

No. 1-11-1575

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County, Illinois.
	)	
	)	
v.	)	No. 10 CR 14526
	)	
WILLIAM NEAL,	)	Honorable
	)	Nicholas Ford,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE TAYLOR delivered the judgment of the court.  
Justices Howse and Palmer concurred in the judgment.

**ORDER**

¶ 1 *Held:* Defendant was not prejudiced where the State asked, without supporting evidence, a defense witness if she had discussed her testimony with another witness, where properly admitted evidence clearly proved his guilt. Further, the trial court did not display bias by noting that the case at bar does not involve complex forensic evidence, rejecting one of defense's numerous voir dire questions and ensuring the orderly administration of the case. The court's mention, at sentencing, that the case involved a gun did not warrant resentencing where it only mentioned it in

passing. However, it was error to charge defendant a DNA processing fee when his DNA was already in the system.

¶ 2 Following a jury trial, defendant, William Neal, was found guilty of unlawful use or possession of a weapon by a felon and sentenced to four years' imprisonment. On appeal, defendant contends he was denied a fair trial because the State impeached one of the defense witnesses without offering evidence to complete that impeachment, and because the court demonstrated judicial bias in favor of the State. Defendant further contends that in sentencing, the trial court improperly considered in aggravation matters that were inherent in the offense of which he was convicted. Lastly, defendant contends, and the State agrees, that his fines and fees order erroneously included a \$200 DNA fee.

### ¶ 3 BACKGROUND

¶ 4 The record shows that defendant was charged with two counts of unlawful possession of a weapon by a felon, one count for a gun and another for its ammunition, in connection with an incident which occurred on the evening of July 30, 2010, on the south side of Chicago. Defendant elected a jury trial, and during *voir dire*, a prospective juror stated that she liked watching shows like CSI and Law and Order. That prompted the court to note that "not everything you see on TV is real," and that "there are aspects of evidence and things that occur there that are completely unreal." The court further observed that "[j]ust because that you saw that they did something on Law and Order with microscopic analytic something, or whatever they do, I don't see all of them - ." The court went on to tell the prospective juror that "[t]his case is predicated, most of it, on the testimony of the witnesses from the stand."

No. 1-11-1575

¶ 5 Defense counsel proposed a list of questions to ask the venire. While the trial court accepted 10 of those questions, the court rejected one question about their participation in neighborhood watch programs. It is undisputed that during jury selection, the State relied on reports from the Law Enforcement Agencies Data System (LEADS), which are generated from the Illinois State Police. After *voir dire*, the trial court admonished the venire about what are known as *Zehr*<sup>1</sup> factors, which are not pertinent to this appeal. The defense stated that the admonishments had been too cursory, and the court responded: "That was me laughing, for the record \*\*\* I'm so tired of this. The Defense has seized upon some of these cases in this area as a basis somehow, you know, have every trial appear as if it had never existed."

¶ 6 At trial, the State first called Chicago police officer Troglia, who testified that at approximately 10:20 pm in the evening in question, he and his partner, Officer Mohammad, were on patrol in an unmarked police vehicle when Officer Mohammad told him that he saw defendant walking down the porch steps of a house located at 7818 South Escanaba with a shiny chrome handgun in his right hand. As Officer Mohammad slowed down, defendant made eye contact with Officer Troglia, who exited the car and announced his office. At that point, defendant turned around and ran back up the porch steps.

¶ 7 According to Officer Troglia, as he pursued defendant up the stairs, defendant threw the gun off the porch, over the vacant lot adjacent to the house, and onto the roof of a house located at 7812 South Escanaba. The officer testified that he saw the gun in defendant's hand before he

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<sup>1</sup>Under Illinois Supreme Court Rule 431(b), the trial court must ask the prospective jurors whether they understood and accepted four principles, first enumerated in *People v. Zehr*, 103 Ill. 2d 472 (1984).

No. 1-11-1575

threw it, saw the gun leave his hand, and saw it land on the roof next door. At that time, Officer Troglia detained defendant and told Officer Mohammad to watch the roof where the gun had landed. He conducted a protective pat-down of defendant, but did not recover anything from him, and according to Officer Troglia, they did not search anywhere else in the area. Officer Mohammad, whose unmarked police vehicle did not have a "cage" in the back, called for an assist unit, as well as for the Chicago Fire Department (CFD) to retrieve the gun from the roof. When the assist vehicle arrived, Officer Troglia placed defendant in it. The officer further noted that none of the police officers who arrived to assist searched the area.

¶ 8 Officer Troglia further averred that as the events unfolded, there were two other men sitting on the porch, who did not stand up or otherwise interfere as defendant was arrested. After defendant was placed in the assist vehicle, the two officers conducted a pat-down of the two men to ensure that they were not armed.

¶ 9 Once the CFD arrived, Officer Troglia climbed the ladder and recovered the gun from the roof at 7812 South Escanaba. He emptied the ammunition from the gun, and stated that there were five live 25 rounds in the magazine and one live 25 round in the handgun's chamber. Defendant was then transported to Area 2, where, shortly after midnight, Officer Mohammad interviewed defendant in Officer Troglia's presence. The officer explained that during the interview, defendant stated "something to the effect of he had the gun because of the killings on the street and he bought it for \$125." The officer acknowledged, on cross-examination, that the officers did not write defendant's statement for him to sign, and did not record it any other way, but explained, on re-direct, that defendant's statement was documented in the arrest report.

No. 1-11-1575

Further, while the gun was not tested for fingerprints, Officer Troglia stated that he had never requested a fingerprint test on an object that he saw in a person's hand. The gun's serial number was run through a data base, which revealed that it had been stolen five years earlier in Missouri.

¶ 10 The State next called Officer Mohammad, who testified consistently with Officer Troglia's account of the events, and confirmed that the only people sitting on the porch that night were two other males. Officer Mohammad added that he exited the vehicle just after Officer Troglia began pursuing defendant, and that from his vantage point, he could also see defendant toss a gun off the porch.

¶ 11 Once the State rested, the defense introduced testimony from two witnesses, Shante Anderson and Tacara Moore, both of whom lived at 7818 South Escanaba. Anderson, who testified first, stated that on the night in question, she was sitting on her porch with defendant, Moore and her boyfriend, Darion. According to Anderson, defendant was leaving her house to change clothes at about 9:00 or 9:30 pm because he did not like sweat stains, but turned around and began walking back when he saw police pull up. She stated that the police then ran up, grabbed defendant, placed him in their vehicle and began looking around for something. Anderson further testified that about 15 other officers arrived later and began searching the porch, yard, roof, the neighbor's yard, the alley, and under cars and garbage cans. She attested that she did not see a gun in defendant's hand, and did not see him throw anything, but acknowledged that when he returned to the porch, her attention was focused on the police. According to Anderson, the police waited two and a half hours before calling the CFD, and while she saw police climb up to the roof next door as well as her own, she did not see them find

No. 1-11-1575

anything.

¶ 12 Anderson acknowledged, on cross-examination, that she never contacted the police or the State's Attorney's Office to tell them that defendant was unarmed. When the State asked Anderson whether "nobody else on the porch was doing anything or making any movements or causing a commotion," she responded that "[y]ou really don't have to. Just being a [b]lack male walking down the street, the police -." At that point, the State objected, and the court stated:

"Ma'am, you've got to listen to the question when it's posed and answer that. Look at me. Okay. Answer the question when it's posed. Answer the direct question. Don't add anything on. Just answer the question. Okay."

¶ 13 Defense counsel announced during direct examination that he was going to show Anderson 14 photographic exhibits, and had Anderson mark the location on the first picture where the police had searched the house. The court then asked defense counsel if he was going to use a displaying device known as Elmo to show the images to the jury and counsel answered affirmatively. The court then directed him to "do it all at once," and stated that it was "not going to sit here and watch the witness mark the exhibits and put them up there. Miss Scott Anderson, I'm going to ask you to step down. He's going to show you the exhibits. You can mark them on the Elmo as he's showing them to you."

¶ 14 After Anderson's testimony, the defense called Moore, who testified consistently with Anderson's account of the events that evening. Unlike Anderson, however, Moore stated that police arrived at 7:00 or 8:00 pm that evening, and she explained that defendant did not run, but was simply "power-walking" up the porch when the police pulled up. Moore specifically noted,

No. 1-11-1575

in contrast to the officers' account of the events, that Darion was the only other male on the porch that evening. Moore attested that she did not see defendant with a gun at any point that night and, unlike Anderson, Moore made a point of looking at defendant's hands as he was coming off the steps. Like Anderson, Moore acknowledged that she never told police that defendant had not done anything wrong, but explained that she did not know why defendant was arrested.

¶ 15 On cross-examination, the State asked Moore if she had ever discussed the events of that night with Anderson prior, and Moore responded that they told other family members about defendant's arrest, but averred that she and Anderson never talked about having to testify. While Moore admitted to considering Anderson "like family" and to riding in the same car on the way to the courthouse, she answered negatively when the State asked her whether she and Anderson discussed what they were going to testify about. She acknowledged that she waited in the hallway while Anderson testified, and that the two spent about 20 minutes together in the hallway after Anderson testified, but when asked if Anderson discussed her testimony during that break, Moore denied it. Defense counsel objected to the last of those questions, on the basis that Moore had already stated that she and Anderson "did not talk to each other about it." On re-direct, the defense asked Moore, *inter alia*, whether she knew "that witnesses aren't supposed to talk about their testimony," whether that was the reason she did not talk to Anderson about her testimony, and whether that was her first time in court, which prompted the court to direct defense counsel not to ask leading questions.

¶ 16 In rebuttal, the State called Officer Kill, who was summoned to assist Officers Troglia and Mohammad on the night of defendant's arrest. He testified that when the CFD arrived at the

No. 1-11-1575

scene, Officer Troglia climbed the ladder and went to a specific location on the roof of 7812 South Escanaba, and did not conduct a search of that roof, or any other roofs. According to Officer Kill, about eight officers came to the scene, all of whom stayed in front of the house.

¶ 17 The jury returned guilty verdicts on both counts of unlawful use or possession of a weapon by a felon. At sentencing, the State introduced evidence of defendant's prior convictions, including two convictions for possession of cannabis, one for possession of a stolen vehicle, two for domestic battery and two violations of an order of protection. In mitigation, defendant's mother testified that she needed defendant's help because of a serious illness, his father stated that he would be willing to teach defendant a trade, and defendant explained that he was trying to change his life. The court then sentenced defendant to four years' imprisonment, merging his two convictions. In doing so, the court stated that it had considered the evidence in aggravation and mitigation presented, as well as the statutory factors, the financial impact of incarceration, arguments of the attorneys and defendant's elocution. The court noted that one of his prior convictions resulted in a boot camp, in which defendant was unsuccessful, and another resulted in a light sentence. It then observed that even after those convictions, defendant tossed a loaded firearm on a roof, endangering the lives of the officers and the others in the vicinity. The court further stated that it "had the issue of the gun itself, which is a scourge in the community I live, which is the City of Chicago."

¶ 18 A fines and fees order was entered reflecting a total obligation of \$530, which total included a DNA testing fee of \$200. Defendant filed a motion for a new trial, which was denied.

#### ¶ 19 ANALYSIS

No. 1-11-1575

¶ 20 On appeal from that judgment, defendant first contends that he was denied a fair trial when the State attempted to impeach Moore by insinuating that she discussed her testimony with Anderson in violation of a motion to exclude, without a good-faith basis for that line of questioning and without offering any evidence to complete the impeachment.

¶ 21 The State first responds that defendant has forfeited that argument because there is no evidence on the record that defendant ever asked for an order to exclude witnesses. It further claims that defendant failed to preserve his argument because he failed to specifically object to the State's impeachment of Moore's testimony based on the State's failure to present supporting evidence. Defendant acknowledges those omissions, but contends that he preserved the issue by objecting to the State's impeachment when it stated that "she said she [sic] didn't talk to each other about it," and by raising that issue in his posttrial motion. He also claims that, in any event, this issue should be reviewed for plain error.

¶ 22 It is well established that it is improper for the State to ask a witness questions for the purpose of impeachment unless the prosecutor is prepared to offer proof of the impeaching information. *People v. Olinger*, 112 Ill. 2d 324, 341 (1986). Not only must the State have a good-faith basis in asking such questions during cross-examination, but it must also have the intent and ability to complete the impeachment. *People v. Williams*, 204 Ill. 2d 191, 212 (2003). However, in order to preserve the issue of the State's failure to perfect the impeachment of a defense witness, defendant must object at trial on the specific ground that the State failed to perfect its impeachment with supporting evidence. *Id.* Here, defendant objected at trial on the ground that Moore had already denied discussing her testimony with Anderson, but never on the

No. 1-11-1575

State's failure to support its impeachment. Further, while the defense apparently objected to the State's rebuttal witnesses, it merely stated that it didn't "know whether their [sic] intentions for rebuttal, but [it didn't] think it's to bring out everything that was mentioned in the [D]efense's case." Thus, we reject defendant's claim that he properly preserved this issue for review and consider whether plain error is warranted.

¶ 23 The plain error doctrine allows a reviewing court to consider an unpreserved error where the evidence is so closely balanced that the error alone may have caused the scales of justice to tip against defendant, or where a clear error occurred that is so serious that it affected the fairness of the trial and challenged the integrity of the judicial process. *People v. Piatkowski*, 225 Ill. 2d 551, 564-565 (2007). Defendant bears the burden of persuasion in either instance. *People v. Herron*, 215 Ill. 2d 167, 187 (2005). Before conducting plain error review, however, we must first determine whether any error occurred at all. *People v. Ingram*, 401 Ill. App. 3d 382, 390 (2010).

¶ 24 Although, as noted above, the State must have the ability to complete its impeachment of a witness (*Olinger*, 112 Ill. 2d at 341), it is proper, on cross-examination, to develop all circumstances that qualify, explain, discredit or destroy that witness' testimony (*People v. Williams*, 66 Ill. 2d 478, 486 (1977)). Furthermore, in order for a failure to complete impeachment to rise to the level of reversible error, the unfounded insinuation that the witness is lying or is not credible must be "substantial, repeated and definitely prejudicial." *People v. Jurczak*, 147 Ill. App. 3d 206, 217 (1986); *People v. Redman*, 135 Ill. App. 3d 534, 542 (1985).

¶ 25 Here, the State correctly notes that the State's questions to Moore with regard to whether

No. 1-11-1575

she lived with Anderson, rode in the car with her to the courthouse and spoke to Anderson in the hallway after Anderson testified, were only an effort to show that the witnesses had the opportunity to discuss their testimony. Further, the record does not reveal any instances where the court admonished Anderson or Moore against speaking to one another. Thus, even the more specific questions as to whether Moore actually discussed her testimony with Anderson during those opportunities were not accusing Moore of misconduct, but only developing a circumstance that might discredit her testimony. Moreover, the State only asked six of those questions, after properly establishing that Moore had ample opportunity to discuss her testimony with Anderson. While Anderson and Moore contradicted the testimony of Officers Troglia and Mohammad insofar as whether defendant had a gun, they acknowledged that none of the people on the porch engaged in any kind of behavior that might have caused the officers to approach defendant that night. In fact, no one contradicted the officers' testimony that defendant confessed to buying the gun that was recovered from the roof. Thus, in light of the evidence against defendant and the fact that the State had properly established Moore's opportunity to discuss her testimony with Anderson, we conclude that any incomplete impeachment with regard to whether she did, in fact discuss her testimony, is unlikely to have changed the result of the trial and does not amount to reversible error. See, e.g., *People v. Adams*, 283 Ill. App. 3d 520, 526-17 (1996) (inquiry into whether defendant asked his uncle for an alibi was not prejudicial where two witnesses identified defendant as the shooter); *People v. Amos*, 204 Ill. App. 3d 75, 82 (1990) (improper impeachment of defendant's sole occurrence witness was harmless where the State's witnesses clearly established his guilt).

No. 1-11-1575

¶ 26 Defendant's reliance on *People v. O'Banner*, 215 Ill. App. 3d 778 (1991); *People v. Valdery*, 65 Ill. App. 3d 375 (1978), is misplaced. In *O'Banner*, 215 Ill. App. 3d at 793-94, the State asked defendant's sister numerous questions insinuating that defendant had an extramarital affair and referred to them during closing argument, which was definitely prejudicial because there was no properly admitted evidence to support even an inference of the affair, while in this case, there was properly admitted evidence testimony to the opportunity to discuss their testimony. Further, unlike *Valdery*, 65 Ill. App. 3d at 378, the State in this case never vouched for the credibility of its own witnesses, or made any statements that could be construed as testimony from the prosecutor himself.

¶ 27 Defendant further contends that if defense counsel's failure to object to the State's failure to perfect its impeachment constitutes forfeiture, his cause should be remanded for a new trial because his counsel was ineffective. However, to establish ineffective assistance of counsel, defendant must demonstrate not only that counsel's performance was objectively unreasonable, but also that such deficiency resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Here, having found that any error in allowing the State to impeach Moore without support was harmless, we conclude that defense counsel's failure to object to the State's failure to introduce supporting evidence for that impeachment was not prejudicial. Since defendant failed to meet the second prong of the *Strickland* test, we need not address the issue of whether defense counsel's performance was objectively unreasonable and must reject defendant's claim of ineffective assistance of counsel. *Id.* at 697.

¶ 28 Next, defendant contends that he was denied a fair trial because the trial court

No. 1-11-1575

demonstrated judicial bias in favor of the State by its actions and comments throughout the trial. According to defendant, the court favored the State by: (1) stating to a potential juror that most of the evidence in this case was testimonial; (2) refusing to allow defense counsel to ask the venire about participation in neighborhood watches while allowing the State to use LEADS reports; (3) dismissing his objection to the court's explanation of the *Zehr* factors; (4) directing defense counsel to use the Elmo and not to ask leading questions; and (5) admonishing Anderson to answer the question. Defendant maintains that when taken together, those actions show improper judicial bias against defendant.

¶ 29 The State initially responds that, aside from the claim that the trial court improperly told a prospective juror that scientific evidence may not be presented, defendant forfeited his contention of judicial bias based on the remaining allegedly partial actions by the court. We note that defendant did not, in fact object to such remaining actions by the court, and with the exception of his argument that the court showed bias in admonishing Anderson, he did not raise those issues in his motion for a new trial. Defendant, in turn, argues that the forfeiture rule does not apply when defendant raises, for the first time on appeal, a claim of judicial impartiality.

While our supreme court held, in *People v. Sprinkle*, 27 Ill. 2d 398, 400-01 (1963), that the forfeiture rule should be relaxed when the basis for the objection is the conduct of the trial judge, that same court recently explained, in *People v. McLaurin*, 235 Ill. 2d 478, 488 (2009), that the failure to preserve a claim should be excused "only under extraordinary circumstances," such as where a judge makes inappropriate remarks to the jury. In this case, however, we need not reach the question of whether the forfeiture rule should be applied less rigidly to defendant's failure to

No. 1-11-1575

contemporaneously object to the trial court's alleged misconduct because, as discussed below, the conduct cited by defendant did not amount to judicial bias.

¶ 30 A trial judge has a duty to see that all parties are provided a fair trial and, therefore, must refrain from interjecting opinions, comments or insinuations reflecting bias against any party.

*People v. Sims*, 192 Ill. 2d 592, 636 (2000). However, allegations of judicial bias must be viewed in context and evaluated in terms of the trial judge's reaction to the events taking place, such that the mere fact that a judge displays displeasure with an attorney's behavior is not necessarily evidence of prejudice against a party or his counselor. *People v. Urdiales*, 225 Ill. 2d 354, 426 (2007). Further, even where a trial judge's comments are, in fact, improper, they constitute reversible error only if the defendant can show that those comments were a material factor in his conviction or had a probable effect on the jury's verdict. *Sims*, 192 Ill. 2d at 636.

¶ 31 Defendant here alleges that three of the trial court's acts that showed bias in favor of the State occurred before trial, namely, the judge's comment to a prospective juror, rejection of one of defense counsel's proposed questions to the venire, and a comment to defense counsel outside the presence of the jury. With regard to the trial judge's remarks that the prospective juror should not "expect Law and Order" and that this case was mostly predicated on the testimony of witnesses, we note that those are not comments that rise to the level of prejudice. Contrary to defendant's contention, explaining to a juror who stated that she enjoys Law and Order and CSI, that she should not expect the type of complex scientific evidence that she may see on those shows, did not undermine defendant's argument in pointing out that the gun was never tested for fingerprints. It was an innocuous statement to ensure that the juror understood that the absence

No. 1-11-1575

of the type of forensic evidence that she sees on television did not mean that the trial was somehow incomplete. See, e.g., *People v. Seuffer*, 144 Ill. 2d 482, 503 (1991) (court's acknowledgment that the insanity defense "may be overused" was not biased where the court was merely ensuring that a juror would at least listen to that defense); *c.f. People v. Mitchell*, 228 Ill. App. 3d 167, 170 (1992) (court showed bias where it not only specifically disparaged questions about the lack of fingerprint evidence, but also mocked defense counsel's questions about the environment where defendant was questioned).

¶ 32 The trial court's rejection of defendant's *voir dire* question as to whether the prospective jurors participated in a neighborhood watch program, while allowing the State to use LEADS reports during *voir dire* does not change our conclusion. The purpose of *voir dire* examination is the selection of a jury that is free from bias or prejudice, and the trial court does not abuse its discretion during this process if the questions it asks the venire " 'create a reasonable assurance that any [such] prejudice or bias would be discovered.' " *People v. Rinehart*, 2012 111719, ¶16, quoting *People v. Dow*, 240 Ill. App. 3d 392, 397 (1992). Here, while the trial judge rejected defendant's proposed question about jurors' participation in neighborhood watches, he accepted 10 of his questions regarding their background, including inquiries into their feelings towards firearms, bias in favor of police officers' testimony, their prior arrests and experience working for law enforcement agencies. While the State was allowed to use LEADS reports, nothing indicates that defense counsel could not have seen them, or that he ever asked to do so.

¶ 33 Similarly, the trial judge's response to defense counsel's objection to the manner in which he was admonishing the venire on the *Zehr* factors could not have prejudiced the jury, since it

No. 1-11-1575

was made outside their presence. See *People v. Young*, 248 Ill. App. 3d 491, 502 (1993) (in a jury trial, "[i]t is axiomatic that any comments made outside the presence or hearing of the jury cannot affect the jurors."). Further, even if trial courts' alleged failure to properly admonish the jury on the *Zehr* factors had been made in front of the jury, the trial judge's apparent annoyance with defense counsel's objection does not appear, in this instance, to be indicative of prejudice against defendant. See *Urdiales*, 225 Ill. 2d at 426.

¶ 34 Defendant's objections to the trial court's comments and actions during trial are similarly misplaced. Trial courts have the inherent power to preserve their own dignity by ensuring that the proceedings before them progress in a dignified and orderly fashion. *People v. Griffin*, 194 Ill. App. 3d 286, 294 (1990). They also have the responsibility to achieve prompt and convenient dispatch of court business. *People v. Thigpen*, 306 Ill. App. 3d 29, 40 (1999). Further, a trial judge has wide discretion to control the course of the trial and has a duty to interpose when necessary to avoid the miscarriage of justice. *People v. Jackson*, 250 Ill. App. 3d 192, 204 (1993).

¶ 35 Here, it appears that when the trial judge directed defense counsel to "do it all at once" when using the Elmo to display photographs, and instructed the witness to mark the exhibits on the Elmo instead of the pictures themselves, he was simply trying to ensure that the proceedings took place in an efficient and prompt manner. In doing so, the court allowed defense counsel to display all of his photographic exhibits, and was merely avoiding any delays that may arise from having the witness mark each picture while on the stand. The State correctly notes that while defendant contends that the trial judge was "exasperated" and "scolding" defense counsel, the

No. 1-11-1575

record does not reflect such attitude towards the defense and such ambiguity must be construed against defendant. See *People v. Barker*, 403 Ill. App. 3d 515, 523 (2010).

¶ 36 Similarly, it does not appear that the court displayed prejudice when defense counsel asked several leading questions during re-direct examination of Moore, such as "did you know that witnesses aren't supposed to talk about their testimony?" and "[i]s that part of the reason why you didn't talk to [Anderson] about what she may have testified to?" Even though the trial court admonished defense counsel, *sua sponte*, not to lead his own witness, it acted within its discretion. Neither did the trial court show any bias in favor of the State by admonishing Anderson to look at the trial judge and answer only the question asked. The record indicates that Anderson was not giving direct answers to questions on whether defendant had a gun and whether anyone on the porch was doing anything wrong, and instead, she was adding remarks suggesting that the officers stopped defendant for no reason. The trial court's admonishments to Anderson were within its power to admonish a witness to answer questions directly and responsively. See *Urdiales*, 225 Ill. App. 3d at 439.

¶ 37 Defendant next contends, however, that even if his conviction is not reversed, this court should nevertheless remand his cause for resentencing because the trial court improperly considered in aggravation matters that were inherent in the offense of being a felon in possession of a weapon. According to defendant, the trial court abused its discretion in considering that defendant possessed a gun when it stated that there was "the issue of the gun itself, which is a scourge in the community I live, which is the City of Chicago."

¶ 38 The trial court is vested with wide discretion at sentencing, such that a sentence is not to

No. 1-11-1575

be altered on review absent an abuse of discretion. *People v. Stacey*, 193 Ill. 2d 203, 209-10 (2000). While a factor implicit in the offense for which defendant was convicted cannot be used as an aggravating factor at sentencing (*People v. Rissley*, 165 Ill. 2d 364, 390 (1995)), a sentence will not be remanded where the court merely mentions an element of the offense in passing and gives no indication that it actually considered it as an aggravating factor (see *People v. Beals*, 162 Ill. 2d 497, 509 (1994)). And in any event, a court's actual reliance on an improper factor does not necessitate resentencing if it can be determined from the record that the weight placed upon the improperly considered factor was insignificant and did not lead to a greater sentence. See, e.g., *Beals*, 162 Ill. 2d at 509-10 (improperly considered factor would be insignificant where it was clear that the court relied on other aggravating factors to sentence him); *People v. Bradney*, 273 Ill. App. 3d 170, 176 (1995) (improper factor insignificant where there were two other valid grounds for defendant's extended term of imprisonment).

¶ 39 Here, it appears that the court only stated in passing that gun possession is a scourge to the community, after noting that it was taking into account all the statutory factors, as well as defendant's prior convictions and the arguments presented at the hearing. The court does not appear to indicate that it was, in fact, considering the fact that this crime involved a gun as an aggravating factor. See *Beals*, 162 Ill. 2d at 509 (court did not appear to consider the death of the victim as an aggravating factor in sentencing defendant for murder where it stated that defendant's conduct caused the loss of a human life). Furthermore, even assuming, *arguendo*, that the court had improperly considered the gun as an aggravating factor, it sentenced defendant to four years' imprisonment for a crime which has a sentencing range of two to ten years. In

No. 1-11-1575

doing so, the court relied on defendant's criminal history, noting that he previously received boot camp and a light sentence, and also noted that he endangered the lives of officers and the others by tossing a loaded firearm on a roof. Thus, while the trial court imposed a harsher sentence than the minimum required for the offense, it apparently relied on factors other than the involvement of a gun, such that any weight that it may have placed on such improper factor was insignificant.

¶ 40 Lastly, defendant contends, and the State agrees, that this court should vacate the \$200 DNA ID System fee from his fines and fees order because he has already submitted a DNA sample in connection with a prior felony conviction. The fee was imposed pursuant to section 5/5-4-3 of the Unified Code of Corrections (730 ILCS 5/5-4-3(j) (West 2012)), which, according to our supreme court in *People v. Marshall*, 242 Ill. 2d 285, 301-02 (2011), authorizes a trial court to order payment of the DNA analysis and indexing fee from a qualified offender only where he is not already registered in the Illinois State DNA database as a result of a prior conviction. Since it is undisputed that defendant's DNA profile was already registered in the DNA database when this case arose due to a prior felony conviction, we hereby vacate the portion of the trial court's fines and fees order requiring defendant to pay the \$200 DNA analysis fee.

¶ 41 For the foregoing reasons, we affirm defendant's conviction and sentence, and vacate the DNA analysis fee charged against him.

¶ 42 Affirmed in part, vacated in part.