12-4(b)(1) of the Criminal Code (720 ILCS 5/12-4(b)(1) (West 2008)), a defendant commits aggravated battery if he batters a person using a weapon other than a firearm.

¶ 34 We conclude that the State proved by a preponderance of the evidence that the defendant committed this act of aggravated battery. The record indicates that Mario Jr. and Saresa testified that the defendant attacked Mario Jr. from behind and had his hands on Mario Jr.'s neck. As soon as Kenneth removed the defendant from Mario Jr.'s person, Mario Jr. began bleeding from the neck. Although the police did not perform confirmatory tests on the defendant's clothing, the court found that the blood on the defendant's clothing was Mario Jr.'s due to the quantity of it. Our review of the record does not indicate that these findings are against the manifest weight of the evidence. Thus, while we acknowledge that no one saw the defendant with a knife or

recovered a knife from the scene, the most logical explanation for the cut and the immediate blood flow from Mario Jr.'s neck is that the defendant cut him while the defendant had his hands and arms near Mario Jr.'s neck as the two were fighting.

¶ 35 In so concluding, we note the defendant's contention that it is "possible" that Mario Jr. sustained his cut accidentally. However, in this case, the trial court did not so find. It is the duty of the trial court to assess the testimony of the witnesses and to draw reasonable inferences therefrom. We do note that, although the police confiscated the defendant's pants and shirt, the blood on them was never tested. The trial court inferred that the blood was "probably" Mario Jr.'s, but there are no facts supporting that assumption. Nonetheless, the court's finding that Mario Jr. sustained his cut at the hands of the defendant is generally supported by some evidence and on appeal, we may not reverse the trial court's judgment merely because we may have reached a different result. Overall, the direct and circumstantial evidence is not so arbitrary or unreasonable that it does not support the trial court's finding concerning this offense. Consequently, the trial court's finding that the defendant violated his probation by committing this act was not against the manifest weight of the evidence.

¶ 36 Additionally, the defendant has cited no authority for the proposition that a State must prove each count of a petition to revoke a defendant's probation before a court may properly find the defendant in violation of his probation. In fact, in his appellate brief, the defendant expressly acknowledges that the court may have found the defendant in violation of his probation even if it did not find that the State proved this count. Thus, even if we agreed that the preponderance of the evidence did not support the trial court's finding concerning the allegation involving the knife, we nonetheless believe that the trial court properly revoked the defendant's probation based

on the State's proof of the remaining counts. Furthermore, because we have concluded that the preponderance of the evidence indicated that the defendant committed the act of aggravated battery involving the knife, we decline the defendant's suggestion to remand the cause for a new sentencing hearing on the basis that the State's evidence did not sufficiently prove this count.

¶ 37 (B) Sentencing

¶ 38 On appeal, the defendant next contends that the court considered the improper factors of his race and the revocation conduct when it imposed the instant 12-year term of imprisonment. The State, on the other hand, contends that the trial court properly sentenced the defendant, and only made references to his race to lecture the defendant about the detrimental effect of his actions on the African-American community.

¶ 39 The trial court's sentencing decision is entitled to great deference because the court is in a better position than the reviewing court to determine appropriate sentences (*People v. Stacey*, 193 Ill. 2d 203 (2000)) and to balance the need to protect society with the rehabilitation of the defendant (*People v. Spencer*, 303 Ill. App. 3d 861 (1999)). The sentencing judge has the opportunity to weigh the defendant's credibility, his demeanor and general character, and his mentality, social environment, habits, and age. *People v. Streit*, 142 Ill. 2d 13 (1991); *People v. Perruquet*, 68 Ill. 2d 149 (1977). Consequently, the trial court's sentencing determination will not be reversed absent an abuse of discretion. *Streit*, 142 Ill. 2d 13. A sentence that falls within the statutory range is not an abuse of discretion unless it 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 203. Here, the offense of unlawful possession of a controlled substance with the intent to deliver is a Class 1 felony that is punishable by a term of imprisonment ranging from 4 to 15

years, or a term of probation or conditional discharge. 720 ILCS 570/401(c) (West 2008); 730 ILCS 5/5-4.5-30(a), (d) (West 2008).

¶ 40 This court has previously noted that a trial court's consideration of an improper aggravating factor is an abuse of discretion, as doing so affects a defendant's fundamental right to liberty. *People v. McAfee*, 332 Ill. App. 3d 1091 (2002). Thus, a defendant is entitled to a new sentencing hearing if the trial court relies on an improper factor in fashioning that defendant's sentence. *People v. Clemons*, 175 Ill. App. 3d 7 (1988).

¶ 41 (I) Forfeiture

¶ 42 Here, the defendant did not object at the sentencing hearing to the trial court's alleged error of considering the defendant's race when it sentenced him, nor did he object to the trial court's comments allegedly indicating that it was sentencing him for the revocation conduct and not the original offense. The defendant filed a motion to reconsider his sentence, and raised the latter claim. However, to properly preserve an issue for appellate review, a defendant must object to the alleged error at trial and file a posttrial motion raising the issue. *People v. Allen*, 222 Ill. 2d 340 (2006). Thus, because the defendant did not object to either of the alleged errors at the sentencing hearing, these claims are forfeited. Consequently, we may only reach these issues by relaxing the traditional rule of forfeiture (see *People v. Wardell*, 230 Ill. App. 3d 1093 (1992)) or under the plain error doctrine (see *People v. Walker*, 232 Ill. 2d 133 (2009)).

¶ 43 (ii) Whether the court improperly sentenced the defendant for the revocation conduct rather than the original offense

¶ 44 On appeal, the defendant does not acknowledge that this contention is forfeited, nor does he assert that the court's consideration of the revocation conduct was plain error. Rather, the

defendant only notes that at the sentencing hearing, defense counsel "reminded the court that it was not the violating conduct, but rather the violation on the possession with intent to deliver that brought [the defendant] before the court." Thus, we may not consider whether the trial court's consideration of the revocation conduct was plain error. See *People v. Nieves*, 192 Ill. 2d 487, 503 (2000) (If the defendant "neither argues that the evidence was closely balanced nor explains why the error is so severe that it must be remedied to preserve the integrity of the judicial process," his plain error argument is forfeited).

¶ 45 Notwithstanding our inability to review this matter for plain error, we note that "the fundamental importance of a fair trial and the practical difficulties involved in objecting to the trial court's conduct compel a less rigid application of the waiver rule." *People v. Taylor*, 357 Ill. App. 3d 642 (2005); see also *People v. Nevitt*, 135 Ill. 2d 423 (1990) (court noted that although the defendant did not file a posttrial motion raising an issue of which he sought review on appeal, application of the forfeiture rule is less rigid when the basis for the objection is the trial judge's conduct).¹ Likewise, in this instance, because the conduct of the trial court is at issue, we believe

¹ Our supreme court has noted that "courts often use the terms 'forfeit,' 'waive,' and 'procedural default' interchangeably in criminal cases. [Citations.] For purposes of th[at] opinion, [it would] use the term 'forfeited' to mean issues that could have been raised, but were not, and are therefore barred." *People v. Blair*, 215 Ill. 2d 427 (2005). The court also noted that waiver meant the voluntary relinquishment of a known right, and was different from forfeiture because forfeiture encompassed the failure to make a timely assertion of a right. *Blair*, 215 Ill. 2d 427. We, too, use 'forfeit' to mean an issue that could have been raised, but was not.

the rule of forfeiture is sufficiently flexible to permit us to disregard the procedural default and to properly review the defendant's contention that the court improperly considered the revocation conduct when it sentenced him. See *People v. Young*, 248 Ill. App. 3d 491 (1993) (court concluded that the rule of forfeiture was flexible enough to permit it to review that defendant's unpreserved claim of error concerning alleged improper judicial treatment of defense counsel). Thus, we will consider the merits of the defendant's contention.

¶ 46 When a trial court sentences a defendant following the revocation of the defendant's probation, it may properly consider the defendant's conduct while on probation as evidence of rehabilitative potential. *People v. Bedenkop*, 252 Ill. App. 3d 419 (1993). A trial court may impose any sentence that was appropriate for the original offense, and in doing so, it may impose a more harsh sentence than it originally imposed. *People v. Turner*, 233 Ill. App. 3d 449 (1992). A court, however, may not punish a defendant for the conduct that gave rise to the probation violation. *People v. Varghese*, 391 Ill. App. 3d 866 (2009).

¶ 47 Overall, "the record must clearly show that the court considered the original offense" in fashioning the defendant's sentence following the revocation of his probation. *People v. Hess*, 241 Ill. App. 3d 276 (1993). To ensure that the trial court sentenced the defendant for the original offense, a reviewing court considers the remarks of the trial court during sentencing. *Varghese*, 391 Ill. App. 3d 866 (2009). A trial court may make several references to the conduct underlying the probation revocation, and its subsequent sentence will withstand appellate review provided that a review of the totality of the record reveals that the trial court sentenced the defendant on the original conviction, and not the conduct that was the basis of the probation revocation. See *People v. Wilcox*, 281 Ill. App. 3d 494 (1996). A reviewing court will not set

aside a sentence that is within the statutory range "*unless* [we are] strongly persuaded that the sentence imposed after revocation of probation was *in fact* imposed as a penalty for the conduct which was the basis of revocation, and not for the original offense." (Emphasis in original.)

People v. Young, 138 Ill. App. 3d 130,142 (1985).

¶ 48 Based on our review of the totality of the record, we conclude that the trial court sentenced the defendant for the revocation conduct and not for the original offense. Specifically, as the court was pronouncing the defendant's sentence, it commented that the Holiday Inn could not have a disturbance like the one in which the defendant was involved, and also noted the effect of the defendant's actions on the reputation of the Holiday Inn and downtown Rock Island. Furthermore, the court expressed that it did not understand why the defendant would use a knife and questioned why a family affair should not be filled with love. The court also commented that the defendant would not be able to repay the harm he caused and that Mario Jr. almost died and would have a scar forever.

¶ 49 We initially consider defendant's challenge to the trial court's comments about his race in this context. The racial observations are relevant only to the events occurring at the Holiday Inn, which are the basis for revocation and not pertinent to the drug possession charge. The essence of those observations by the court said that if a man attacked another and seriously injured him at a party and the offender was sentenced to a term of imprisonment, everybody would approve because (1) we cannot have these kinds of disturbances at the Holiday Inn, (2) people will be afraid to go to that hotel, and (3) they will be particularly afraid if they know those involved in the disturbance were black because "those people" will be at the Holiday Inn in Rock Island and people get stabbed there. ¶¶ 22-23, *supra*.

¶ 50 The trial court, in these comments, drew a direct connection between the events at the Holiday Inn, the defendant's race, and the sentence.

¶ 51 Our review of the record does not show that the court considered the revocation conduct only in passing; nor do those comments indicate that it only considered the defendant's conduct as evidence of his rehabilitative potential.

¶ 52 We acknowledge that the court observed that the defendant had only been on probation for seven months leading up to the altercation at the Holiday Inn, and also stated that the original offense was serious and the defendant had been given the opportunity at a term of probation. Therefore, while the court noted the original offense, it appears to have made these comments in passing. Consequently, we cannot properly say that this offense was the focus of the court's sentencing determination.

¶ 53 Overall, the totality of the record shows that the trial court improperly considered the defendant's revocation conduct when it sentenced him. Therefore, we vacate the defendant's sentence and remand the cause for a new sentencing hearing.

¶ 54 (iii) Whether the trial court improperly considered the defendant's race

¶ 55 We are also asked to examine the trial court's comments about defendant's race as a stand-alone issue — that is, did the court sentence defendant more harshly because he was black. As we have noted, the defendant has forfeited this issue, and we may only consider it if we find an exception to forfeiture or if it warrants plain error review.

¶ 56 The plain error doctrine permits a reviewing court to consider a forfeited error in two circumstances: (1) when the evidence at the sentencing hearing was closely balanced; and (2) where the error was so serious that the defendant was denied a substantial right, and therefore, a

fair sentencing hearing. *People v. Hillier*, 237 Ill. 2d 539 (2010); see also *People v. Dover*, 312 Ill. App. 3d 790 (2000). Before we may consider whether the court committed plain error, we must first determine whether the court did, in fact, err by considering the defendant's race when it fashioned his sentence.

¶ 57 (a) Error

¶ 58 When a trial court fashions a defendant's sentence, it "owes the same duty to the defendant to protect [its] own mind from the possible prejudicial effect of incompetent evidence that [it] would owe in protecting a jury from the same contaminating influence." *People v. Wardell*, 230 Ill. App. 3d 1093, 1103 (1992), citing *People v. Riley*, 376 Ill. 364, 369 (1941). A trial court has a duty to shield the jury from the racially prejudicial remarks of the trial participants, and likewise, the court must safeguard against its own racial considerations when it sentences a defendant. *Wardell*, 230 Ill. App. 3d 1093. In an instance where the race of the defendants and the victims was "on [the trial court's] tongue, it most assuredly must be on [its] mind[.]" and thus, a reviewing court "must assume that defendant's race was considered by the judge when he imposed [the defendant's lengthy sentence]." *Wardell*, 230 Ill. App. 3d at 1103.

¶ 59 In this case, we conclude that the trial court improperly considered the defendant's race when it fashioned the instant sentence. Specifically, the court commented that the defendant's actions would serve to further the stereotypes of some members of society who "already had a bad idea about black people." In the context of commenting about the need to protect the public, the court also stated that the defendant's actions "cast a terrible image *** particularly [on] African-American citizens." Because of these comments, the record is not clear that the trial court did not adversely consider the defendant's race when it sentenced him.

¶ 60 In reaching this conclusion, we emphasize that we do not believe that the trial court considered the defendant's race in a manner that incited racial prejudice, or that its remarks indicated a prejudice against African-American people. See *People v. Caffey*, 205 Ill. 2d 52 (2001). Rather, it seems clear that the trial court was genuinely concerned about how the defendant's actions would reflect on other members of his African-American community. Nonetheless, we cannot ascertain from an objective review of the record whether the court imposed a harsher sentence on the defendant due to its disappointment in how it believed the defendant's actions would reflect on the African-American community, and we are unable to confidently conclude that race did not have a role in the trial court's sentencing determination. Thus, the defendant has established that the court committed error.

¶ 61 (b) Plain Error

¶ 62 We must now consider whether the court committed plain error. The defendant does not assert that the evidence at the sentencing hearing was closely balanced, only that the trial court's improper consideration of his race implicated his substantial right to be lawfully sentenced. A defendant has a substantial right to have the court fashion a sentence using proper sentencing considerations, including proper aggravating factors. *People v. Whitney*, 297 Ill. App. 3d 965 (1998). Thus, a trial court's consideration of an improper aggravating factor infringes on the defendant's fundamental and substantial right to liberty. *Whitney*, 297 Ill. App. 3d 965. Since the right to be lawfully sentenced is a substantial right, we may review sentencing errors for plain error. *People v. Kopczick*, 312 Ill. App. 3d 843 (2000).

¶ 63 As we have already concluded, the record indicates that race may have indeed played a part in the trial court's sentencing determination, as the trial court commented on its

disappointment in the defendant's actions and the negative reflection of these actions on the African-American community. Clearly, however, race is not a proper aggravating factor that a trial court may consider in fashioning a defendant's sentence. See 730 ILCS 5/5-5-3.2 (West 2008)). Therefore, the trial court's apparent consideration of the defendant's race was not only error, but it also implicated his substantial right to be lawfully sentenced. Thus, the trial court committed plain error when it fashioned the defendant's sentence.

¶ 64 We emphasize that racial considerations should have no bearing on sentencing. While it is possible that the instant trial court did not consider the defendant's race when it sentenced him, its comments gave rise to an appearance that race was an improper factor in the sentencing decision. While we believe that the trial court was truly disappointed in the defendant's actions, and was likely lecturing the defendant on the detrimental effects of his actions, as the State has suggested, we cannot either ignore or condone even an appearance that the trial court, no matter how well-meaning or benign its intent, considered race when it sentenced the defendant. Therefore, we choose to err, if err we do, on the side of caution. We find remand is also warranted on this basis.

¶ 65 CONCLUSION

¶ 66 For all of the foregoing reasons, the judgment of the circuit court of Rock Island County finding defendant's probation revoked is affirmed; sentence is vacated, and the cause is remanded for further proceedings consistent with this order.

¶ 67 Affirmed in part; vacated and remanded in part.

¶ 68 JUSTICE HOLDRIDGE, specially concurring.

¶ 69 I agree that the trial court did not err when it revoked the defendant's probation. I also agree that the defendant is entitled to a new sentencing hearing because it appears that the trial court sentenced him based upon the conduct leading to the probation violation rather than the underlying conviction.

¶ 70 I write separately because I believe the case should have been decided on these grounds alone. I see no reason to reach out to address the issue of whether the trial court improperly considered the defendant's race in sentencing. In the interest of judicial restraint, we should refrain from deciding issues that are not necessary to the resolution of the appeal. *In re Estate of Glogovsek*, 248 Ill. App. 3d 784, 790 (1993); see also *People v. White*, 2011 IL 109689, ¶ 148 (2011).

¶ 71 Moreover, it is particularly inappropriate to address the race issue here because: (1) the defendant forfeited the issue by failing to raise it before the trial court; and (2) as the majority acknowledges, it is not clear that the trial court improperly considered race in sentencing the defendant. Under these circumstances, finding a reason to address the issue is an awkward and improper stretch that, in my view, borders on an advisory opinion.

¶ 72 In any event, I do not believe that the trial court considered the defendant's race in imposing the sentence. Although the trial court made a few comments regarding how the defendant's bad conduct could affect the local African-American community, there is no evidence that these comments influenced his sentencing determination. In my view, the trial court's comments simply reflect a genuine concern for the detrimental effect that the defendant's conduct might have on African-Americans in the community. Thus, I do not believe that the

comments, standing alone, represented a reversible error that entitles the defendant to a new sentencing hearing.

¶ 73 JUSTICE CARTER, specially concurring.

¶ 74 I concur with the majority's conclusion that the circuit court did not err when it revoked the defendant's probation. I respectfully suggest that the defendant's argument that the court erred by revoking the defendant's probation, in part based on the aggravated battery count allegedly involving a knife, is irrelevant. The court found that the State proved by a preponderance of the evidence that the defendant committed the other two counts of aggravated battery; those findings are not challenged on appeal and individually provide adequate bases to affirm the court's judgment on the issue (730 ILCS 5/5-6-3(a)(1) (West 2008) (a condition of probation is that a person shall not violate any criminal statute of any jurisdiction); 730 ILCS 5/5-6-4(c) (West 2008) (the State must prove a violation of probation by a preponderance of the evidence)).

¶ 75 I also concur with the majority's conclusion that the circuit court improperly considered race when sentencing the defendant such that the defendant's sentence must be vacated and the case remanded for a new sentencing hearing. First, I believe this issue should be reviewed despite its forfeiture. See *People v. Johnson*, 347 Ill. App. 3d 570, 574-76 (2004) (reviewing a forfeited argument, under the plain-error doctrine, regarding proper sentencing); see also *People v. Wardell*, 230 Ill. App. 3d 1093, 1102 (1992) (declining to find an argument forfeited when the complained-of conduct came from the judge). Second, even though the court did not "consider[] the defendant's race in a manner that incited racial prejudice, or that its remarks indicated a prejudice against African-American people" (*supra* ¶ 60), I agree that the court improperly considered race as an aggravating factor when it sentenced the defendant.

¶ 76 While I also agree that the circuit court sentenced the defendant for the revocation conduct rather than the original offense, which could provide an independent basis for vacating the defendant's sentence and remanding for a new sentencing hearing, the aforementioned race issue provides a sufficient basis to reverse and remand for a new sentencing hearing.