

No. 1-10-3729

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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  
 )  
 v. ) No. 06 C6 61254  
 )  
 KEVIN GRAY, ) Honorable  
 ) Frank G. Zelezinski,  
 Defendant-Appellant. ) Judge Presiding.

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JUSTICE MASON delivered the judgment of the court.  
Justices Neville and Pucinski concurred in the judgment.

**ORDER**

¶ 1 *Held:* Prosecutor's remark during rebuttal closing argument that in defendant's world, "the rule is you don't talk to the police" was not improper or prejudicial when read in context. Defendant's sentences for armed robbery including firearm sentence enhancements were proper. The trial court did not err in ordering defendant's sentences to run consecutively because he caused serious bodily injury to the victim. Claims of error not supported by argument or not properly preserved for review are forfeited.

¶ 2 Following a jury trial, defendant Kevin Gray was convicted of one count of armed robbery against victim Kevin Mardis and the jury determined that Gray personally discharged a

firearm during the offense that proximately caused great bodily harm. The jury also found Gray guilty of one count of armed robbery against victim Terrell Hicks and it determined that Gray was armed with a firearm during the commission of that offense. The trial court sentenced Gray to 46 and 31 years' imprisonment, respectively, with the sentences to run consecutively. On appeal, Gray claims that he is entitled to a new trial because the prosecutor's remarks during rebuttal closing argument allegedly referring to his constitutional right to remain silent and that he was in the drug business were improper and prejudicial. Gray also raises sentencing errors claiming that the trial court erred in (1) imposing firearm sentence enhancements to his two armed robbery convictions and (2) imposing consecutive sentences. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 As a result of events occurring on November 6, 2006, Gray was charged with: (1) five counts of attempted first degree murder of Mardis; (2) one count of aggravated battery with a firearm of Mardis; (3) two counts of aggravated battery of Mardis; (4) three counts of armed robbery of Mardis; and (5) armed robbery of Hicks.

¶ 5 During Gray's trial, Mardis, Hicks, Antonio Matthews and Lavenia Smyles testified for the State. Hicks, Matthews and Smyles testified consistently with Mardis' testimony and each witness acknowledged their substantial criminal backgrounds. Mardis testified that on November 6, 2006, around midnight or 1 a.m. he, Hicks and Matthews arrived at a single story residential house located at 15726 South Myrtle in Harvey, Illinois. Matthews was Smyles's boyfriend. Smyles did not own the house; she lived there as a squatter. When Mardis and the other men arrived at the house, Smyles was smoking cocaine and approximately six or seven

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other people were also there smoking marijuana and cocaine. After entering the house, Mardis, Hicks and Matthews went into the living room and remained there smoking a "blunt"<sup>1</sup> and talking.

¶ 6 A week or two earlier, Mardis and Smyles had an altercation that turned physical when he pushed her away from him and put his hand in her face because she was spitting while talking. On the evening of the incident, Mardis did not expect any trouble with Smyles because he apologized to her, gave her a hug and kissed her on her cheek.

¶ 7 Gray is Smyles' cousin and she previously told him about her altercation with Mardis. At approximately 1:30 a.m. or 1:45 a.m., Gray arrived at Smyles's house. Matthews responded to Gray's knock and let him into the house. Gray entered the house and walked into a backroom starting a conversation with Smyles. According to Smyles, Gray asked her who the other men were and whether they had any money. She responded no, but informed Gray that one of the men was the man who had "jumped" her. Gray and Smyles talked for a few minutes and she offered to pay him if he would "check" Mardis. Gray agreed to do so and left the house.

¶ 8 Gray returned within a few minutes and continued his conversation with Smyles. A short time later, Gray entered the living room. As Mardis reached for a chair to sit down, Gray struck him from behind with a gun on the side of his face near his right ear. Mardis then turned slightly to his right in an attempt to grab Gray's arm, but Gray pulled the gun's trigger while Mardis still had his back to him. Mardis did not see Gray shoot him. Smyles, though, saw Gray shoot Mardis. After being shot, Mardis slid on his stomach into the dining room. Gray then kicked

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<sup>1</sup> A "blunt" is marijuana rolled in a cigar and is more powerful than normal marijuana.

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Mardis in the leg, told him to get up and kicked him in the side. Mardis, however, was unable to get up.

¶ 9 Smyles was in the front room and Gray walked toward her, pointed a gun at her and told her to turn Mardis over. Smyles complied and turned Mardis over onto his back. After she did so, Mardis saw Gray's face, who was standing at his feet in front of him. Mardis also saw Gray holding a black, automatic gun in his hand. Gray put the gun down and went through Mardis' pockets taking his cellphone, cigarettes, a "bag of weed" and \$80. After removing the items from Mardis' pockets, Gray stood up, turned to Hicks and Matthews and told them to remove everything out of their pockets. Gray pointed a gun at Hicks and demanded his money. In response, Hicks gave Gray \$50. Gray also asked Matthews for money, but Smyles stopped Gray from taking his money because she told him that Matthews was her boyfriend and "that's like my money." Gray then left.

¶ 10 After being shot, Mardis described his stomach as "bubbling," he felt his legs swell immediately and he felt funny. He was also unable to move. Matthews picked Mardis up, put him in a vehicle and Hicks drove them all to the hospital. Mardis was subsequently transferred by helicopter to another hospital for treatment. At the time of trial, Mardis experienced constant pain primarily from his legs down and sometimes in his side and stomach. Mardis is unable to walk and it hurts whenever he attempts to move. He is paralyzed from the waist down.

¶ 11 At trial, Dr. Ellen Omi elaborated on the medical treatment provided to Mardis and the nature of his injuries. Dr. Omi testified that because of the spinal cord injury sustained in the shooting, paraplegia resulted leaving Mardis unable to move either of his legs.

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¶ 12 During closing arguments, Gray's counsel remarked that the State's witnesses were "criminals, not just people with unsavory backgrounds, people [who are] not boy scouts or girl scouts, criminals. People who have given their lives to criminal enterprise. You heard that from the witness stand." Defense counsel also remarked that the witnesses were "drug addicts, people who smoke crack cocaine, and people who smoke marijuana and people who at the time of this incident were high on those substances." During the State's rebuttal closing argument, the prosecutor made the following remarks:

"Now, the Defense Counsel tells you, we brought you thugs and convicts and drug addicts. No, we didn't choose the witnesses. He did. He went to the house at 15726, and that is where he did his shooting. Why? Because that is where in his world he's comfortable just pulling out a gun and putting a bullet in the back of somebody. He was taking care of some dirty work because he could get away with it. Because in his world, the rule is you don't talk to the police. In his world –"

Gray's counsel objected claiming that the prosecutor's last statement improperly referred to his decision to invoke his constitutional right to remain silent. The trial court promptly sustained the objection. The prosecutor continued his remarks by stating:

"Ladies and gentlemen, he did it where he was comfortable in front of people he was comfortable with. But he miscalculated. The person he shot had friends in that room. And the person he shot didn't die. It all went wrong from there, didn't it?"

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Antonio Matthews got up there. Again, he didn't want to be here, no, not in their world do they want to be here. But it's their friend, so he got up there, and he again told you that

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what happened reluctantly, he gave – told you everything in his [own] words up to the point that he would have say that this defendant shot him and everything afterwards."

The prosecutor also commented about Gray's co-defendant by stating:

"Lavenia, Miss Smyles, the codefendant, let's talk about this person who the Defense again wants you to perceive as this mastermind. Ladies and gentlemen, you saw her. You heard her. Did she sound like the Machiavellian mastermind of Harvey? She was managing a drug house. In the defendant's world, in her world, that is routine as managing the Burger King."

Gray's counsel objected to the last statement because it insinuated that Gray was in the drug business. The trial court overruled the objection.

¶ 13 Following closing arguments, the trial court instructed the jury that opening statements and closing arguments are not evidence, and statements or arguments made by the attorneys not based on the evidence should be disregarded. At the conclusion of deliberations, the jury found Gray guilty of armed robbery of Mardis and that he personally discharged a firearm that proximately caused great bodily harm to him. The jury also found Gray guilty of armed robbery of Hicks and that he was armed with a firearm during the commission of the armed robbery.

¶ 14 On May 4, 2010, Gray filed a motion for judgment of acquittal notwithstanding the jury verdict or, in the alternative, a motion for a new trial. In that motion, Gray argued, among other things, that the prosecutor's remarks during rebuttal closing argument that repeatedly referred to his decision not to testify were prejudicial. On July 30, 2010, the trial court denied Gray's posttrial motion.

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¶ 15 On November 24, 2010 during the sentencing hearing, the State offered victim impact statements from Mardis and his mother. Both statements discussed Mardis' pain and suffering, as well as the devastating effect that his injuries have on his family. Following the sentencing hearing and arguments in mitigation and aggravation, the trial court sentenced Gray. In rendering the sentence, the trial court noted that the armed robbery of Mardis was subject to a sentence enhancement of an additional 25 years to the minimum sentence and the armed robbery of Hicks was subject to an enhancement of 15 years to the minimum sentence of six years. The trial court sentenced Gray to 46 years' imprisonment for the armed robbery of Mardis and 31 years' imprisonment for the armed robbery of Hicks. The trial court imposed consecutive sentences for the convictions because Gray seriously injured Mardis. On December 10, 2010, Gray filed a motion to reconsider the sentence asserting that the 77-year prison term was excessive. Gray's motion to reconsider was denied, and he timely appealed.

¶ 16

#### ANALYSIS

¶ 17

#### A. Closing Argument

¶ 18 Gray contends that the prosecutor made improper and prejudicial remarks during rebuttal closing argument by (1) referencing his right to remain silent and (2) inferring that he was in the drug business. Specifically, Gray maintains that when the prosecutor argued, "in [Gray's] world, the rule is you don't talk to the police," she was commenting on Gray's failure to testify at trial and, therefore, Gray's right to remain silent. Gray claims that the prosecutor's remark was improper under *Doyle v. Ohio*, 426 U.S. 610, 618 (1976), which held that it is "fundamentally unfair and a deprivation of due process" for the prosecution to comment that the defendant

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asserted his constitutional right to remain silent. See also *People v. Lackland*, 248 Ill. App. 3d 426, 434 (1993); *People v. Hellemeyer*, 28 Ill. App. 3d 491, 499 (1975).

¶ 19 In criminal proceedings, prosecutors are given wide latitude in making their closing arguments. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005). In fact, the prosecutor may comment on the evidence and on any reasonable inferences that may be drawn from the evidence, even those that reflect negatively on the defendant. *Id.* A prosecutor's comments during closing arguments must be viewed in their entirety, and challenges to remarks made must be viewed in context. *Id.* at 122. The prejudicial impact of improper comments made during closing arguments is generally sufficiently cured by an objection promptly sustained combined with a proper jury instruction. *People v. Johnson*, 208 Ill. 2d 53, 116 (2003).

¶ 20 Gray asserts that we should review the propriety of the State's closing remarks adopting a *de novo* standard of review because the issues are legal conclusions to be drawn from undisputed facts. The State does not address the applicable standard of review. Based on our research, we note that there is uncertainty in this court about whether the appropriate standard is *de novo* or an abuse of discretion. See *People v. Land*, 2011 IL App (1st) 101048, ¶ 150 (comparing *People v. Love*, 377 Ill. App. 3d 306, 313 (2007) and *People v. Averett*, 381 Ill. App. 3d 1001, 1007 (2008) applying an abuse of discretion standard of review with *People v. McCoy*, 378 Ill. App. 3d 954, 964 (2008), *People v. Palmer*, 382 Ill. App. 3d 1151, 1160 (2008), *People v. Ramos*, 396 Ill. App. 3d 869, 874 (2009) and *People v. Vargas*, 409 Ill. App. 3d 790, 797-98 (2011) applying a *de novo* standard of review.) In this case, we need not resolve the current uncertainty regarding the appropriate standard of review because our result would be the same even if we were to apply the more strict standard of *de novo* review. See *People v. Chaban*, 2013 IL App (1st) 112588, ¶

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58; *People v. Luna*, 2013 IL App (1st) 072253, ¶ 125; *People v. Cosmano*, 2011 IL App (1st) 101196, ¶ 52; and *People v. Phillips*, 392 Ill. App. 3d 243, 274-75 (2009) (applying this same approach.)

¶ 21 We reject Gray's classification of the prosecutor's remark as impermissibly referring to his constitutional right to remain silent. In this case, the prosecutor's remark referred to Gray's knowledge that individuals in his neighborhood who witnessed a crime would not likely talk to the police. Just prior to making the challenged remark, the prosecutor stated that Gray decided to go to that particular house because that is where in "his world" he felt comfortable shooting an individual and know that "he could get away with it." Reading the prosecutor's remark in context we cannot conclude that the prosecutor affirmatively referred to Gray's decision to remain silent in violation of *Doyle*. Rather, the prosecutor's remark referred to Gray's expectation that after he discharged his weapon in the house, witnesses would not discuss his shooting of Mardis with the police. Thus, the prosecutor's remark was directed toward the witnesses' reluctance to speak to the police and not Gray's silence.

¶ 22 Importantly, the trial court instructed the jury that closing arguments are not evidence and statements made by the attorneys that are not based on the evidence should be disregarded. The trial court also promptly sustained defense counsel's objection to the prosecutor's remark. Counsel's objection in conjunction with the trial court's instruction sufficiently cured any possible prejudice arising from the allegedly improper remark. *Johnson*, 208 Ill. 2d at 116.

¶ 23 Gray also claims that the prosecutor's remark that in his world, managing a drug house is "as routine as managing the Burger King" was prejudicial because it inferred that he was in the

drug business. The State responds that Gray's claim is forfeited even though counsel objected because he did not include this error in his posttrial motion. We agree with the State.

¶ 24 To preserve an issue for review, a defendant must object at trial and include the issue in a written posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Failure to do both operates as a forfeiture of the right to raise the claim of error on review. *People v. Ward*, 154 Ill. 2d 272, 293 (1992). We may still review forfeited errors, however, if the error was plain error. Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999). In Illinois, the plain error doctrine permits this court to review forfeited errors when either: "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Under the plain error doctrine, the defendant bears the burden of persuasion to establish that both requirements of the doctrine have been satisfied. *People v. McLaurin*, 235 Ill. 2d 478, 495 (2009); *People v. Thurow*, 203 Ill. 2d 352, 363 (2003). If a defendant fails to meet his burden, we must honor the procedural default created by his failure to properly preserve a claim for review. *People v. McCoy*, 405 Ill. App. 3d 269, 273 (2010). Stated differently, a defendant who fails to present argument supporting the application of both prongs of the plain error doctrine forfeits plain error review. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010).

¶ 25 In his opening brief, Gray asserts that this error should be considered as plain error. However, Gray's only reference to plain error states: "This error also, should be considered as plain error, and a new trial ordered." As support for that proposition, Gray cites, without

discussion, to *People v. Lackland*, 248 Ill. App. 3d 426 (1993) and directs us to section 1.A. in his brief. In that section, Gray argues that the prosecutor improperly remarked on his decision to remain silent. Gray also raises plain error in that section, but his discussion of plain error is limited to the following statements: "Defendant respectfully prays that this error be considered as plain error, and that a new trial be ordered. The evidence was closely balanced, and the error involves fundamental fairness, due process, and attacks the integrity of a criminal trial."

Although Gray mentions plain error in his brief, the mere mention of a doctrine and the general concepts underlying the doctrine are wholly insufficient to satisfy the burden a defendant bears to establish reversible error under a plain error analysis. *McCoy*, 405 Ill. App. 3d at 274; see also Ill. S. Ct. Rule 341(h)(7) (eff. September 1, 2008) (requiring an appellant's brief to include an argument section containing his contentions with citation to authorities.) Specifically, Gray has failed to present an argument supported by relevant authority that the reference to the routine nature of running a drug house either tipped the scales in a closely balanced case or undermines the integrity of the judicial process. See *McCoy*, 405 Ill. App. 3d at 274. Because Gray forfeited review of this claim and he failed to address a judicial process claim of error under the plain error doctrine on this point, we will not review this contention on its merits.

¶ 26

#### B. Sentencing

¶ 27 Gray claims that both sentences for the armed robbery convictions were void following our supreme court's decision in *People v. Hauschild*, 226 Ill. 2d 63, 87 (2007). The issue in *Hauschild* was whether the defendant's sentence for armed robbery while armed with a firearm that included the 15-year firearm sentence enhancement was disproportionate to the sentence for armed violence based on robbery with a category I or II weapon. *Id.* at 71. The *Hauschild* court

held that the sentence for armed robbery while armed with a firearm violated the proportionate penalties clause because that sentence was more severe than the sentence for the identical offense of armed violence based on robbery with a category I or II weapon. *Id.* at 87. The court further held that the proper remedy was to remand the case for resentencing in accordance with the armed robbery statute as it existed before the amendment that added the 15-year firearm sentence enhancement. *Id.* at 88.

¶ 28 Subsequent to Gray filing his opening brief on appeal, our supreme court issued its decision in *People v. Blair*, 2013 IL 114122. In *Blair*, the court recognized that after its decision in *Hauschild*, the legislature amended the armed violence statute through Public Act 95-688 (eff. Oct. 23, 2007) so that robbery cannot serve as a predicate offense for armed violence. *Id.* at ¶ 21. As a result of Public Act 95-688, armed robbery and armed violence no longer shared identical elements for proportionate penalties purposes. *Id.* Consequently, Public Act 95-688 rectified the proportionate penalties issue identified in *Hauschild* between the armed violence and armed robbery statutes. *Id.* In *Blair*, our supreme court recognized that Public Act 95-688 cured the disproportionate penalties between the offenses of armed robbery and armed violence, which in turn revived the 15-year firearm sentence enhancement for armed robbery. *Id.* at ¶ 27.

¶ 29 We granted Gray's motion to cite *Blair* as additional authority, though we note that he included a discussion of *Blair* in his reply brief. Gray argues that his sentencing issues are meritorious because the firearm sentence enhancements are unenforceable for conduct occurring on the day of the shooting and that *Blair* was decided after his opening brief was filed.<sup>2</sup> *Blair*,

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<sup>2</sup> Our supreme court decided *Hauschild* on June 7, 2007, which was subsequent to the shooting incident that occurred in 2006. Contradictorily, Gray asserts that *Hauschild* is

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however, addresses the identical issue that we must dispose of in this appeal and our supreme court's decision in that case is not only dispositive, but we are bound by that decision. *People v. Muhammad*, 398 Ill. App. 3d 1013, 1017 (2010). Contrary to Gray's claim, judicial decisions are generally given retroactive and prospective effect. *Exelon Corp. v. Department of Revenue*, 234 Ill. 2d 266, 285 (2009). In light of our supreme court's clear holding in *Blair* that the 15-year firearm sentence enhancement is revived, the firearm sentence enhancement imposed by the trial court relating to Gray's conviction for the armed robbery of Hicks is proper. Apart from relying on *Hauschild*, Gray raises no other bases for finding either of his two armed robbery sentences void. Significantly, *Hauschild* was silent regarding the constitutionality of the 25-year-to-life firearm sentence enhancement for armed robbery while personally discharging a firearm that proximately caused great bodily harm. Consequently, neither *Hauschild* nor *Blair* provide support for finding either of the armed robbery sentences that included firearm sentence enhancements void. Accordingly, we affirm Gray's sentences for both armed robbery convictions.

¶ 30 Lastly, Gray claims that the trial court erred in imposing consecutive sentences as no legal basis exists to find that Gray "inflicted severe bodily injury." Because the jury found that Gray was not guilty of attempted first degree murder of Mardis and not guilty of aggravated battery with a firearm of Mardis, he claims that it cannot be found that he inflicted severe bodily injury. We disagree.

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dispositive for finding the firearm sentence enhancements void, but asserts that *Blair* is not dispositive even though both cases were decided after the shooting incident. Moreover, when Gray committed the offenses, the 15-year firearm sentence enhancement was valid and had not been found unconstitutional for violating the proportionate penalties clause.

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¶ 31 In this case, Gray was convicted of armed robbery against Mardis and the jury found that he personally discharged a firearm that proximately caused great bodily harm, which is a Class X felony. 720 ILCS 5/18-2 (West 2000). Our supreme court in *People v. Jones*, 207 Ill. 2d 122, 133-34 (2003), held that "[d]efendants in Illinois can no longer challenge convictions on the sole basis that they are legally inconsistent with acquittals on other charges." See also *People v. Pelt*, 207 Ill. 2d 434, 440 (2003). Thus, we reject Gray's contention that the trial court erred in imposing consecutive sentences because he was acquitted of other charges as his claim contradicts established precedent.

¶ 32 Moreover, a trial court shall impose a consecutive sentence if "one of the offenses for which defendant was convicted was first degree murder or a Class X or Class 1 felony and the defendant inflicted severe bodily injury." 730 ILCS 5/5-8-4(a)(i) (West 2006). Our supreme court has defined bodily harm as "some sort of physical pain or damage to the body, like lacerations, bruises or abrasions." *People v. Mays*, 91 Ill. 2d 251, 256 (1982). Severe bodily injury "requires an injury of a more grave and serious character than simple bodily harm." *People v. Ruiz*, 312 Ill. App. 3d 49, 62 (2000).

¶ 33 Here, the State presented evidence at trial establishing that Mardis suffered severe bodily injury as a result of Gray shooting him in the back. During trial, Mardis testified that he is in constant pain, cannot walk and is paralyzed from the waist down. Immediately following the shooting, he was hospitalized and underwent surgery. Dr. Omi corroborated Mardis' condition testifying that due to his spinal cord injury, he is paralyzed and unable to move either of his legs. Consequently, these facts alone were sufficient for the trial court to find that Mardis suffered severe bodily injury. A trial court has broad discretion in imposing a sentence and, here, no

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abuse of discretion resulted from the imposition of consecutive sentences. *People v. Stacey*, 193

Ill. 2d 203, 209 (2000).

¶ 34 For the reasons stated herein, we affirm.

¶ 35 Affirmed.