2013 IL App (4th) 110608-U

NO. 4-11-0608

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
April 26, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Sangamon County
DEREK D. NOLDEN,	)	No. 08CF979
Defendant-Appellant.	)	
	)	Honorable
	)	Leslie J. Graves,
	)	Judge Presiding.

PRESIDING JUSTICE STEIGMANN delivered the judgment of the court.
Justices Appleton and Pope concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court rejected defendant's claims that the trial court erroneously allowed evidence of other crimes evidence and that his 22-year sentence was excessive. Nevertheless, the court reversed one of the defendant's convictions as violative of the one-act, one-crime rule.

¶ 2 In April 2011, a jury convicted defendant, Derek D. Nolden, of being an armed habitual criminal (720 ILCS 5/24-1.7 (West 2008)), possession of a stolen firearm (720 ILCS 5/16-16(a) (West 2008)), and unlawful possession of a weapon by a felon (UUW by a felon) (720 ILCS 5/24-1.1(a) (West 2008)). The trial court later sentenced him to 22 years in prison on the armed-habitual-criminal conviction, two terms of 7 years each on the other convictions, and ordered those sentences to run concurrently to each other.

¶ 3 Defendant appeals, arguing that the trial court erred (1) when it allowed the State to present multiple witnesses and arguments regarding an uncharged burglary and (2) by

imposing an excessive sentence of 22 years because, in part, the court considered improper factors and failed to consider evidence in mitigation. Defendant also argues that his conviction for possession of a stolen firearm must be vacated because it is predicated on the same act that formed the basis for his UUW by a felon charge. Because we agree only with defendant's last argument, we affirm in part, vacate in part, and remand with directions.

¶ 4 I. BACKGROUND

¶ 5 In October 2008, the State charged defendant with six counts of various offenses regarding firearms. Count I charged defendant with possession of a stolen firearm in that he knowingly possessed a Smith and Wesson .38 caliber handgun with knowledge that it had been stolen or converted and without being entitled to possess that firearm. 720 ILCS 5/16-16(a) (West 2008). Count II charged the same offense, only this time the gun involved was a Kimber Arms .45 caliber handgun. Count III charged defendant with UUW by a felon in that, being a person who had been convicted of a felony, he knowingly possessed a Smith and Wesson .38 caliber pistol. 720 ILCS 5/24-1.1(a) (West 2008). Counts IV and V charged defendant with the same offense as count III, differing only in a description of the weapons defendant allegedly possessed. Count IV alleged it was a Titan FS .25 caliber pistol, while count V alleged it was the same Kimber Arms .45 caliber handgun referred to in count II. Count VI alleged that defendant committed the offense of being an armed habitual criminal in that he received and possessed a firearm after twice being convicted of UUW by a felon in two separate cases. 720 ILCS 5/24-1.7 (West 2008).

¶ 6 A. Pretrial Proceedings

¶ 7 The State's theory of the case was that defendant, who had multiple prior

convictions for UUW by a felon, had three guns wrapped in a sweatshirt that was hidden in the clothes dryer of his residence. The police found the guns when they searched his residence. Two of the guns were stolen in a burglary that occurred a few days earlier in Springfield. After the guns were found in defendant's residence, he gave a statement to the police in which he described how he set up the burglary, where it occurred, and how two other individuals involved repeatedly entered the premises and removed various items. Defendant told police that he himself never went into the house but was watching from across the street during the burglary. He later traded two pounds of "weed" to one of the burglars for the larger of the two guns stolen in the burglary.

¶ 8 In May 2010, defendant filed a motion *in limine* to preclude the introduction into evidence of other crimes. In December 2010, the trial court conducted a hearing on that motion, and defense counsel made clear that the evidence of other crimes he wished precluded concerned the burglary in which the guns were stolen and defendant's trading "weed" for one of the guns. Defendant had also filed (1) a motion to suppress his written statement and (2) a motion to suppress the guns. Following a December 2010 hearing on all three motions, the court first denied both of defendant's motions to suppress.

¶ 9 The police who testified at that hearing explained that they arrived at defendant's apartment about 4:45 a.m. on September 28, 2008, in response to a call that shots had been fired at that location. They encountered defendant outside his residence and informed him that because he was on parole, they were going to search his residence for any illegal contraband. Defendant was present inside his residence when they searched. When the police found three firearms in the dryer, defendant "[t]ook off running out the door" and escaped.

¶ 10 The following evening, defendant came to the Springfield police station and after being advised of his *Miranda* rights (*Miranda v. Arizona*, 384 U.S. 436 (1966)), provided a statement to Sergeant Matthew Fricke. Fricke wrote out what defendant told him, and defendant signed the statement.

¶ 11 After the trial court denied both motions to suppress, defense counsel raised the issue of the motion to preclude other-crimes evidence, indicating that he sought to bar informing the jury that the recovered firearms were stolen in a burglary. The prosecutor responded that defendant indicated in his statement that he came into possession of at least one of those guns "during his participation in a burglary, and how he came into the actual physical possession of the gun 'by trading two pounds of marijuana to his buddy to get the gun that was taken in the burglary.' " Defense counsel complained that the State's intention "[p]uts the [d]efendant at a distinct disadvantage, getting into the burglary and guns, how they were acquired." The court denied defendant's motion to preclude introduction of this evidence.

¶ 12 Before trial, the State dismissed count IV of the charges against defendant and the trial court permitted defendant to again speak in support of his motion to exclude any reference to the burglary from which the weapons came. When the court asked if the defendant had admitted the burglary, defense counsel responded, "Yes, but there is going to be some contest over his admission." Defense counsel also argued that the court had discretion "pertaining to relevant evidence in the event that the court feels although this may be relevant evidence, that the introduction of the burglary involving the defendant far outweighs the—it is so prejudicial and far outweighs the relevancy."

¶ 13 The State responded that evidence of the burglary contained in defendant's written

statement is necessary because the burglary is how defendant "obtained the one particular weapon in question." The prosecutor added that with regard to the possession-of-stolen-firearms counts, the State needed to prove that defendant knew the firearms were stolen or converted, and defendant's confession regarding the burglary "seems to indicate that he was present at the time the weapons were taken from the home." The court then asked if the State had any other way of proving that defendant knew they were stolen or converted, and the prosecutor responded that he did not. The court then denied the motion with the following admonition to the prosecutor:

> "Let's not beat a dead horse. Get the evidence in, evidence in that needs to be gotten in, about how they were stolen, and go on."

¶ 14 B. Defendant's Jury Trial

¶ 15 At defendant's jury trial, the State's first witness was Amy Bulpitt, who testified that on September 23, 2008, the residence she lived in Springfield on West Elliott with her then-fiancé, Paul, was burglarized while she was at work. When she returned from work that evening, she noticed the back window of her kitchen was broken and the back door was open. Items that were taken in the burglary included a flat screen TV, a personal laptop, all her jewelry, and two guns. The prosecutor showed two guns to Bulpitt, a Smith and Wesson .38 caliber and a Kimber handgun, which she identified as the guns taken from her residence during the burglary. Paul Bulpitt, who was Amy's husband at the time of trial, testified and also identified the Kimber .45 caliber handgun as belonging to him.

¶ 16 Springfield police officer Ricci Castles testified that in the early morning hours of September 28, 2008, she responded to a call about shots having been fired at 3120 Butler Street in Springfield. When Castles arrived at that address, she saw defendant in the front yard. Other

officers, including Fricke, joined Castles, who explained to defendant about the shots-fired call, they knew he was on parole, and they wanted to search his residence. Defendant responded that he lost his key. After police spent an hour outside defendant's apartment building trying to find his key, Fricke called the building manager, who let the police into defendant's apartment.

¶ 17 The officers then searched defendant's apartment while he sat in the living room. They found nothing until Castles searched the clothes dryer in the kitchen. In it, she found three firearms inside a balled-up sweatshirt. When Castles told Fricke what she had found, defendant ran out the front door. Castles identified the guns that Bulpitt had previously identified as being the guns she found in the dryer.

¶ 18 Other police officers present at defendant's residence during the search testified, including the officer who chased defendant after he ran out of the apartment. After an approximately 200-yard chase, that officer lost sight of defendant after defendant jumped over two chain-link fences.

¶ 19 The following morning, a Springfield police officer informed Fricke that defendant had called and wanted to speak to Fricke. Defendant provided a cell-phone number that Fricke called. Defendant told Fricke that he fled because he was scared due to his being on parole. He knew officer Castles found something in his apartment and thought Fricke had a warrant for his arrest. Fricke told defendant that Fricke would be working that evening at the Springfield police department and defendant should go there to give a statement regarding what happened.

¶ 20 Later that night, defendant arrived at the station with his uncle, Morris Hobbson, and defendant's girlfriend. Fricke told his girlfriend to remain in the lobby, and defendant and his

uncle went with Fricke upstairs to an interview room. Fricke then advised defendant of his *Miranda* rights, which defendant waived. As Fricke questioned defendant, his uncle remained in the interview room. Fricke explained that he wrote out a summary of what defendant told him, had defendant read it over, and then asked defendant to sign the statement if he agreed that it was correct. Defendant signed it and made no changes. That written statement, which was admitted into evidence, referred, in pertinent part, to defendant and two acquaintances going to a house on Elliott Street. Fricke then read a portion of the statement to the jury, as follows:

> "Mike and Jackson went to the back of the house. I heard them break in the back of the house by either a window or kicking the back door. I went across the street. I never went inside the house. They were there about 30 minutes. They made several trips in and out of the house. The first trip they brought out a TV with a sheet. Second trip they brought out a backpack. The third trip they carried out a suitcase. When we went to leave I saw Mike had two guns. We then went to Mike's house on South 9th. Mike wanted to trade the guns for some weed. I traded him two pounds of weed for the larger gun. Mike keeps his guns sometimes at my place."

¶ 21 After the State rested its case, defendant called Hobbson, who testified that he was present when defendant gave a statement to the police at the Springfield police department and defendant never told the officers that "Mike wanted to take the gun for some weed, and Derek traded him two pounds of weed for the larger gun." Hobbson testified that the police wrote out a report in defendant's presence, but Hobbson did not see defendant sign it or initial it.

¶ 22 Defendant testified at trial and was shown the one-page statement that Fricke said he wrote out and defendant signed. Defendant denied telling Fricke that Mike wanted to trade a gun for some weed, or that he traded him two pounds of weed for the larger gun. He also denied telling Fricke that Mike keeps his guns sometimes at defendant's residence. Defendant explained that Fricke mentioned that the document he wrote out "was a consent form, so it was kind of a rushed thing, *** so I was basically tricked a little bit."

¶ 23 Defendant claimed that the guns police found in his residence were not his but belonged to Michael Lightfoot, the boyfriend of defendant's sister, who was going to stay with defendant's sister the night the guns were found. Defendant explained that his sister lived with defendant in the apartment that was searched. Defendant claimed that Lightfoot also had a key to the apartment.

¶ 24 On this evidence, the jury found defendant not guilty of UUW by a felon and possession of a stolen firearm, both of which counts involved the Smith and Wesson .38 caliber gun. However, the jury found defendant guilty of the other three counts—namely, possession of a stolen firearm and UUW by a felon, both of which involved the Kimber Arms .45 caliber gun, and being an armed-habitual-criminal. (As the prosecutor explained at the sentencing hearing, the Kimber Arms gun was the larger of the two taken in the Bulpitt burglary for which defendant, according to his statement to Fricke, traded two pounds of "weed.")

¶ 25 In June 2011, the trial court sentenced defendant to 22 years in prison on the armed-habitual-criminal conviction, seven years on each of the other two convictions, and ordered all of these sentences to run concurrently. Defendant subsequently filed a motion for reconsideration of sentence, which the court denied.

¶ 26 This appeal followed.

¶ 27 II. ANALYSIS

¶ 28 Defendant argues that the trial court erred (1) when it allowed the State to present multiple witnesses and arguments regarding an uncharged burglary and (2) by imposing an excessive sentence of 22 years because, in part, the court considered improper factors and failed to consider evidence in mitigation. We address defendant's arguments in turn.

¶ 29 A. The Trial Court Did Not Err by Allowing The State To Present Evidence Regarding an Uncharged Burglary

¶ 30 Defendant acknowledges that for the State to convict him of the charge of possession of a stolen firearm, the State had to prove that defendant both possessed the gun in question and knew that it was stolen. He contends that (1) his incriminating statement to Fricke regarding the weapons discovered in the dryer in defendant's apartment was sufficient for the State to establish his knowledge that the guns were stolen and (2) accordingly, the court erred by permitting the State to present "substantial evidence regarding the burglary wherein the guns were stolen" that was not the subject of defendant's trial. Specifically, defendant asserts that the court erred by permitting the State to present the testimony of Amy and Paul Bulpitt regarding the burglary of their residence on Elliott Street in Springfield. Defendant further contends that the court also "abused its discretion by failing to conduct a second component of the relevancy examination, weighing the prejudicial nature of the evidence against its probative value." We disagree.

¶ 31 1. *Testimony About the Burglary, in Addition to Defendant's Statement, Was Properly Admitted*

¶ 32 The admissibility of the other-crimes evidence at issue here lies in the trial court's

sound discretion, which this court will not disturb absent a clear abuse thereof. *People v. Vannote*, 2012 IL App (4th) 100798, ¶ 39, 970 N.E.2d 72. We note that although defendant is correct that the court did not specifically state that it engaged in the balancing process, the absence of such a showing in the record does not necessarily demonstrate error. *People v. Abernathy*, 402 Ill. App. 3d 736, 750, 931 N.E.2d 345, 356 (2010). While it is always better practice for a court to make clear on the record that it has engaged in this balancing process, we note that defense counsel in this case reminded the court that it had discretion regarding relevant evidence to determine, as counsel argued, whether it was so prejudicial that it far out-weighed its relevancy. Certainly, on this record, we find no error in the court's not specifically stating that it engaged in the balancing process. We find support for this conclusion in *People v. Mullins*, 242 Ill. 2d 1, 18-19, 949 N.E.2d 611, 622 (2011), where the supreme court rejected the defendant's argument that the record did not demonstrate that the trial court weighed the probative value of impeachment evidence against its possible prejudicial effect, concluding that the record demonstrated that the trial court was aware of that standard.

¶ 33 Defendant's argument that the other-crimes evidence was improperly admitted is somewhat strange, given that he first concedes the relevancy of that evidence—namely, to prove defendant's knowledge that the guns in question were stolen in the Elliott Street burglary, as shown by the statement defendant gave to Fricke—but then asserts that the court erred by permitting the Bulpitts, who were the victims of the burglary, to testify about its circumstances. Defendant's position is strange because once the jury heard from defendant's statement about the burglary and his role in it, the testimony of the Bulpitts would have been rather anticlimactic. Defendant seeks to overcome this problem by arguing that even if testimony about the Bulpitt

burglary was properly admitted through defendant's statement to Fricke, permitting the State to call the Bulpitts amounted to the trial court's conducting a minitrial concerning that burglary. We are not persuaded.

¶ 34 First, as the State points out, the testimony of the Bulpitts was quite short, constituting less than 10 pages of the transcript of this short trial, which contained a total of 85 pages of transcript containing the testimony of the 9 witnesses who testified.

¶ 35 Second, the testimony of Amy Bulpitt in particular was probative where she explained that one of the items taken in the burglary was a flat screen TV. That testimony corroborated the statement defendant gave to Fricke, in which defendant said that his accomplices in the burglary brought out a TV in their first trip out of the burglarized house on Elliott Street. This corroboration is significant because defendant testified at trial that the document containing his statement, which was written by Fricke and signed by defendant, was not accurate in multiple respects.

¶ 36 2. *The Absence of IPI Instruction No. 3.14 Does Not Require Reversal*

¶ 37 Defendant also contends that he was denied his due process right to a fair trial because the trial court failed to give Illinois Pattern Jury Instructions, Criminal, No. 3.14 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 3.14) either at the time the jury heard the other-crimes evidence or with all of the instructions at the conclusion of the case. Defendant is correct regarding these omissions, and we again note that it is better practice for courts to do both. Defendant acknowledges that he failed to ask the court to give IPI Criminal 4th No. 3.14 but contends that this court may grant him relief because (1) the court's omission amounted to plain error "because the evidence was closely balanced and [defendant] was denied his fundamental

right to a fair trial," and (2) defense counsel's failure to ask for IPI Criminal 4th No. 3.14 constituted ineffective assistance of counsel. We disagree with both contentions.

¶ 38 First, we reject defendant's plain error argument because we disagree that the evidence was closely balanced. In our judgment, the evidence of defendant's guilt was overwhelming. Second, we note that any limiting instruction for the jury in this case would be more complicated than in the ususal case involving other-crimes evidence because some of the evidence and testimony (such as defendant's being on parole, which led to the police search his apartment) constituted an element of UUW by a felon that the State needed to prove to sustain that charge. Defendant has not suggested on appeal what the proposed limiting instruction might look like under the circumstances of this case, and we are disinclined to find plain error when the circumstances are, as here, so complicated.

¶ 39 We also reject defendant's claim that his trial counsel provided ineffective assistance. In so concluding, we find what this court said in *People v. Johnson*, 368 Ill. App. 3d 1146, 1161, 859 N.E.2d 290, 303-04 (2006), to be fully applicable to this case:

> "Ineffective-assistance-of-counsel claims are reviewed under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed.2d 674, 104 S. Ct. 2052 (1984). *People v. Evans*, 186 Ill. 2d 83, 93, 708 N.E.2d 1158, 1163 (1999). 'To obtain reversal under *Strickland,* a defendant must prove (1) his counsel's performance failed to meet an objective standard of competence and (2) counsel's deficient performance resulted in prejudice to the defendant.' *Thompson*, 359 Ill. App. 3d at 952, 835 N.E.2d at 937.

To satisfy the deficient-performance prong, the defendant must show that counsel made errors so serious that he was not functioning as the 'counsel' guaranteed by the sixth amendment (U.S. Const., amend.VI). To satisfy the prejudice prong, the defendant must show that but for counsel's errors, a reasonable probability exists that the outcome of the proceedings would have been different. *Thompson*, 359 Ill. App. 3d at 952, 835 N.E.2d at 937. The failure to satisfy either *Strickland* prong will preclude a finding of ineffective assistance of counsel. *People v. Young,* 347 Ill. App. 3d 909, 927, 807 N.E.2d 1125, 1140 (2004).

In this case, defendant has not shown that his trial counsel was not functioning as the 'counsel' guaranteed by the sixth amendment when counsel failed to request a limiting instruction for the other-crimes evidence. Counsel may have made a tactical decision not to request such an instruction to avoid unduly emphasizing the other-crimes evidence. Moreover, this court has held that a defendant cannot establish prejudice as to his counsel's failure to request a limiting instruction when—as here—' "the other-crimes evidence is an integral part of the context of the crime for which defendant has been tried." ' *Thompson,* 359 Ill. App. 3d at 953, 835 N.E.2d at 937, quoting *People v. Figueroa,* 341 Ill. App. 3d 665, 672, 793 N.E.2d 712, 718 (2003)."

¶ 40 B. Defendant's Sentence Was Not Excessive

¶ 41 Defendant next argues that the trial court erred by sentencing him to 22 years in prison for his conviction of being an armed habitual criminal. In support of this contention, defendant asserts that in imposing sentence, the court (1) improperly relied on factors inherent in the offense and (2) did not properly take into account defendant's youth, intellectual disability, or potential for rehabilitation. We disagree.

¶ 42 1. *The Standard of Review*

¶ 43 Generally, a trial court has great discretion to fashion an appropriate sentence within statutory limits. *People v. Kenton*, 377 Ill. App. 3d 239, 245, 879 N.E.2d 402, 407 (2007). Because the trial court is in a better position to observe the witnesses and consider the relevant factors, its sentencing determination is entitled to great deference. *Id.* This court will not substitute its judgment for that of the trial court simply because we might have weighed the sentencing factors differently. *Id.*

¶ 44 2. *Defendant's Criminal Record*

¶ 45 After defendant was convicted, the trial court ordered a presentence investigation and report (PSI). At defendant's June 2011 sentencing hearing, the court and both parties had received the PSI and commented upon its contents. Although defendant argues in his brief that he was 20 years old at the time of sentencing, the PSI shows that he was 23 and had an extensive criminal record. As a juvenile, he had multiple adjudications for theft, had been placed on juvenile delinquency probation, and was ultimately committed to the Illinois Department of Juvenile Justice.

¶ 46 As an adult, defendant was convicted in 2006 of manufacture/delivery of a

controlled substance and sentenced to 24 months probation. Five months later, defendant was convicted in an unrelated case of UUW by a felon and sentenced to five years in prison. In December 2007, defendant again was convicted of UUW by a felon and sentenced to three years in prison. The PSI report indicated that defendant was paroled in July 2008, and in September 2008, he was arrested for the offenses at issue in this case.

¶ 47 Defendant was convicted of being an armed habitual criminal, which is a Class X felony. 720 ILCS 5/24-1.7(b) (West 2008). Accordingly, on his conviction of that offense, the trial court was required to impose a prison sentence of not less than 6 and not more than 30 years. 730 ILCS 5/5-8-1(a)(3) (West 2008) (text of section eff. until June 1, 2004).

¶ 48 3. *The Trial Court's Sentence*

¶ 49 The State argued at defendant's sentencing hearing that the trial court should impose a sentence of 23 years on his conviction for being an armed habitual criminal. The State also argued that the court should impose five-year prison sentences on the other two convictions (UUW by a felon and possession of a stolen weapon) and order all the sentences to be served concurrently. In support of its recommendation, the State argued that defendant's conduct threatened serious harm because the weapons he possessed in his apartment were loaded.

¶ 50 In mitigation, defense counsel argued that defendant was "crippled in his mental development *** and emotional development." Counsel further argued that his client could still be a useful member to society and that the court should grant him some leniency.

¶ 51 Before imposing sentence, the trial court noted that it had read the PSI and taken into account all of the factors in mitigation. The court then noted the defendant's prior involvement in the juvenile and adult justice systems and observed that defendant did not learn

from his mistakes or benefit from those services. The court acknowledged that defendant was "not gifted with a particularly high IQ," but also noted that there are many people with similar backgrounds who "still live life within the law."

¶ 52 The trial court also noted that despite the fact defendant may not have a very high IQ, he was "smart enough to write me letters, which means you had the ability to read what you signed that day. Do not tell me that you did not know what was going on. You knew exactly what's going on." (These remarks appear to be a reference by the court to defendant's claim that Fricke somehow "tricked" him regarding the one-page statement Fricke wrote out based upon his interview with defendant that defendant later signed.) The court then sentenced defendant to 22 years in prison on his conviction of being an armed habitual criminal, seven years on each of the other gun charges, and ordered all of the sentences to run concurrently.

¶ 53 4. *Defendant's Claim That the Trial Court Relied on Factors Inherent in the Offense*

¶ 54 Defendant contends that when the trial court imposed the sentence of 22 years in prison for his conviction of being an armed habitual criminal, the court improperly considered factors inherent in the offense. We disagree.

¶ 55 We note that defendant's motion for reconsideration of sentence failed to include this claim. Accordingly, defendant has forfeited this claim on appeal. Nonetheless, defendant asks us to review his contention as plain error, but we decline.

¶ 56 Over the last few years, this court has had occasion to address similar arguments and reject them. See *People v. Ahlers*, 402 Ill. App. 3d 726, 731-34, 931 N.E.2d 1249, 1253-56 (2010); *People v. Montgomery*, 373 Ill. App. 3d 1104, 1122-24, 872 N.E.2d 403, 418-20 (2007); *People v. Rathbone*, 345 Ill. App. 3d 305, 309-11, 802 N.E.2d 333, 336-38 (2003). We stand by

what we wrote in those cases and find their analyses fully applicable to the present case. In so doing, we reiterate a portion of what we wrote in *Ahlers*, as follows:

> " '[The] defendant's claim is precisely the type of claim the forfeiture rule is intended to bar from review when not first considered by the trial court. Had [the] defendant raised th[e] issue in the trial court, that court could have answered the claim by either (1) acknowledging its mistake and correcting the sentence, or (2) explaining that the court did not improperly sentence [the] defendant ***. If the court did not change the sentence, then a record would have been made on the matter ***, avoiding the need for [the reviewing] court to speculate as to the basis for the trial court's sentence.' *Rathbone*, 345 Ill. App. 3d at 310, 802 N.E.2d at 337." *Ahlers,* 402 Ill. App. 3d at 732, 931 N.E.2d at 1254.

¶ 57 In closing, we add that when sentencing a defendant for being an armed habitual criminal based upon his having received and possessed a firearm after having been twice convicted of UUW by a felon, a trial court commits no error by mentioning guns. See *People v. Gramo*, 251 Ill. App. 3d 958, 971, 623 N.E.2d 926, 935 (1993) (quoting *People v. Barney*, 111 Ill. App. 3d 669, 679, 444 N.E.2d 518, 525 (1982), as follows: "It is unrealistic to suggest that the judge sentencing a convicted murderer must avoid mentioning the fact that someone has died or risk committing reversible error." (Internal quotation marks omitted.)).

¶ 58 5. *The Trial Court Properly Considered Mitigating Factors*

¶ 59 Defendant also contends that the trial court failed to properly consider "several

factors in mitigation." We disagree.

¶ 60 The record shows that the court gave careful consideration to the PSI and remarked that the court was considering all factors in mitigation. The court's disagreement with defendant regarding the significance of such factors in his particular case does not constitute failure by the court to consider them, especially when, in a case like this, defendant's criminal record is so terrible. Consistent with the standard of review that applies here, we conclude that defendant's 22-year sentence was not excessive. Indeed, in our judgment, that sentence is not close to being "greatly at variance with the spirit and purpose of the law" or being "manifestly disproportionate to the nature of the offense." *People v. Fern*, 189 Ill. 2d 48, 54, 723 N.E.2d 207, 210 (1999).

¶ 61 C. Defendant's Conviction for Possession of a Stolen Firearm Will be Vacated Because It Is Predicated on the Same Act that Formed the Basis for His UUW by a Felon Conviction

¶ 62 Last, defendant contends that his convictions for possession of a stolen firearm and UUW by a felon violate the one-act, one-crime rule. The State concedes this argument, and we accept the State's concession. Accordingly, we vacate defendant's sentence for possession of a stolen firearm and his sentence therefor. We remand with directions that the trial court revise the sentencing order accordingly.

¶ 63 III. CONCLUSION

¶ 64 For the reasons stated, we affirm in part, vacate in part, and remand with directions. As part of our judgment, we award the State $50 against defendant as costs for this appeal.

¶ 65 Affirmed in part and vacated in part; cause remanded with directions.