2015 IL App (1st) 121180-U
No. 1-12-1180

THIRD DIVISION
March 4, 2015

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 04 CR 14420
	)	
KEITHEN TOLLIVER,	)	The Honorable
	)	Brian Flaherty,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE PUCINSKI delivered the judgment of the court.
Justices Hyman and Mason concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's conviction for first degree murder affirmed where: he was not prejudiced when the State impeached him with his prior felony conviction; the State's closing and rebuttal arguments did not deprive him of his right to a fair trial; and he suffered no prejudice from the court's failure to inquire whether he agreed with defense counsel's request to tender a lesser-included offense jury instruction. Defendant's 30-year sentence affirmed where the sentence was not excessive and was based on the circuit court's consideration of relevant factors.

¶ 2 Following a jury trial, defendant Keithen Tolliver[1] was convicted of first degree murder and was sentenced to 30 years' imprisonment. On appeal, defendant seeks reversal of his conviction and the sentence imposed thereon, arguing that: (1) the circuit court erred in allowing the State to impeach him with his prior felony conviction; (2) the State made multiple improper statements during closing and rebuttal arguments; (3) the circuit court erred in failing to inquire whether defendant agreed with defense counsel's decision to tender a jury instruction on the lesser-included offense of reckless homicide; and (4) the circuit court erred when it conducted its own investigation prior to imposing an excessive sentence, and he is thus entitled to a new sentencing hearing. For the reasons set forth herein, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 On May 23, 2004, four pedestrians were struck by a vehicle: Quinetta Blair, Clarissa Bell, Keonna Robinson and Kiyara Stuckey. Blair, Bell, and Robinson each suffered various injuries, but survived the incident, while Stuckey, who was three-years old, died from her injuries. Defendant, who had been driving the car, was subsequently charged with various offenses, including multiple counts of attempt murder and first degree murder.

¶ 5 First Trial

¶ 6 Defendant initially elected to proceed by way of a bench trial. At the conclusion of that trial, he was ultimately convicted of three counts of attempt murder and one count of first degree murder. Following a sentencing hearing, defendant was sentenced to 30 years' imprisonment for first degree murder, and six years' imprisonment for each attempt murder count. The circuit court ordered each of the six-year terms to be served concurrent with the other six-year attempt

[1] We note that both parties identify defendant as "Keith Tolliver;" however, other documents in the record refer to defendant as "Keithen Tolliver." Defendant, himself, consistently spells his name as "Keithen Tolliver," and for the sake of clarity and consistency, this court will refer to defendant as such.

murder sentences, but consecutive to the 30-year sentence imposed on the first degree murder conviction, for a total sentence of 36 years' imprisonment.

¶ 7 Defendant appealed his convictions and sentences, arguing that: he was denied his right to effective assistance of counsel; the State failed to prove him guilty of the charged offenses beyond a reasonable doubt; and the circuit court abused its discretion in admitting and considering defendant's unauthenticated videotaped and transcribed statement. In an unpublished Rule 23 order, this court found that the circuit court erred in considering the unauthenticated transcript and videotape of defendant's confession, vacated defendant's three attempt murder convictions as well as his first degree murder conviction, and remanded the cause for a new trial on the first degree murder charge only. *People v. Tolliver*, No. 1-07-1383 (March 31, 2009) (unpublished order under Supreme Court Rule 23).

¶ 8 Second Trial

¶ 9 On remand, defendant elected to proceed by way of a jury trial on the first degree murder charge. Prior to trial, defendant filed a motion *in limine* seeking to bar the State from using his 2001 felony burglary conviction to impeach his credibility. In pertinent part, defendant argued that his "prior conviction predates the [second] trial in this cause by more than 10 years and is therefore barred by the rule announced in *People v. Montgomery*, 47 Ill. 2d 510 (1971) and as interpreted in *People v. Naylor*, 229 Ill. 2d 584 (2008)." Following a hearing, the court denied defendant's pre-trial motion and the cause proceeded to trial.

¶ 10 At trial, Quinetta Blair testified that on May 23, 2004, at approximately 7:30 p.m., she was walking westbound on 17th Street in Chicago Heights with her sister, Clarissa Bell, whose nickname was Ree-Ree, and Kiyara Stuckey, their three-year-old niece. On their way to a neighborhood candy store, they were joined by two of Blair's girlfriends, Keonna Robinson and

Damesha Carroll, and they all continued walking down 17th Street together. Because 17th Street was a one-way street, Blair testified that the girls walked on the right side of that street, alongside cars that were parked in the area. She explained that they were walking in the street because there were "a whole lot of people on the sidewalk" who were gambling and they did not want to interrupt the gamblers.

¶ 11 As they were walking, Blair recalled that defendant pulled up beside them in a light-colored Ford Taurus. When she looked into the car, she recognized Jessica Harrison, who was sitting in the front passenger seat. Blair did not know Harrison well but she was familiar with her because she and her sister, Ree-Ree, "kept getting into [altercations]." After parking the car, defendant, Harrison, and another female occupant exited the Taurus. Defendant then addressed Blair and her friends, asking: "Which one of y'all is Ree-Ree?" Blair pointed to her sister, who was standing next to her, and asked defendant, "Why are you looking for her?" In response, defendant raised his voice and indicated that he wanted Harrison and Blair's sister to fight. Blair told defendant that her sister was pregnant and would not be taking part in any fight. Although defendant was insistent that Harrison and Bell fight, Blair stated that neither girl appeared to have any interest in fighting each other.

¶ 12 After arguing with defendant for "[a]bout 20, 30 minutes" in the street, Blair testified that defendant then asked where he could find Bell's boyfriend, Alandis Reed. After her sister informed defendant that Reed was "around the corner, on 16th Street," Blair, Bell, Stuckey and Robinson began walking away from defendant. Carroll, however, did not immediately follow them, but remained behind to briefly talk to somebody. As she continued walking, Blair heard Carroll say, "I ain't telling him shit." Approximately three seconds later, Blair heard the sound of "tires squealing." When she turned her head to look behind her, she saw the Taurus "coming

directly at [them]" and saw defendant in the driver's seat. Blair jumped out of the way, but the car struck her left hand. After striking her, Blair testified that defendant "kept going * * * [and] hit everybody else" before stopping the vehicle. Blair saw Bell and Stuckey fall to the ground and she immediately ran to her niece. At the time, Stuckey was face down and bleeding; she was not moving and was not responsive. Blair then ran over to defendant, who was still sitting in the Taurus, and "swung on him." When she did so, defendant got out of the car and started running away. Defendant had been the sole occupant of the vehicle and he left it unattended in the street.

¶ 13 After defendant ran away, ambulances and police cars arrived on scene. Stuckey was transported to University of Chicago Hospital (Chicago Hospital) while Blair was taken to St. James Olympia Fields Hospital (St. James Hospital) to receive treatment. After she was discharged, Blair joined her sister, Yolanda Stuckey, who was the victim's mother, at Chicago Hospital. She learned that Stuckey died as result of the injuries she sustained when defendant struck her with the Ford Taurus.

¶ 14 Blair acknowledged that the incident happened quickly and that only a few seconds passed from the time that she heard the sound of tires squealing to the time it struck her and the other victims. She never had the time to yell out or warn any of the others. Although the incident was brief, Blair was certain that defendant never hesitated when he drove in her direction and she testified that she never saw defendant try to swerve away from any of the other girls as he continued in their direction. Once the car passed her, Blair did not see the brake lights come on until after defendant struck her sister and niece. On cross-examination, Blair also confirmed that defendant did not make any verbal threats toward her or any of the other girls before striking them with the car.

¶ 15 Clarissa Bell testified that on the day of the incident she was 14 weeks pregnant and that her nickname was "Ree-Ree." Reed was her boyfriend and the father of her child. Although Reed was her boyfriend, Bell testified that she was aware that Jessica Harrison, a girl that she knew from school, was also dating Reed at the same time. She also was aware that Harrison had another boyfriend in addition to Reed, but Bell had not met defendant prior to May 23, 2004.

¶ 16 Bell testified that she spent that day at a family barbecue at her grandmother's house and that she and her sister, Blair, left the barbecue to take Stuckey, their three-year-old niece, to the candy store located near the intersection of 17th Street and Division. Along the way, they met up with Keonna Robinson and Damesha Carroll, two friends from the neighborhood, and they continued walking westbound on 17th Street together. Bell testified that she was holding Stuckey's hand during their walk. As they were walking, Bell recalled that a Ford Taurus pulled up alongside of them. Defendant was the driver and Harrison was sitting in the front passenger seat of the vehicle. After stopping the vehicle, defendant exited the car, and asked "Who is Ree-Ree?" Bell didn't identify herself, but her sister, Blair, began arguing with defendant because he indicated that he wanted Bell and Harrison to fight.

¶ 17 Bell confirmed that her sister and defendant "went back and forth for a while," and that the argument only concluded when they began walking away from defendant. As she led her niece away from the scene, Bell heard defendant ask, "Where is Alandis?" At that point, Bell spoke up and told defendant that Reed was over on 16th Street and continued walking away from him. Bell testified that she then heard the sound of tires squealing and immediately became fearful of being hit by defendant's car. She quickly bent down to pick up Stuckey in an effort to "get her out of danger." Before she could get herself and her niece to safety, Bell testified that she was hit by the car defendant was driving and that she and her niece "went flying." Bell

"didn't see [any]thing after that," as she was lying on the street. She was subsequently transported to St. James Hospital where she received medical treatment. She learned that the ligaments in her right knee had been torn as a result of the incident. Bell was released from the hospital the following day and was told that her niece had died.

¶ 18 On cross-examination, Bell confirmed that she did not hear defendant make any verbal threats prior to hitting her with the car. She also confirmed that the incident happened quickly. Once Bell heard the sound of tires squealing, she did not have the opportunity to look behind her prior to being struck by the vehicle.

¶ 19 Damesha Carroll confirmed that sometime after 7 p.m. on May 23, 2004, she and her cousin, Keonna Robinson, met up with their friends Blair and Bell, who were walking westbound on 17th Street with their niece Stuckey. As the group continued their walk to a nearby candy store, a tan Ford Taurus stopped "right on the side of [them]." Carroll indicated that she recognized Harrison, the female passenger in the car, from school, but she testified that had not seen defendant, the driver of the vehicle, prior to that evening. Once defendant stopped the vehicle, he and Harrison exited the car, and defendant indicated that he was looking for "Ree-Ree" because Harrison wanted to fight Ree-Ree. At that point, Bell did not identify herself, but Blair, Bell's sister, began arguing with defendant.

¶ 20 After the argument, Blair, Bell, Robinson and Stuckey resumed walking west on 17th Street. Carroll testified that she briefly remained behind to talk to somebody that she knew and that as she turned to join her friends, defendant addressed her in a "very angry voice." She did not recall exactly what defendant said, but Carroll remembered telling him that she was not going to "tell [him] shit." Defendant responded by saying something about Bell's "baby daddy." Immediately thereafter, Carroll testified that she heard the engine of "a car start up," which was

followed by the sound of "tires screeching." She immediately looked behind her and saw defendant driving directly towards her and became afraid for her life. To avoid being hit, Carroll jumped on the hood of a parked car that was located just to the left of her. From that vantage point, she saw defendant steer the vehicle towards Blair, who was able to jump in between two other parked cars. He then steered towards Robinson, Bell and Stuckey. Robinson and Bell were both struck by the car and fell to the ground. Stuckey, in turn, made contact with the front windshield of the Taurus and "flew all the way down the street." Defendant then brought the car to an abrupt stop. Carroll testified that she immediately ran toward her cousin and her friends. Robinson was lying in the middle of the street with a broken leg. Stuckey, in turn, was "laying face down" in the street and was not moving. Carroll confirmed that she never saw defendant hesitate as he drove towards her or her friends.

¶ 21 On cross-examination, Carroll acknowledged that defendant did not threaten her prior to driving in her direction. She also never heard him threaten Blair when they were arguing. Carroll also acknowledged that the incident happened very quickly and that she did not have time to issue a verbal warning to the others as defendant drove in their direction.

¶ 22 Keonna Robinson confirmed her cousin's account of the events that transpired on May 23, 2004. She recalled that defendant pulled up alongside of them in a "goldish tan Taurus," and that he began arguing with Blair. Defendant apparently wanted his girlfriend, Harrison, to fight Blair's sister, Ree-Ree, and Blair defended her sister. Although Harrison exited the vehicle with defendant, Robinson testified that Harrison "just stood there. She didn't say anything. She didn't move." After it became clear that there was not going to be a physical altercation, Robinson, Blair, Bell, and Stuckey began walking away from defendant. Carroll, her cousin, briefly stopped to speak to somebody she knew before she walked to "catch up with" them. After

hearing her cousin swear at defendant, Robinson looked back and saw defendant reach for the car keys that had been placed on the top of the Taurus. Robinson then heard defendant start the car. Immediately thereafter, she heard tires squealing like they were "burning rubber." Robinson looked back and saw defendant drive directly at her cousin. Carroll was forced to jump on top of a parked car to avoid being hit. Defendant then continued driving in Robinson's direction, and she testified that she tried "to get out of the way, but it was too late." Robinson was struck by the vehicle and was knocked into two parked cars. As she was falling to the ground, Robinson saw Bell trying to pick up Stuckey as defendant drove in their direction. She did not see what happened to them because she "hit the ground" and blacked out. Once she came to, Robinson testified that she was unable to get up as her right thigh was "bent and * * * twisted" and "sitting up on her chest." When she lifted her head from the ground, Robinson saw Stuckey lying face-down on the street. Robinson was subsequently transported to St. James Hospital, where she had surgery on her right femur. During surgery, doctors inserted a rod and pins into her thigh. Robinson explained, however, that surgical intervention was not able to remedy the nerve damage that she suffered as a result of the incident and that she never regained any sensation in her right foot. She can only walk with the assistance of a leg brace.

¶ 23 On cross-examination, Robinson also acknowledged that she never heard defendant make any verbal threats before driving towards her or the other girls. She also confirmed that the incident happened so quickly that she did not have a chance to warn Bell or Stuckey, who were walking slightly ahead of her at the time.

¶ 24 Letha Foster, an eyewitness to the incident, testified that on May 23, 2004, she was a Chicago Heights resident, and was living at 508 West 17th Street. She recalled that at approximately 7 p.m. that evening, she was outside cleaning her front yard and keeping an eye

on her son, who was outside playing with his friends. At one point, Foster "heard a loud argument, cussing and swearing," and when she looked down the street, she saw a group of young people in the street having an argument. They were approximately "three houses" away from Foster's residence. Foster testified that defendant was the only male involved in the argument and that he appeared to be arguing with a group of four girls. She was not familiar with any of the individuals. Foster estimated that the argument went on for about "25, 30 minutes" before the group of girls began walking away. As the girls were walking, Foster heard defendant say something about a "baby" and then she heard one of the girls respond by saying, "I ain't telling him shit."

¶ 25 Foster subsequently observed a "young lady," who did not appear to be part of the group of other girls, toss defendant a pair of car keys. He got into the car, "pulled off," and accelerated quickly. Foster described it as if "defendant was slamming on the accelerator towards the children." She saw defendant aim the vehicle at the girl who had just cursed at him. The girl was able to avoid being hit by the car by jumping onto the hood of a parked car. Defendant then continued driving in the direction of the other three girls. Foster saw another girl jump in between two other parked cars to avoid being hit by the vehicle, but testified that the remaining two girls were not able to get out of way of the vehicle and were knocked to the ground.

¶ 26 Foster stated that defendant did not use his brakes or attempt to slow the car down as he drove at the girls and testified that he only stopped the vehicle when he reached the stop sign at the end of the street. He did not attempt to render aid to any of the victims, and only exited the car when other eyewitnesses approached the vehicle and tried to "start punching on him." The "crowd [then] chased him down the street." It did not appear to Foster that defendant had lost

control of his car as both of his hands remained on the steering wheel as he drove the vehicle in the direction of the girls.

¶ 27 Foster testified that she was "shocked" by defendant's actions and immediately ran to help the girls. The first girl that Foster approached was lying in the street with her leg "all bent up." The girl kept saying, "baby, baby, baby." Foster explained that she had not noticed a baby or young child in the street, but when she looked around, she saw a Stuckey lying in the street approximately 25 to 30 feet away. She ran to the child, who was lying face down on top of a gutter, and observed blood coming from her face. Because Foster was a pre-school teacher who had received CPR training, she knew not to touch Stuckey and she "kept the crowd away" until medical personnel arrived on the scene.

¶ 28 On cross-examination, Foster acknowledged that the incident happed within a matter of seconds and she confirmed that even though she had been able to observe defendant's hands on the steering wheel, she had not seen the toddler in the presence of the girls until discovering her prone body lying on the ground. Foster also acknowledged that defendant did not run away from the scene until a group of people approached him and threatened his safety.

¶ 29 Kellie Shannon, another eyewitness to the incident, testified that on May 23, 2004, she and her daughter were visiting to a relative who lived at 510 West 17th Street. She recalled that was sitting on the front porch of the residence sometime after 6:30 p.m., when she heard "a commotion." When she turned her head in the direction of the disturbance, Shannon saw a group of four or five teenage girls arguing with a male and another female who were both standing next to a parked car. One of the teenagers was carrying a baby. Although "everybody was kind of talking," it appeared to Shannon that the argument was primarily between the male and one of the girls.

¶ 30 After a while, Shannon saw the group of girls begin walking away. Defendant, however, continued to have words with them, before he got into the car. Shannon "heard the engine revving" and saw defendant "take off toward an angle to the right." She testified that defendant accelerated the car as he drove towards the girls. One of the girls had enough time to get out of the way of defendant's car, but the others were hit by the vehicle. Shannon saw the baby "in the air" after making contact with defendant's car. It did not appear to Shannon that defendant had lost control of the car before making contact with the girls and she testified that he only "slammed on the brakes" after the incident. Defendant was then confronted by people who had just witnessed what had occurred and she saw defendant start running away from the scene. Shannon did not know whether defendant had been attacked by a group of individuals, but she saw "people chasing him."

¶ 31 On cross-examination, Shannon confirmed that she did not hear the actual words being said during the argument; rather, she simply heard raised voices. Shannon admitted that she did not yell out to the girls to warn them as defendant drove towards them, explaining that as she was watching the events unfold, she did not really believe that the car was actually going to strike anybody.

¶ 32 Chicago Heights Police Officer Kevin Malone testified that on May 23, 2004, at approximately 7:30 p.m., he and his partner, Dan Wriggler, were dispatched the area of 17th Street and Division to investigate an accident. When he arrived at the scene, Officer Malone observed an unoccupied Ford Taurus parked in the middle of the street and three pedestrians on the ground, one of whom was an infant. The infant was nonresponsive. After speaking to several eyewitnesses, Officer Malone learned that the driver who was responsible for the incident had fled the scene on foot and had run into a nearby residence. Based on what he had been told,

Officer Malone walked over to a residence located at 498 West 17th Street and knocked on the door. The owner of the residence opened the door, and when Officer Malone asked him if anyone had come into his house, the owner pointed him in the direction of the back stairwell. Officer Malone found defendant "crouched down in the stairwell" and took him into custody.

¶ 33 On cross-examination, Officer Malone acknowledged that he did not know whether or not defendant had been chased to that residence after the incident; rather, he was simply told that defendant exited the vehicle and ran into that house. He had also been told by eyewitnesses that defendant had been wearing a blue jersey at the time of the incident, but confirmed that when he discovered defendant in the stairwell, he was not wearing a blue jersey. Before Officer Malone removed defendant from the house, however, the owner of the residence gave him defendant's blue jersey.

¶ 34 Yolanda Stuckey, the victim's mother, testified that she received a phone call from her sister, Blair, at approximately 7:30 p.m. on May 23, 2004, and was told that her daughter had been hit by a car. In response, Yolanda drove over to the area where she was told the incident occurred. When she arrived, Yolanda approached an ambulance that was at the scene and saw her daughter lying on a gurney. Paramedics were making efforts to revive her. Yolanda testified that her daughter was initially taken to St. James Hospital but was subsequently transferred to University of Chicago Children's Hospital where she died. Kiyara was only three years' old at the time of her death.

¶ 35 After presenting the aforementioned testimony, the State proceeded by way of stipulation. Pursuant to the stipulation, Larry Olsen, a crime scene investigator employed by the Illinois State Police, would testify that he was assigned to process the crime scene at 17th Street.

He measured the width of the street and found it to be 30 feet across. He would further testify that no visible skid marks were present on the street.

¶ 36 The parties also stipulated to the testimony of Doctor Tae Long An, a Deputy Medical Examiner, employed by the Cook County Medical Examiner's Office, who performed Stuckey's autopsy. Pursuant to the stipulation, Doctor An would testify that Stuckey died as a result of multiple injuries that she sustained after being struck by an automobile and that the manner of Stuckey's death was homicide.

¶ 37 After presenting the aforementioned testimony, the State rested its case-in-chief. Defendant's motion for a directed verdict was denied, and afterwards, he elected to testify. Defendant recalled that on May 23, 2004, he spent the day with his girlfriend, Jessica Harrison, who told him that a girl named Ree-Ree had been harassing her with telephone calls. She also told him that Ree-Ree's boyfriend, Alandis, "had been saying a lot of things about [defendant]," and as a result, defendant wanted to confront him. After receiving that information from his girlfriend, defendant testified that he and Harrison drove around looking for the girl, but were unsuccessful. Later that day, sometime around 7 p.m., defendant testified that he was driving Harrison's Ford Taurus on 17th Street. Harrison was in the front passenger seat and defendant's sister, Sadie Jones, was in the rear passenger seat. Defendant testified that they were on their way to his godfather's house, which was located at 498 West 17th Street. As they were getting closer to his godfather's house, defendant recalled that Harrison pointed at a group of girls walking in the street, and said, "there they go right there." One of the girls in the group was Ree-Ree. Although defendant admitted that he and Harrison had been looking for Ree-Ree earlier that day, he denied that they were driving around looking for her that evening. Even though they

were on their way to defendant's godfather's house, he stopped the car after Harrison identified Ree-Ree.

¶ 38 After stopping the car, defendant testified that he approached the girls and indicated that he was looking for Ree-Ree. At that point, Harrison also exited the car and began having a verbal altercation with one of the girls. Defendant estimated that the argument lasted "several minutes" before the girls started walking away. As they were leaving, defendant yelled to one of the girls and told her to tell her boyfriend that he wanted to "see [him] in a dark alley." In response, the girl informed defendant that her boyfriend was over "on the next block." Defendant testified that he then re-entered Harrison's car with the intention of "going around to the next block to confront [the] boyfriend." On the way, defendant admitted that he "drove in the direction of the girls" with the intention of "scaring the girls out the street." He explained that he accelerated quickly and drove close to the girls, but when he "realized how close [he] got to them, [he] lost focus [and] blanked out." Defendant indicated that he "tried to prevent the incident from happening" and "tried to turn the wheel," but that it was "too late" and he collided with a parked car. After he "bounced off the [parked] car," defendant testified that he tried attempted to "regain control of the car" he was driving. At that point, defendant heard "some lady scream that [he] had hit a baby," and he immediately "slammed on the brakes" and brought the vehicle to a stop. Once he did so, "[p]eople started mobbing up on [his] car" so defendant ran to his godfather's house, which was nearby. He hid in the back stairwell until police arrived. Defendant admitted that he took off the shirt he had been wearing because he did not want any of the people who had chased him to recognize him.

¶ 39 On cross-examination, defendant admitted that he drove in the direction of the girls, but denied that when he did so that he expected or intended to hit them or hit a parked car; rather, he

merely intended to scare them and only came into contact with them "accidentally." He explained that he had wanted to make the girls jump out of the street, but acknowledged that he was aware that if they were unable to jump out of the way, they would "get struck." Defendant denied being angry at the girls at the time and stated that he simply wanted to "show[] out in front of [his] girl," because the other girls had been "talking crazy." Defendant described the incident as "an out-of-body experience" and testified that he never actually saw any of the girls get hit by his car. Defendant acknowledged, however, that he did not use his brakes as he drove in their direction. Defendant further acknowledged that when he was interviewed by Detective El-Amin after the incident, he told the detective that he had wanted to "sideswipe" them. He explained, however, that when he used the term "sideswipe," he meant that he "[b]asically just wanted to get close enough [to the girls] to scare them." Defendant denied that he ever wanted to hit the girls with the vehicle.

¶ 40 Following defendant's testimony, the parties stipulated that if Officer Kevin Malone were called to testify about his investigative efforts, he would state that he interviewed Damesha Carroll on May 23, 2004, and that during that interview, Carroll informed him that she and her friends had been arguing with another female who had been sitting in the passenger seat of the Taurus prior to the incident. The parties further stipulated that if Detective El-Amin were called to testify, he would state that he interviewed Quinetta Blair on May 24, 2004, at approximately 9:25 p.m. and she told him that she had been arguing with a girl named Jessica prior to the incident. He would further testify that he interviewed Keonna Robinson on May 24, 2004, at 12:10 p.m. at St. James Hospital, and she told him that Harrison and Blair were arguing earlier that evening. Finally Detective El-Amin would state that he interviewed Clarissa Bell on May

25, 2004, at 11:50 a.m. and that during the interview, she told him that she and Harrison had been arguing about cell phone calls before she was struck by a car.

¶ 41 After the defense presented the stipulations, the parties delivered closing arguments. The circuit court then provided the jury with relevant instructions. Following deliberations, the jury returned with a verdict, finding defendant guilty of the offense of first degree murder. The circuit court subsequently presided over a sentencing hearing, and after hearing the arguments advanced by the parties in aggravation and mitigation, sentenced defendant to 30 years' imprisonment. Defendant's post-trial motions were denied and this appeal followed.

¶ 42 ANALYSIS

¶ 43 Prior Convictions

¶ 44 On appeal, defendant raises no challenge to the sufficiency of the evidence; rather he argues that the circuit court erred in permitting the State to impeach him with his prior felony conviction. He observes that he was convicted of burglary in 2001, and that at the time of his 2012 retrial, the conviction was inadmissible for impeachment purposes because "it fell outside of the [ten-year] time frame established in *People v. Montgomery*, 47 Ill. 2d 510 (1971)." Accordingly, defendant argues that the circuit court deprived him of a fair trial when it permitted the State to impeach him with an untimely conviction.

¶ 45 The State, in turn, denies that the impeachment of defendant with his prior felony conviction deprived him of his constitutional right to a fair trial. Although the State acknowledges that defendant's 2001 burglary conviction exceeded the 10-year time limitation set forth in *Montgomery* at the time of his 2012 retrial, the State observes that the conviction fell within the requisite time period at the time of his first trial, which was conducted in 2007. Because defendant's prior conviction was admissible at the initial proceeding, the State argues

that "fundamental fairness" dictated that the State be permitted to introduce defendant's felony conviction for impeachment purposes at his 2012 retrial and thus, the circuit court did not err in allowing the State to do so.

¶ 46 In criminal proceedings, a defendant's prior convictions are "generally inadmissible to demonstrate propensity to commit the charged crime." *People v. Donoho*, 204 Ill. 2d 159, 170 (2003); see also *People v. Naylor*, 229 Ill. 2d 584, 594 (2008) ("the record of the defendant's prior conviction is not introduced, and cannot be considered, for the purpose of proving the defendant's guilt or innocence of the charged offense"). In certain circumstances, however, prior convictions may be admissible for impeachment purposes to attack a witness' credibility. *People v. Mullins*, 242 Ill. 2d 1, 14 (2011); *Naylor*, 229 Ill. 2d at 594. In *People v. Montgomery*, 47 Ill. 2d 510 (1971), our supreme court set forth the factors to be considered to determine whether a prior conviction may be admitted for the express purpose of attacking the credibility of a defendant or other witness. Pursuant to the *Montgomery* rule, a prior conviction may be admitted if: (1) the crime was punishable by death or a term of imprisonment in excess of one year, or the crime involved dishonesty or false statements regardless of the punishment imposed; (2) less than 10 years has elapsed since the date of conviction of the prior crime or the release of the witness from confinement, whichever date is later; and (3) the probative value of admitting the prior conviction outweighs the danger of unfair prejudice. *Montgomery*, 47 Ill. 2d at 516; *Mullins*, 242 Ill. 2d at 14. It has been explained that "the *Montgomery* rule limits the potential for abuse where the accused elects to take the witness stand, but it still makes prior convictions relevant to the issue of his credibility in part because 'it would be unfair to permit the accused to appear as a witness of blameless life.' " *People v. Medrano*, 99 Ill. App. 3d 449, 451 (1981), *quoting* E. Cleary & M. Graham, Handbook of Illinois Evidence s. 609.1, at 284 (1979).

¶ 47 Although the ultimate decision as to whether to admit a defendant's prior convictions for purposes of impeachment is within the sound discretion of the circuit court, the determination as to whether a conviction falls within *Montgomery*'s 10-year requirement is not a matter of discretion. *Naylor*, 229 Ill. 2d at 601; *Mullins*, 242 Ill. 2d at 15. Rather, the supreme court has specified that "*Montgomery*'s 10-year time limit should be calculated in relation to the date of the defendant's trial." *Naylor*, 229 Ill. 2d at 602.

¶ 48 The 10-year requirement, however, is not without limitation. In *Naylor*, the supreme court recognized that the " 'the philosophy underlying this time limitation is that 10 years of conviction-free living demonstrates sufficient rehabilitation in the witness' credibility to attenuate any probative value, thus making those prior convictions inadmissible.' " *Naylor*, 229 Ill. 2d at 601, *quoting People v. Medrano*, 99 Ill. App. 3d 449, 451 (1981). Accordingly, where there is evidence that a defendant is drawing out legal proceedings, the court held that "the running of the 10-year time limit could be tolled on the ground that a defendant's 'effort to manipulate the judicial system negates the positive inference supposedly to be drawn from ten years of law abiding behavior.' " *Naylor*, 229 Ill. 2d at 601, quoting 28 C. Wright & V. Gold, Federal Practice & Procedure § 6136, at 261 (1993).

¶ 49 Another exception to *Montgomery*'s 10-year rule was established in *People v. Reddick*, 123 Ill. 2d 184 (1988). In that case, the trial court prevented the defendant from impeaching a prosecution witness with a prior felony conviction, finding that the felony conviction was too old. The trial court's ruling, however, was based on a mathematical error, as the witness' conviction did fall within 10-years of the defendant's trial. In remanding the cause for a new trial, the supreme court recognized that the defendant's second trial would occur more than 10 years after the witness' felony conviction, but stated that *Montgomery*'s time bar could not be

used to prevent the defendant from impeaching the State's witness with that conviction. The court explained its rationale as follows: "If the evidence should have been admitted previously, then it must be admitted on retrial. [The witness] will likely be attempting to track his prior testimony, and fundamental fairness dictates that defendant be allowed to impeach him in the same manner that defendant should have been permitted to impeach him in the initial trial." *Reddick*, 123 Ill. 2d at 203. The fundamental fairness doctrine set forth in *Reddick* has since been employed by courts to permit the admission of a defendant's prior convictions for impeachment purposes during subsequent legal proceedings as long as the defendant's convictions occurred within 10 years of the initial proceeding. See, e.*g.*, *People v. Knox*, 2014 IL App (1st) 120349, ¶¶ 40-42; *People v. Jackson*, 299 Ill. App. 3d 104, 113 (1998).

¶ 50 Here, defendant was convicted of burglary on June 26, 2001, and was sentenced to probation. There is thus no dispute that defendant's prior felony conviction occurred more than 10 years prior to the start of his second trial, which commenced on March 7, 2012. There is similarly no dispute that defendant's 2001 conviction did fall within the requisite time period at the time of his first trial, which began on January 3, 2007. In denying defendant's motion *in limine*, the circuit court relied upon the fundamental fairness exception set forth in *Reddick*, and reasoned that *Montgomery's* 10-year time requirement would not bar the State from using defendant's felony conviction to impeach him at his second trial because the conviction fell within the requisite time period at the time of his first trial. In addition, the court found that the "charge of burglary is certainly a charge of moral turpitude" and that the probative value of defendant's conviction outweighed any prejudicial effect because defendant was "going to be testifying."

¶ 51 Defendant, however, argues that *Reddick*'s exception should not be applied in the instant case because his burglary conviction was not used by the State to impeach him during his first trial. Indeed, the record reveals that although defendant testified during his first trial, the State never sought to obtain a ruling from the court regarding the admissibility of defendant's prior felony conviction for impeachment purposes and never referenced the conviction during its cross-examination of defendant. The State concedes that defendant's conviction was not admitted in his first trial, but argues that *Reddick*'s exception is nonetheless applicable because pursuant to *Reddick* and its progeny, "the issue is not whether the evidence was used at the first trial; the issue is whether it was admissible at the first trial."

¶ 52 We do not agree. In *Reddick*, the supreme court said: "If the evidence should have been admitted previously, then it must be admitted on retrial." *Reddick*, 123 Ill. 2d at 203. The supreme court chooses its words carefully. If it had wanted to say, for example, "if the evidence was admissible previously," or "if the evidence could have been admitted previously," or "if the evidence existed previously," or "whether admitted or not, if it was available previously," it could have done so, but it did not. Instead, the word "should" was used. The use of "should" in the sentence following "if" presupposes that the evidence was offered at the first trial and it should have been admitted at the first trial and therefore it should have been admitted at the second trial. This use of the word "should" following "if" is the past conditional and requires that the condition be met. There is nothing about this sentence that says the State can fail to present evidence of a prior conviction at the first trial and then be allowed to use it at the second trial. We hold that the *Reddick* exception applies only when a party offers the evidence of a prior conviction, pursuant to the *Montgomery* rules, at the first trial. If the party made the offer, and if it was admissible, even if not admitted, then the evidence should be admitted in the second trial.

¶ 53 Based on the facts of this case, we find that the circuit court erred in its application of the supreme court's holding in *Reddick* to allow the State to impeach defendant with his prior burglary conviction. We conclude, however, that the error was harmless. See *People v. Jackson*, 299 Ill. App. 3d 104, 114 (1998) (the improper use of a prior conviction for impeachment purposes is subject to harmless error review). Although defendant suggests that the State's use of his prior conviction was "not harmless because the jury's assessment of [his] credibility was crucial to determining whether he was guilty of first degree murder or reckless homicide," we find that evidence of his guilt of the greater offense was overwhelming. Multiple witnesses testified that defendant entered his girlfriend's vehicle after an argument with Blair and the other girls, accelerated the vehicle quickly, and steered the vehicle in the direction of Stuckey and the other girls. Eyewitness testimony established that defendant did not attempt to prevent the incident by turning the steering wheel or applying the brakes and defendant, himself, testified that he was aware that if the girls did not jump out of his way, they would "get struck." The evidence thus overwhelmingly establishes that defendant's actions were not simply reckless. We therefore conclude that the admission of defendant's prior felony conviction did not deprive him of his right to a fair trial; rather, its admission was harmless.

¶ 54 Closing Arguments

¶ 55 Defendant next challenges the propriety of the State's closing and rebuttal arguments. He contends that that he "was denied a fair trial because the State improperly argued in closing that [defendant's] actions were comparable to a 'gang banger,' that the defense was based on fabrication and depended on the jury lacking intelligence, and that the actions of the group of people that chased [defendant] following the accident showed that [defendant] was guilty of first degree murder."

¶ 56 The State, in turn, initially responds that defendant has failed to properly preserve this issue on appeal, noting that defendant did not object to each of the statements at trial and include them with specificity in his post-trial motion. On the merits, the State argues that "the comments were not improper because they properly used an analogy to illustrate the proper law, were proper commentary and inferences based on the evidence presented at trial, and did not imply that defense counsel used trickery."

¶ 57 As a threshold matter, we note that defendant failed to properly preserve each of the State's allegedly improper arguments for appellate review. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (To properly preserve an issue for appeal, a defendant must object to the purported error at trial *and* specify the error in a post-trial motion); *People v. Bannister*, 232 Ill. 2d 52, 65 (2008) (same). In this case, only the first statement that defendant challenges on appeal was objected to at trial and cited as an error in a post-trial motion and will be reviewed for harmless error. The remaining statements were not properly preserved, and will thus be subject to plain error review. The plain error doctrine provides a limited exception to the forfeiture rule and allows for review of forfeited issues on appeal if the evidence is closely balanced or the error is of such a serious magnitude that it affected the integrity of the judicial process and deprived the defendant of his right to a fair trial. Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967); *Bannister*, 232 Ill. 2d at 65. Because the first step in any such analysis is to determine whether any error actually occurred, we must first determine whether any of the statements constitute error. *Bannister*, 232 Ill. 2d at 65; *People v. Zoph*, 381 Ill. App. 3d 435, 439 (2008).

¶ 58 Generally, prosecutors are afforded wide-latitude during closing argument. *People v. Caffey*, 205 Ill. 2d 52, 131 (2001); *People v. Phillips*, 392 Ill. App. 3d 243, 275 (2009). Accordingly, a " 'defendant faces a substantial burden in attempting to achieve reversal [of his

conviction] based upon improper remarks made during closing arguments.' " *People v. Gutierrez*, 402 Ill. App. 3d 866, 895 (2010), quoting *People v. Williams*, 332 Ill. App. 3d 254, 266 (2002). When delivering closing arguments, prosecutors may comment on the evidence as well as any reasonable inferences that the evidence may support, even if those inferences reflect negatively on the defendant. *People v. Perry*, 224 Ill. 2d 312, 347 (2007). To be proper, however, the inferences must be reasonable and based on the facts and circumstances proven during the trial. *Gutierrez*, 402 Ill. App. 3d at 895; *People v. Hood*, 229 Ill. App. 3d 202, 218 (1992). In addition, in rebuttal argument, the State is permitted to respond to arguments made by defense counsel that clearly invite a response. *People v. Hall*, 194 Ill. 2d 305, 346 (2000); *People v. Ramos*, 396 Ill. App. 3d 869, 877 (2009).

¶ 59 To evaluate a defendant's allegation of prosecutorial misconduct during closing argument, a reviewing court will consider the closing argument as a whole and evaluate the challenged comments in the context in which they were delivered. *People v. Wheeler*, 226 Ill. 2d 92, 122 (2007). Reversal is warranted only if the prosecutor's comments resulted in "substantial prejudice" to the defendant. *Wheeler*, 226 Ill. 2d at 123; *People v. Walton*, 376 Ill. App. 3d 149, 160 (2007). Substantial prejudice exists when it can be determined that the improper remarks constituted a material factor in the defendant's conviction. *Wheeler*, 226 Ill. 2d at 123; *Gutierrez*, 402 Ill. App. 3d at 895.

¶ 60 The first purportedly improper statement that defendant objects to was a comment made by the prosecutor comparing defendant's actions to those of a gang banger. He argues that this statement was improper because it was designed to "arouse the jurors' fears and prejudices concerning street gangs" and to "arouse the jurors' emotional response to the death of a young child." Specifically, the prosecutor argued:

> "There was the phone call, that desperate call from [Yolanda Stuckey's] sister Quinetta and those few terrible words, [']Kiyara has been hit by a car.['] This car. A car driven and [directed] by this defendant. A projectile, aimed if you will, aimed like any bullet fired from a gun by one gang banger at another that kills a three-year-old watching Barney at her house on the next street."

¶ 61 It is well-established that it is improper for a prosecutor to make statements designed to solely inflame the passions or arouse the prejudice of the jury. *People v. Blue*, 189 Ill. 2d 99, 128 (2000). "It has also been recognized that, particularly in metropolitan areas, there may be strong prejudice against street gangs." *People v. Smith*, 141 Ill. 2d 40, 58 (1991). Accordingly, it is generally considered improper for a prosecutor to make references to gang activity or gang affiliation unless it is relevant to explain motive or some other aspect of a case. See, *e.g.*, *People v. Smith*, 141 Ill. 2d 40, 62 (1991) (finding that the State's repeated references to a potential gang motivation for the crime during closing argument was improper given that there was no evidence of the defendant's gang affiliation and motivation); *People v. Terry*, 312 Ill. App. 3d 984, 993 (2000) (finding that the prosecutor's repeated statements implying that the defendant was a gang member constituted error because it was not supported by the evidence and was designed solely to inflame the passion and prejudice of the jury to secure a conviction). Given that there is no evidence that the crime was in any way connected to gang activity, we find that the prosecutor's statements exceeded the bounds of proper argument and were designed solely to appeal to the jurors' bias against street gangs. *Smith*, 141 Ill. 2d at 62; *Terry*, 312 Ill. App. 3d at 993. Although we find the statements improper, we cannot conclude that they were a material factor in defendant's conviction in light of the substantial evidence against him, which as set forth above, included his own statement that he intended to "sideswipe" the girls and was aware that if

they did not jump out of his way that they would be hit. As such, the improper statements constitute harmless error.

¶ 62 Defendant next argues that several statements made by the State during its rebuttal argument were improper as they disparaged defense counsel and accused counsel of fabricating a defense. He cites to the following statements as indicative of the prosecutor's efforts to demean his defense efforts:

> "You presume to intend the natural consequences of your act. I asked him. You heard his response. What happens [if the girls do not] jump out of the way? She gets hurt. * * * And what about the baby? It can't jump out of the way. That natural thing to do when a baby gets hit is to do exactly what it did. It went flying. * * * This is no accident. This is no reckless act. Everything this man did was intentional. And everything you heard about the horrendous injuries, the death, was the natural consequence of his actions. They could be foreseen and came true. He knew that when he drove at the girls. He knows it now. *He is just hoping that you are not intelligent enough to understand that*." (Emphasis added.)
>
> [And]
>
> "There is only one witness here that tells you it wasn't first degree murder what happened that day. All those other ones, four girls in the street and one's who don't have an ax to grind, either way tells you that this man got in his car and drove exactly at four people he had just had an argument with because he found out [A]landis was doing his girl. That's what this is about. * * * *The only one that comes in here and tells you that it wasn't first degree murder, that [']I didn't drive at these women,['] is the defendant*

himself and his self-serving statements, self-serving statements that he's had eight years to think about." (Emphasis added.)

¶ 63 We do not find that these comments exceeded the bounds of propriety. The statements were made in rebuttal argument in direct response to comments made by defense counsel that "[defendant's] words" about what happened established that he was not guilty of first-degree murder. It is not improper for a prosecutor to respond to an argument made by defense counsel (*People v. Johnson*, 208 Ill. 2d 53, 113 (2003)), comment on the weakness of the defendant's theory of defense (*People v. Wiley*, 165 Ill. 2d 259, 295 (1995), or comment on witness credibility (*People v. Gorosteata*, 374 Ill. App. 3d 203, 223 (2007)).

¶ 64 The final statements cited by defendant as evidence of prosecutorial impropriety also occurred in the State's rebuttal argument, when the prosecutor urged the jury to speculate about the motivation of the crowd that chased defendant to his godfather's house after the incident and argued that the mob's actions constituted evidence that defendant was guilty of first degree murder. Specifically, the prosecutor stated: "[Defense] [c]ounsel says [defendant] ran to the house because the mob wanted to attack him. Mobs usually want to attack you right after a car accident? I don't think so. * * * I bet every single one of you has been in a car accident. Nobody tried to kill you afterwards. No because that doesn't happen. * * * Mobs attack when they see a three-year-old being murdered. Who cares if they do?"

¶ 65 We agree that it was improper for the State to urge the jury to speculate and infer defendant's mental state solely based on the actions of the mob. We note however, that the circuit court sustained defense counsel's objections to those statements and admonished that jury that closing and rebuttal arguments were not facts and that arguments not based on the evidence should be disregarded. See *People v. Johnson*, 208 Ill. 2d 53, 116 (2003) (recognizing that any

prejudice that may result from improper statements can generally be cured by promptly sustaining an objection and providing the jury with an appropriate curative instruction); *People v. Campbell*, 2012 IL App (1st) 101249, ¶ 42 (same). We also reiterate that prosecutors are afforded wide latitude during closing argument (*Caffey*, 205 Ill. 2d at 131; *Phillips*, 392 Ill. App. 3d at 275) and that any improper remarks delivered during closing or rebuttal arguments do not warrant a new trial unless they resulted in substantial prejudice to the defendant (*Wheeler*, 226 Ill. 2d at 123). Here, we are unable to conclude that any of the objectionable statements made by the State constituted a material factor in defendant's conviction such that a new trial is warranted.

¶ 66 Although defendant characterizes the evidence as closely balanced, we disagree. As stated previously, multiple witnesses testified that defendant entered his girlfriend's vehicle after engaging in a verbal altercation with Blair and the other girls in the middle of a public street, accelerated the vehicle quickly, and steered the vehicle in the direction of Stuckey and the other girls. Eyewitness testimony established that defendant did not attempt to prevent the incident by turning the steering wheel or applying the brakes and defendant, himself, himself, testified that he was aware that if the girls did not jump out of his way, they would "get struck." Moreover, defendant acknowledged fleeing the scene following the incident. Based upon the record, we are unable to characterize the evidence as closely balanced. In so finding, we reject defendant's argument that the fact that the jury deliberated for over six hours and sent out notes during its deliberations constitutes proof that the evidence was closely balanced. Courts have consistently recognized that the nature of a jury's deliberations is not itself indicative of closely balanced evidence. See, *e.g.*, *People v. Cotton*, 393 Ill. App. 3d 237, 260 (2009) (finding that the mere fact that the jury initially indicated that it could not reach a verdict did not render the evidence closely balanced); *People v. Nugen*, 399 Ill. App. 3d 575, 585 (2009) ("reject[ing] the general

premise that a lengthy deliberation necessarily means that the evidence is closely balanced"). As such, we do not conclude defendant was prejudiced by a few isolated improper statements made by the State during its rebuttal argument. See, *e.g.*, *Campbell*, 2012 IL App (1st) 101249, ¶ 42.

¶ 67 Lesser-Included Offense Jury Instruction

¶ 68 Defendant next argues that he was denied his right to a fair trial because the circuit court failed to question him to ensure that he agreed with his attorney's request to provide the jury with an instruction pertaining to the lesser-included offense of reckless homicide. Because the Illinois supreme court has recognized that the decision to offer a jury instruction on a lesser-included offense belongs exclusively to a criminal defendant, defendant maintains that the trial court's failure to ensure that he assented to the use of a lesser-included offense "undermined the basic fairness of his trial."

¶ 69 The State concedes that the circuit court should have made an inquiry to determine that defendant understood the risks associated with tendering a lesser-included offense jury instruction and ensure that he consented to the use of a reckless homicide jury instruction. The State, however, argues that defendant is not entitled to any relief because he was not convicted of the lesser-included offense of reckless homicide; rather, he was convicted of first degree murder and thus suffered no prejudice by the circuit court's failure to question him about the use of a lesser-included offense jury instruction.

¶ 70 As a threshold matter, defendant concedes that this issue was not properly preserved for appellate review and invokes the plain error doctrine to avoid forfeiture. Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). As set forth above, the first step in plain error review is to determine whether any error occurred. *Bannister*, 232 Ill. 2d at 65.

¶ 71 In *People v. Ramey*, 152 Ill. 2d 41 (1992), our supreme court held that there are four decisions that ultimately belong to a defendant in criminal cases: (1) what plea to enter; (2) whether to waive a jury trial; (3) whether to testify on his own behalf; and (4) whether to appeal. *Id*. at 54. The court further held that "[b]eyond these four decisions, however, trial counsel has the right to make the ultimate decision with respect to matters of tactics and strategy after consulting with his client. Such matters include what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike and what trial motions should be made." *Id*. Thereafter, in *People v. Brocksmith*, 162 Ill. 2d 224 (1994), the court added a fifth right to the list enumerated in *Ramey*, and held that a criminal defendant also has the exclusive right to decide whether or not to submit an instruction on a lesser-included offense to a jury at the conclusion of the evidence. *Id*. at 229. In doing so, the court reasoned:

> "[T]he decision to tender a lesser included offense is analogous to the decision of what plea to enter, and * * * the two decisions should be treated the same. Because it is [a] defendant's decision whether to initially plead guilty to a lesser charge, it should also be [the] defendant's decision to submit an instruction on a lesser charge at the conclusion of the evidence. In both instances the decisions directly relate to the potential loss of liberty on an initially uncharged offense." *Id*.

After expanding the list of decisions belonging exclusively to defendants to include the decision of whether or not to tender a lesser-included offense jury instruction, the supreme court subsequently instructed that "when a lesser-included offense instruction is tendered, * * * the trial court should conduct an inquiry of defense counsel, in [the] defendant's presence, to determine whether counsel has advised [the] defendant of the potential penalties associated with the lesser-included offense, and the court should thereafter ask [the] defendant whether he agrees

with the tender." *People v. Medina*, 221 Ill. 2d 394, 409 (2006). In doing so, the court reasoned that such an inquiry "procedure w[ould] strike the appropriate balance of inquiry and confirmation without overreaching and [would not result in] undue intervention in the attorney-client relationship." *Id*.

¶ 72 Based on the aforementioned authority, we find that the circuit court erred when it failed to inquire whether defendant was aware of the risks and potential outcomes associated with a reckless homicide instruction and failed to ensure that defendant agreed with counsel's request to tender the lesser-included offense instruction. *Medina*, 221 Ill. 2d at 409. Having found error, the next step in plain-error review is to determine whether defendant was prejudiced by the error. *McLaurin*, 235 Ill. 2d at 495. Here, defendant seeks to establish plain error by the relying solely on the second prong of plain-error review.

¶ 73 "Under the second prong of plain-error review, prejudice to the defendant is presumed because of the importance of the right involved, regardless of the strength of the evidence. [Citation]." (Internal quotation marks omitted.) *People v. Thompson*, 238 Ill. 2d 598, 613-14. Because the court failed to make an inquiry to ensure that defendant was exercising one of his fundamental rights, defendant argues that the court's omission was so serious that automatic reversal is warranted. Despite defendant's argument to the contrary, however, such an error does not always mandate automatic reversal under the second prong of plain error review. Our supreme court has clarified that " 'automatic reversal is only required where an error is deemed 'structural', *i.e.*, a systemic error which serves to 'erode the integrity of the judicial process and undermine the fairness of the defendant's trial.' " *Id*. quoting *People v. Glasper*, 234 Ill. 2d 173, 197-98 (2009). Here, we do not find that defendant has shown that the circuit court's failure to make the necessary inquiry in this case amounted to such a structural error. Importantly, a trial

court's failure to ask whether a defendant agreed with the decision to tender a lesser-included offense jury instruction does not, in fact, mean that the defendant disagreed with the tender. See, *e.g.*, *People v. Williams*, 275 Ill. App. 3d 242, 247 (1995) (recognizing that where the record is silent as to whether a defendant took part in the decision to decision to tender an instruction, there can be no finding that the defendant disagreed with his counsel's request or suffered prejudice). Indeed, defendant does not claim that he did not actually take part in the decision to tender the reckless homicide instruction or that he disagreed with the tender. Moreover, this court has previously found that a circuit court's failure to comply with *Medina*'s directive and inquire whether the defendant consented to the tender of a lesser-included offense does not amount a violation of that defendant's right to a fair trial, where, as here, the defendant was not ultimately convicted of the lesser offense. See *People v. Calderon*, 393 Ill. App. 3d 1, 12 (2009) ("We fail to perceive any error under *Medina* where he was not convicted of the lesser-included offense. The danger *Medina* seeks to avoid—a defendant convicted of an uncharged offense to which he unknowingly concedes liability by way of a jury instruction he has not tacitly or expressly approved—while it may have been present here, did not harm the defendant"). Accordingly, we find that defendant failed to meet his burden of showing that the error in question affected the fairness of his trial and constituted plain error under the second prong of plain-error review.

¶ 74 Sentence

¶ 75 Defendant next challenges his sentence. He first argues that he was denied a fair sentencing hearing because the circuit court conducted its own investigation and relied on evidence outside of the record to determine his sentence.

¶ 76 The State initially responds that defendant forfeited this issue for review. On the merits, the State acknowledges that the circuit court judge made comments during defendant's sentencing hearing that indicated that he had engaged in conversations with other people not involved in the case prior to sentencing defendant, but argues that "those conversations were not a determining factor in [defendant's] sentence" and as a result, defendant suffered no prejudice.

¶ 77 As a threshold matter, we acknowledge that defendant made no objection to the court's reference to conversations that it took part in prior to the sentencing hearing. As explained above, the failure to make a timely objection ordinarily results in forfeiture of an issue for appellate review. See *Enoch*, 122 Ill. 2d at 186. However, "[a]pplication of the waiver rule * * * is less rigid where the basis for the objection is the circuit judge's conduct." *People v. Davis*, 185 Ill. 2d 317, 343 (1998); see also *People v. Saldivar*, 113 Ill. 2d 256, 266 (1986) ("To preserve any error of the court made at that time [sentencing], it was not necessary for [defense] counsel to interrupt the judge and point out that he was considering the wrong factors"). Accordingly, we find that defendant did not forfeit this issue by failing to object to the circuit court's comments during his sentencing hearing and will consider this issue on the merits.

¶ 78 It is well-established that " '[a] determination made by the trial judge based upon a private investigation by the court or based upon private knowledge of the court, untested by cross-examination, or any rules of evidence constitutes a denial of due process of law.' " *People v. Dameron*, 196 Ill. 2d 156, 171-72 (2001), *quoting People v. Wallenberg*, 24 Ill. 2d 350, 354 (1962). That is because a "defendant in any criminal proceeding has an inherent constitutional right that all proceedings against him shall be open and notorious, and in his presence * * * [and] [h]e has a right to rely upon his constitutional guarantee that nothing shall be considered against him except the competent evidence introduced in open court, in his presence, by the witnesses

who confront him." *People v. Rivers*, 410 Ill. 410, 416-17 (1951). In evaluating the propriety of judicial comments during a sentencing hearing, those comments should not be considered in isolation; rather, must be viewed in the appropriate context. *People v. Walker*, 2012 IL App (1st) 083655, ¶ 32. A sentence imposed based on improper factors will not be upheld on appeal unless it can be determined from the record that the weight placed on the improper factor was so insignificant that it did not result in a greater sentence. *People v. Heider*, 231 Ill. 2d 1, 21 (2008). Ultimately, because the trial court is presumed to have only considered competent evidence, that presumption will only be rebutted where there is affirmative evidence to the contrary. *People v. Gilbert*, 68 Ill. 2d 252, 258-59 (1977); *People v. Jackson*, 409 Ill. App. 3d 631, 647 (2011).

¶ 79 In support of his argument that the circuit court erred in relying on evidence outside of the record during his sentencing hearing, defendant points to the following statements the court made before imposing a sentence of 30 years' imprisonment:

> "It never fails to affect me though on how just stupid things in life, just a little argument in life causes the death of a child. You could have driven down the street, go look for that other guy, maybe fought with him, and that's fine.
>
> But you kind of are—were stuck with your words. You stuck with the word sideswipe, [']I tried to sideswipe him,['] and then you testified in court with what your version of sideswipe meant. *I've actually mentioned this to a number of people, asked them [']what does the word sideswipe mean[?']. Nobody but nobody came up with your version of what it meant.*[2] Sideswipe means you drive by and you try to hit him by

[2] As stated in paragraph 39, defendant testified that when he used the term "sideswipe," he meant that he "[b]asically just wanted to get close enough [to the girls] to scare them."

hitting him with the side of your car. But you were stuck with those words, you had to come to court and you had to explain what does the word sideswipe mean.

Apparently the jury didn't buy it, and I certainly didn't buy it. When I heard that was your explanation, I thought this person is not telling the truth.

So I don't think you are accepting responsibility for your actions because of your testimony. I found your testimony to be extremely incredible." (Emphasis added.)

¶ 80 Defendant contends that the court's statements "demonstrate[] that the judge relied on private investigation—his conversations with 'a number of people' – to conclude that [his] testimony was not credible and that he was not accepting responsibility for his actions." We disagree. Although it is apparent from the record, that the circuit court engaged in out-of-court conversations about the facts of defendant's case, it is also similarly apparent from the face of the record that the circuit court did not rely upon those conversations to make its determination as to defendant's credibility or lack thereof or to impose an increased sentence. When the court's statements are read in context, it is evident that the court based its credibility determinations solely on defendant's testimony and not on any conversations it had with other people. Indeed, it is evident from the court's statements that it formulated its conclusion that defendant was not a credible witness at trial when it heard defendant's definition of the term "sideswipe." Although we do not condone the court's reference to out-of-court conversations during defendant's sentencing hearing, because the record does not support defendant's contention that the court actually relied on the substance of those conversations to impose an increased sentence, we find no error.

¶ 81 Defendant nonetheless maintains that he is entitled to a new sentencing hearing because the 30-year prison sentence imposed by the circuit court is "excessive given his youth, minimal criminal history, lack of premeditation, and difficult upbringing."

¶ 82 The Illinois Constitution requires a trial court to impose a sentence that achieves a balance between the seriousness of the offense and the defendant's rehabilitative potential. Ill. Const. 1970, art. I, §11; *People v. Lee*, 379 Ill. App. 3d 533, 539 (2008). To find the proper balance, the trial court must consider a number of aggravating and mitigating factors including: "the nature and circumstances of the crime, the defendant's conduct in the commission of the crime, and the defendant's personal history, including his age, demeanor, habits, mentality, credibility, criminal history, general moral character, social environment and education." *People v. Maldonado*, 240 Ill. App. 3d 470, 485-86 (1992). Although a defendant's rehabilitative potential must be considered, that factor " 'is not entitled to greater weight than the seriousness of the offense.' " *People v. Alexander*, 239 Ill. 2d 205, 214 (2010), *quoting People v. Coleman*, 166 Ill. 2d 247, 261 (1995). Moreover, because a trial court need not explicitly analyze each relevant factor or articulate the basis for the sentence imposed, when mitigating evidence is presented before the trial court, it is presumed that the court considered that evidence in imposing the defendant's sentence. *People v. Averett*, 381 Ill. App. 3d 1001, 1021 (2008); *People v. Ramos*, 353 Ill. App. 3d 133, 137 (2004). Ultimately, because the trial court is in the best position to weigh these factors, the sentence that the trial court imposes is entitled to great deference and will not be reversed absent an abuse of discretion. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000); *People v. Lee*, 379 Ill. App. 3d 533, 539 (2008). As such, a reviewing court will not reweigh the factors in reviewing a defendant's sentence and may not substitute its judgment for the trial court

merely because it could or would have weighed the factors differently. *People v. Jones*, 376 Ill. App. 3d 372, 394 (2007).

¶ 83 Keeping these principles in mind, we turn to address the merit of defendant's claim. Initially, we note that defendant concedes that his 30-year sentence falls within the permissible statutory sentencing range for the offense of first degree murder and is thus presumed proper. See *People v. Gutierrez*, 402 Ill. App. 3d 866, 900 (2010). After reviewing the record, we find that defendant has failed to rebut the presumption of propriety afforded to his sentence. At defendant's sentencing hearing, defense counsel presenting mitigating evidence to the court in support of his argument for a lesser sentence. In pertinent part, defense counsel emphasized that defendant was only 21-years-old at the time of the incident and did not act with malicious intent; rather, he committed an "immature act that had a tragic result." Defense counsel also informed the court that defendant made efforts to better himself during his incarceration period and "didn't just sit around like a bunch of deadbeats sometimes do there down at County." In addition, defendant was permitted to address the court in allocution and took the opportunity to directly apologize to Stuckey's mother "and her family for the loss of the[ir] daughter and everybody else who [wa]s involved in th[e] incident."

¶ 84 Upon sentencing defendant, the circuit court stated that it had "taken the factors in aggravation and mitigation" under advisement and had "reviewed [defendant's] certificate of achievements." The court, however, concluded that defendant was not entitled to "any mercy," citing defendant's prior criminal history, including the fact that he was on probation at the time of the incident, as well as the "serious harm" that resulted from defendant's conduct. The record ultimately reveals that the circuit court considered relevant aggravating and mitigating factors prior to sentencing defendant to 30 years' imprisonment and we find that defendant has failed to

establish that his sentence was excessive and an abuse of the court's discretion. Accordingly, defendant's 30-year sentence is affirmed.

¶ 85 CONCLUSION

¶ 86 The judgment of the circuit court is affirmed.

¶ 87 Affirmed.