

No. 1-11-2267

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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. 09 CR 3687
)	
JOSEPH SCOTT,)	Honorable
)	Timothy Joseph Joyce,
Defendant-Appellant.)	Judge Presiding.

JUSTICE Hoffman delivered the judgment of the court.
Presiding Justice Connors and Justice Cunningham concurred in the judgment.

ORDER

- ¶ 1 **Held:** Defendant forfeited claims of trial court error in allowing him to represent himself and in considering a factor implicit in the offense in setting the sentence; 25-year sentence was not excessive; judgment affirmed.
- ¶ 2 Following a bench trial, defendant Joseph Scott was convicted of armed robbery and sentenced to 25 years' imprisonment. On appeal, he contends that the trial court erred in allowing him to represent himself at trial because his behavior throughout the proceedings indicated that he was not fit to do so. He also contests the propriety of his sentence.
- ¶ 3 Defendant was charged with the armed robbery of Cara Molitor (victim) based on evidence showing that about 9 p.m. on January 28, 2009, he approached her on a CTA platform,

held a knife to her throat, and threatened to slit it if she did not give him her wallet. Defendant was initially appointed counsel, but after his pretrial motion to suppress his identification was denied, he requested to proceed *pro se*. The court continued the matter, and on the next court date, defendant again asserted that he wanted to represent himself, informing the court that he had done so in a prior criminal case, and had college experience. The court properly admonished him of the ramifications of self-representation, and then granted defendant's request to proceed *pro se*.

¶ 4 On October 8, 2010, defendant told the court he believed that he was arrested due to a prior confrontation he had with a government official in which he refused to cooperate as a confidential informant in an investigation to apprehend persons involved in robberies of armored trucks. Defendant also claimed that he believed his fellow inmates were confidential informants, who tried to obtain information from him, wearing wires. The court stated that it was concerned by defendant's allegations and ordered a behavioral examination (BCX) to see if he was fit to stand trial and represent himself. The BCX that was returned indicated that defendant was determined to be fit to stand trial, and noted that he was not on any psychotropic medication.

¶ 5 Defendant subsequently asked for extensive discovery from the State. He also filed an alibi defense with the court, asserting that he was at the residence of Milcee Scott and Dennis Brown at 7130 South Vernon Avenue in Chicago at the time in question.

¶ 6 The matter was transferred to a different judge who again admonished defendant pursuant to Supreme Court Rule 401 (eff. July 1, 1984). Defendant indicated that he understood the admonishments, and the court allowed him to continue his self-representation. Defendant then presented an opening statement in which he asserted his theory that the government fabricated this case. He also maintained that the evidence would show that he had an alibi, namely, that he was with two government employees at the time the offense was committed.

¶ 7 The victim testified that at 9 p.m. on January 28, 2009, she was waiting for a CTA Red line train at the Harrison station when defendant came up from behind her, covered her eyes, placed a knife to her throat, and told her to give him her wallet or he would slit her throat. The victim complied with his demand, and he then let go of her. As she stood up, she noticed that he had a dark mark on his throat.

¶ 8 The victim also noticed that her friend Felicia Kovacs had arrived at the station, and observed defendant remove money from her wallet. When he tossed her wallet, the victim picked it up, and saw that \$80 was missing. In February 2009, the victim identified defendant in two separate photo arrays and a lineup. She also viewed a video of the incident which truly and accurately showed the incident.

¶ 9 On cross-examination by defendant, the victim stated that defendant was the only person in the photo arrays and lineup who had a scar. She further noted that defendant was the only person with a beard in the nine-person photo array, and one of two men in the six-person photo array who had a beard.

¶ 10 Felicia Kovacs testified that she witnessed the incident and called police. In February 2009, she identified defendant in a photo array and a lineup. On cross-examination, Kovacs stated that defendant was the only person with a scar and beard in the lineup and in the nine-person photo array she viewed. Upon further questioning, she stated that she could not see a knife in the video, but saw it in person when the incident occurred.

¶ 11 Chicago detective Michael Takaki was called by defendant and testified that he conducted the lineup and the six-person photo array. He noted that defendant was the only person with a scar in the lineup and the photo array but that "[y]ou could vaguely see it."

¶ 12 Chicago police officer Pedro Yanga was called by defendant and testified that he located defendant at 314 East 69th Place in Chicago. He approached defendant, who was on the porch, under the ruse of being his newly assigned parole officer, then placed him in custody.

¶ 13 Milcee Scott, defendant's uncle, testified that he was a federal letter carrier, and would not jeopardize his career and lie for defendant. Scott testified that defendant came to his residence at 7130 South Vernon Avenue in Chicago on January 28, 2009, "around 7:30, 8:00 o'clock. 7:00 or 7:30." He then testified that it "was around 8:30, 9:00 o'clock." Scott later testified that defendant was at his residence between 9 and 9:30 p.m., and noted that his brother Dennis Brown was also at his house that evening. About 9:30, 10 p.m., Scott drove defendant to the 9500 block of Martin Luther King Drive to pick up some clothing. After defendant was unable to locate his clothing, Scott drove defendant to his home.

¶ 14 On cross-examination, Scott testified that two weeks after defendant was arrested, defendant sent him a letter telling him that he had been charged with the armed robbery. Scott did not recall what month or year he learned about the incident, or when defendant approached him to be a witness. On redirect, Scott testified that he has a very short term memory and forgets things.

¶ 15 Defendant then submitted a motion *in limine* to prohibit the State from using any prior convictions to impeach him if he testified. The court granted defendant's motion, and he testified in his own defense. Defendant claimed that a little after sunset on January 28, 2009, he was at the home of Sonia O'Neal at 314 East 69th Street in Chicago, and about 9, 9:30 p.m. that evening, he was at 7130 South Vernon Avenue in Chicago. At 9:25 p.m., his uncle took him to the 9500 block of South Dr. Martin Luther King Drive so he could find his clothing, as he had recently been released from prison, but he could not recall which house his clothing was in. His uncle then dropped him off in the 6900 block of south State Street.

¶ 16 Defendant further testified that he did not commit this offense, and that it was fabricated against him because of a confrontation he had with David Zboray, a government official, in November 2007. Zboray accused him of stealing his wallet on the CTA. Defendant stated that he was arrested for that incident in January 2008, and represented himself in that matter.

¶ 17 Defendant further testified that this case could have been fabricated due to his refusal to cooperate as a confidential informant in 2006, when he was having addiction problems and came across some confidential informants for the government who tried to pressure him into helping them with an armored car investigation, but he refused to assist them. He also claimed that he purchased a cellular phone from one of them, but it ended up being wire-tapped.

¶ 18 During closing arguments, defendant maintained that at the time in question he was at 7130 South Vernon Avenue in Chicago, and did not commit the offense. He noted that his fingerprints were not found on the wallet, that the video did not have a clear picture of who stole the victim's wallet, and that it did not show him. Defendant further argued that if Zboray had something to do with this case, he apologizes to him because he did not take his wallet. He then maintained that the confidential government informants said "f**k" his son despite the fact that his son was being threatened.

¶ 19 The court ultimately found defendant guilty of armed robbery, noting that the alibi defense was incredible. The court observed that Scott was simple minded, and could not recall which year he was testifying about, and that Kovacs and the victim were "credible," having testified clearly to what was "an upsetting singular event." The court stated that the victim had a clear view of defendant, and when he brazenly walked slowly away, Kovacs had an opportunity to view him. The court noted that there was no conduct by police, either intentional or negligent, that would lead to any kind of misidentification, and that the photo array barely showed the scar on defendant's neck, and included photos of men with the neck area shaded in such a manner so

that if they had a scar, it might not be evident. The court also noted that many of the men in the photos and lineup appear to have a "five o'clock shadow," and that neither of these identification procedures were suggestive.

¶ 20 Defendant subsequently requested and was granted counsel to represent him in the post-trial proceedings. Counsel filed a motion for a new trial and two lengthy amended motions, which the court denied.

¶ 21 At sentencing, the State noted defendant's criminal history which included a 2008 conviction for aggravated battery for which he was sentenced to two years' imprisonment, a 2004 conviction for delivery of a look alike substance for which he received TASC probation and, upon his subsequent violation of TASC probation, a sentence of two years' imprisonment. Defendant also had a 1997 drug possession conviction for which he received a one-year prison term, a 1994 conviction for unlawful use of a weapon by a felon with a sentence of four years' imprisonment, and a 1985 armed robbery conviction for which he received the minimum sentence of six years' imprisonment. The State further argued that the facts of this case were aggravating, and that defendant's history shows that he had no rehabilitative potential. The State thus requested the maximum sentence to protect society.

¶ 22 In mitigation, defense counsel noted that defendant was 45 years old, and that he had graduated high school, attended college courses for a year and a half and received various diplomas. Counsel further noted that defendant was employed, was part of the Metamorphis program, that he no longer used drugs, and had children and supportive family members.

¶ 23 In allocution, defendant maintained that the fact that he had a confrontation with a government official in his last criminal case was "somewhat the reason why" he was being charged. He further maintained that he was not the offender, that he would like to get an associate's degree, that he had many children, and would like to spend time with them.

¶ 24 In announcing its sentencing determination, the court stated that it had listened to the arguments and to defendant's statement in allocution and had considered the presentence investigation (PSI) report. The court noted that the evidence did not show that defendant was framed, but proved that he robbed the victim, and had a "lot of gall that night and over his long criminal history has continually exhibited a lot of gall." The court further noted that defendant's upbringing was not the best, but that it did not excuse his conduct. The court then observed that defendant's criminal history included 11 misdemeanor convictions, that this was his eighth felony conviction, and that four of those convictions involved violence and/or a weapon. The court also stated that it considered the required statutory mitigation, none of which appeared to apply to defendant, and the statutory factors in aggravation, specifically noting that defendant's conduct threatened serious harm, that he received compensation, has a criminal history, that his sentence was necessary to deter others, and that the incident took place in a large urban setting. The court then sentenced defendant to 25 years' imprisonment.

¶ 25 On appeal, defendant first contends that the trial court erred in allowing him to represent himself at trial because his behavior throughout the proceedings indicated that he was not fit to do so. He requests this court to remand for a new trial, and if he then seeks to represent himself, and the trial court finds him unfit to do so, the trial court should appoint counsel to represent him. In the alternative, he requests this court to remand his case to the trial court for a determination as to whether he was a "gray area" defendant, and whether it would have precluded his self-representation pursuant to the standards set forth in *People v. Edwards*, 554 U.S. 164 (2008).

¶ 26 As an initial matter, the State maintains that defendant has waived this issue. In order to preserve an issue for review, defendant must object at trial and raise the matter in a written post-trial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Defendant did not raise the matter in

his post-trial motion, and thus failed to preserve it for review. *Enoch*, 122 Ill. 2d at 186. As a consequence, we may review this claim of error only if defendant has established plain error. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). Defendant raised plain error for the first time in his reply brief maintaining that he established plain error under the second prong of the rule. He claims that representing oneself at trial, when unfit to do so, is the equivalent of having no counsel at all, and as such, is a structural error that defies the harmless-error analysis and requires a *per se* reversal. The first step of plain error review, however, is to determine if there was error at all. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009). For the reasons that follow, we find none.

¶ 27 Defendant acknowledges that he was found fit to stand trial, but maintains that the trial court should not have allowed him to represent himself because his behavior throughout the proceedings indicated that he was unfit to do so. He claims, relying on *Edwards*, that there is a mental illness exception to the right of self-representation which required him to be tried with the assistance of counsel or at least evaluated for fitness to represent himself, and that because he did not have counsel, he was denied a fair trial.

¶ 28 In *Edwards*, a criminal defendant was found mentally competent to stand trial if represented by counsel, but not mentally competent to represent himself at trial. *Edwards*, 554 U.S. at 167. The issue on appeal was whether the Constitution forbade a State from insisting that defendant proceed to trial with counsel, thereby denying him his right to self representation. *Edwards*, 554 U.S. at 174. The Court found that it was constitutional to deny defendant the right to represent himself if he was not mentally competent to do so in that he suffered from a "severe mental illness." *Edwards*, 554 U.S. at 178.

¶ 29 In reaching this decision, the Court made clear that its prior foundational self-representation decision of *Faretta v. California*, 422 U.S. 806, 834 (1975), which held that criminal defendants have the constitutional right to self-representation, did not address the issue

in *Edwards* because it did not concern a defendant with mental competency issues, or what is also referred to as a "gray area" defendant. *Edwards*, 554 U.S. at 171, 173. The Court held that it was permissible to limit the right to self-representation where defendant may be fit to stand trial, but is unable to carry out the basic tasks needed to present his own defense without the assistance of counsel because he suffers from a "severe mental illness." *Edwards*, 554 U.S. at 177-78. The Court explained that the right to self-representation at trial will not affirm the dignity of a defendant who lacks the mental capacity to conduct his own defense without the assistance of counsel. *Edwards*, 554 U.S. at 176.

¶ 30 Defendant argues, pursuant to *Edwards*, that the trial court should have taken a realistic account of his mental capacities and determined whether he was mentally competent to proceed *pro se*. We observe, however, that *Edwards* did not hold that there was a higher standard of competence requiring an additional inquiry before a trial court permitted a defendant to proceed *pro se* at trial. *People v. Allen*, 401 Ill. App. 3d 840, 851 (2010); *People v. Tatum*, 389 Ill. App. 3d 656, 670 (2009). Rather, *Edwards* simply held that a defendant's right to self-representation was not absolute and could be limited if he was not mentally competent to represent himself, yet was still competent to stand trial with representation. *Allen*, 401 Ill. App. 3d at 851; *Tatum*, 389 Ill. App. 3d at 670.

¶ 31 Defendant maintains that his behavior throughout the trial proceedings indicated that he was not mentally competent to proceed *pro se*. He points to his "incredible" conspiracy theories for why he was being prosecuted, and claims that the discovery was fabricated.

¶ 32 We observe that defendant's conduct in his defense did not show that he was mentally incompetent to represent himself. The record shows clear articulate exchanges between defendant and the court, defendant's assurance to the court that he understood and accepted the perils of self-representation, and when making his request, he specifically outlined his

educational background, and stated that he had represented himself in another criminal matter. The record also shows that defendant was able to perform the basic tasks during trial where he filed and successfully argued a motion *in limine* to exclude his prior convictions, requested extensive discovery, issued subpoenas, filed an answer to discovery, asserted an alibi defense, requested photographs from the lineup, asked for an investigator to assist him, and requested a list of rebuttal witnesses that the State planned to call.

¶ 33 In addition, defendant presented an alibi defense and exhibited sound trial strategy in his cross-examination of the witnesses. He raised the suggestiveness of the photo array and line up identification, questioned police regarding the physical makeup of the other subjects in the lineup, elicited from the eyewitness that the knife could not be seen in the video, and asserted his alibi defense during closing argument. These circumstances militate against a finding that the court abused its discretion (*People v. Baez*, 241 Ill. 2d 44, 116 (2011)), in allowing defendant to proceed *pro se*.

¶ 34 This conclusion is not called into question by defendant's comments regarding a conspiracy. Although they evidence his inability to represent himself as effectively as an attorney, they do not show he was unable to perform the necessary tasks that an attorney would perform at trial. *Tatum*, 389 Ill. App. 3d at 670. Those cases relying on *Edwards* that have found that defendant was properly denied the right to proceed *pro se*, involved defendants who were diagnosed with schizophrenia and refused to take medication, or who suffered from a severe mental illness with paranoid ideation. *People v. Sheley*, 2012 IL App (3d) 090933, ¶24 (cases cited therein). Here, there is no indication that defendant was diagnosed with a mental illness and the report entered on his fitness to stand trial shows that he was not prescribed psychotropic medication. Defendant's representation of himself, as detailed above, did not show that he was mentally incompetent or a "gray-area" defendant who was fit to stand trial but not fit

to represent himself. Although we adhere to the opinion that self-representation is unwise, we will not protect defendant from the consequences of his unwise, but informed, decision to proceed *pro se*. *People v. Palmer*, 382 Ill. App. 3d 1151, 1158 (2008). We thus find no error to excuse his forfeiture of this issue¹.

¶ 35 Defendant next contends that the trial court improperly considered a factor inherent in the offense of armed robbery in making its sentencing decision. He specifically claims that the court improperly considered that he received compensation as an aggravating factor. Defendant acknowledges that he failed to raise this issue below, but maintains that we may review it as plain error. For the reasons that follow, we find no plain error to excuse his procedural default of the issue.

¶ 36 Defendant claims, under the first prong of the plain error rule, that the evidence at sentencing was closely balanced. *People v. Thomas*, 178 Ill. 2d 215, 251 (1997). In support of that claim, he points out the evidence showing that he was a voluntary resident at an addiction treatment center, was employed, supported his children financially, and had family support, and that his longest prior prison sentence was six years in 1986, and the record suggested he had a mental illness. The State responds that the evidence was not closely balanced, and the court's mere statement in reviewing the statutory factors in aggravation that the victim received compensation was not plain error given the other aggravating factors noted by the court.

¶ 37 After reviewing the record as a whole (*People v. Curtis*, 354 Ill. App. 3d 312, 326 (2004)), we find that the evidence presented at defendant's sentencing hearing was not closely balanced, but, rather, showed defendant's recidivism, as detailed by the court, in that he

¹We observe that in further support of this issue, defendant cites to a Florida supreme court case, and a federal district case. These cases, however, have no precedential value in this court. *People v. Reatherford*, 345 Ill. App. 3d 327, 340 (2003); *People v. High Tower*, 172 Ill. App. 3d 678, 691 (1988).

continued to choose a life of crime even though he had the continued support of his family. The court noted that this was defendant's eighth felony conviction, four of which were violent and/or involved a weapon, and that his actions in this case were particularly aggravating where he held a knife to the victim's throat, and threatened to slit it. We thus find that the evidence was not closely balanced as to require plain error review.

¶ 38 Defendant further claims that the court's error impinged on his fundamental right to liberty undermining the fairness of his sentencing proceeding. Defendant's mere assertion that the alleged sentencing error affected his fundamental rights is insufficient to warrant plain error review. *People v. Nieves*, 192 Ill. 2d 487, 503 (2000). Moreover, we find there was no plain error under the second prong of the rule.

¶ 39 Although a factor inherent in an offense may not be considered as a factor in aggravation at sentencing (*People v. Conover*, 84 Ill. 2d 400, 404 (1981)), every reference by a sentencing court to a factor implicit in the offense does not constitute reversible error (*People v. Burge*, 254 Ill. App. 3d 85, 91 (1993)). Here, in reviewing the statutory factors in aggravation, the court noted that defendant received compensation. That single reference did not constitute reversible error where considering the record as a whole, the court reviewed the appropriate factors in mitigation and aggravation including his recidivism and sentenced him to a lengthy term. We thus find that the mere mention that defendant was compensated for his crime did not deprive him of a fair sentencing hearing (*People v. Estrella*, 170 Ill. App. 3d 292, 297-98 (1998)) as any weight placed on that factor was insignificant (*People v. Heider*, 231 Ill. 2d 1, 21 (2008)). Accordingly, we find no plain error to excuse his forfeiture of this issue.

¶ 40 Defendant finally contends that his 25-year sentence was excessive. He maintains that the court failed to consider mitigating evidence, namely, that the victim was not harmed, that he

never had a prison sentence longer than six years, that he was attempting to overcome his addiction, was employed, and had a supportive family.

¶ 41 The parties do not dispute that the 25-year sentence imposed by the court fell within the statutory range for the offense of armed robbery. 730 ILCS 5/5-4.5-95(b) (West 2010). As a result, we may not disturb the sentence absent an abuse of discretion. *People v. Bennett*, 329 Ill. App. 3d 502, 517 (2002).

¶ 42 Defendant claims that the court failed to adequately consider a number of mitigating factors. However, in the absence of evidence to the contrary, we presume that the trial court considered the mitigating evidence before it (*People v. Burnette*, 325 Ill. App. 3d 792, 808 (2001), citing *People v. Burton*, 184 Ill. 2d 1, 34 (1998)), and here we find nothing in the record to refute that presumption. The record shows that the court considered the mitigating factors, the arguments of the parties, defendant's statement in allocution, and the PSI report. *Burnette*, 325 Ill. App. 3d at 808. The court was not required to give greater weight to defendant's rehabilitative potential than to the seriousness of the offense (*People v. Phillips*, 265 Ill. App. 3d 438, 450 (1994)), which included threatening to slit the victim's throat as she waited for a public conveyance.

¶ 43 Defendant, however, maintains that this court should reduce his sentence where the crime he committed was not as severe as that committed by the defendants in *People v. Nelson*, 106 Ill. App. 3d 838 (1982), whose sentences of 20 years were reduced to 10 years on direct appeal. In *Nelson*, defendants' single prior convictions were nonviolent, unlike here where this offense was defendant's eighth felony conviction, four of which were violent and/or included a weapon. Accordingly, *Nelson* is factually inapposite to the instant case. Moreover, this method of challenging the excessiveness of defendant's sentence by comparing it to sentences of other offenders was rejected in *People v. Fern*, 189 Ill. 2d 48, 55-56, 62-63 (1999), where the supreme

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court explained that reviewing courts can look at other cases in deciding excessive-sentence claims, but that defendant cannot challenge his sentence as excessive based on other decisions.

¶ 44 In sum, we conclude that defendant forfeited his claims regarding self-representation and trial court error in considering a factor implicit in the offense in imposing sentence, and find that the sentence imposed by the court was not excessive. In light of the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 45 Affirmed.