2015 IL App (1st) 131366-U

SIXTH DIVISION
Order filed June 26, 2015
Modified Upon Denial of Rehearing August 21, 2015

No. 1-13-1366

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 CR 9321
	)	
TARRENCE THOMPSON,	)	Honorable
	)	Dennis J. Porter,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Hoffman and Justice Hall concurred in the judgment.

O R D E R

¶1 *HELD*: (1) The trial court's improper redaction of a witness's statement did not constitute plain error; (2) the trial court did not err by giving the jury, over the defendant's objection, the testimony of an accomplice instruction; (3) defendant was not denied a fair trial due to the prosecution's closing arguments; and (4) defendant's sentence was not excessive.

¶2 Following a jury trial, defendant Tarrence Thompson was convicted of armed robbery and armed habitual criminal and was sentenced to concurrent terms of 25 and 20 years, respectively. On appeal, he contends he was denied a fair trial because the trial court failed to properly redact the inadmissible portions of a witness's statement; the trial court erroneously instructed the jury with the testimony of an accomplice instruction; and the State engaged in prosecutorial misconduct by shifting the burden of proof and misstating the law during rebuttal closing argument. Defendant also contends the trial court imposed excessive sentences. Based on the following, we affirm the judgment of the trial court.

¶3 I. BACKGROUND

¶4 The State charged defendant with armed robbery, armed habitual criminal, unlawful use of a weapon by a felon, aggravated unlawful use of weapon, and aggravated unlawful restraint. The State alleged that on May 1, 2012, at about 8:30 p.m., defendant knowingly took drug proceeds from Willie Hughes by the use of force or by threatening the imminent use of force, while defendant carried or was armed with a firearm.

¶5 At the jury trial, Chicago police officer Diblich testified that he was conducting a narcotics surveillance in the 3700 block of West Grenshaw Avenue. Officer Diblich saw a black Nissan Pathfinder parked on the south side of the street, across from his surveillance point on Grenshaw Avenue. The driver, Anthony Williams, and the passenger, defendant, exited the vehicle and walked four or five houses west to a vacant building. About 30 seconds after Williams and defendant entered the building, Officer Diblich noticed individuals scattering away from the area. Officer Diblich then saw defendant move east down Grenshaw Avenue, back toward the vehicle, while holding a chrome handgun in his right hand. Officer Diblich did not see defendant carrying any bag. Williams and defendant returned to their vehicle, and Williams

drove east on Grenshaw Avenue towards Central Park Avenue. Officer Diblich radioed to officers a description of the vehicle, defendant, and the gun.

¶6 Officer Jose Rojas testified that he received the radioed information from Officer Diblich and then drove westbound on Grenshaw Avenue and blocked the Pathfinder head to head. Officer Rojas exited the squad car and approached the Pathfinder with a flashlight and his gun drawn. Officer Rojas and his partner ordered Williams and defendant to raise their hands. Williams complied, but defendant did not. Officer Rojas then approached the passenger side of the car and saw a chrome-handled handgun in defendant's lap. Officer Rojas then said "gun, gun, gun, gun" to his partner and saw defendant place the gun in the crevice between the passenger seat and the door. Defendant then raised his hands in the air. The officers removed defendant and Williams from the vehicle and handcuffed them. Officer Rojas recovered the gun from the crevice between the passenger seat and the passenger door. The revolver was loaded with six live rounds of ammunition.

¶7 Officer Diblich then arrived at the arrest location and identified defendant as the suspect he had observed earlier with the gun. Shortly thereafter, Willie Hughes arrived at the location and accused defendant and Williams of robbing him at gunpoint of $260. Hughes was visibly upset about the gun being pointed at him and specifically identified defendant as the person who had the handgun. Officer Diblich then searched defendant and found $260 in his front right pants pocket. Officer Rojas conducted a full search of the offenders' vehicle and did not find any additional money. The officers then brought defendant, Williams and Hughes to the police station. At some point later that night, Officer Diblich learned that Hughes was a drug dealer. Officer Diblich was never alone with defendant and never had a conversation with him after he told defendant he was under arrest.

¶8 Assistant State's Attorney (ASA) Michael Baker testified that he interviewed Hughes after the incident and Hughes gave his statement voluntarily. Baker explained that in their conversation and Hughes' written statement, Hughes identified defendant as the person who robbed him at gunpoint of $260, which Hughes had earned by selling 26 bags of heroin at $10 each. Furthermore, Hughes stated that defendant held his gun in his right hand and said "[g]ive it here" before taking the $260 out of Hughes' left hand. Hughes signed all the pages of his written statement.

¶9 Hughes' trial testimony was largely inconsistent with the written statement he gave ASA Baker. Hughes testified that the Vice Lords street gang controlled the drug operation where he worked for an undisclosed "guy" selling heroin. Hughes claimed that, on the evening in question, he had sold eight bundles of heroin worth about $27,000, and the money belonged to his employer. The $27,000 was in a brown paper bag, which was a little bigger than the size of a standard knit cap. Hughes testified that instead of turning the money over to his employer, he planned to make a "play" for the money by stealing the proceeds and telling his employer that the drugs were stolen or left behind because the police were after him. Accordingly, Hughes telephoned defendant, whom he described as a friend with whom he had "hung a few times," and offered to split the $27,000 with him. Hughes testified that defendant's share would have been half of the $27,000.

¶10 Hughes testified that when defendant arrived at the apartment building, defendant did not have a gun, and Hughes willfully gave him the brown paper bag. After defendant returned to his vehicle and drove away with another person, Hughes saw the police stop the vehicle. According to Hughes, "two guys" told the police something about their uncle being robbed, so the police took Hughes from the apartment building to the scene of the arrest. Hughes told the police that

he did not want to press any charges, but the police forced him to "point [defendant] out" as the person who robbed him at gunpoint by threatening to "put something on" Hughes if he did not "participate." Hughes was forced to go to the police station, where he spoke to a detective and an ASA about the events. At the trial, Hughes denied telling them that defendant robbed him at gunpoint of $260 and claimed the police and ASA forced him to sign the written statement implicating defendant. Hughes acknowledged that he never told the detective or ASA about the $27,000 or any plan to split that money with defendant. Hughes also acknowledged that his life would be in danger for attempting to steal drug proceeds from his employer or the Vice Lords, but he claimed that his employer was allowing him to "work off" the $27,000 debt. Further, Hughes acknowledged that he was convicted of the felony offense of possession of a controlled substance with intent to deliver in 2003 and of the offenses of possession of a controlled substance in 2006 and 2011. He also had a pending charge against him for possession of a controlled substance.

¶11 The parties stipulated that defendant had previously been convicted of two qualifying felonies for the offense of armed habitual criminal.

¶12 Defendant testified that on the day of the incident, he received a telephone call from Hughes about stealing drug proceeds. According to defendant, he was supposed to pick up the money from Hughes at his drug dealing location, meet Hughes a short distance away immediately thereafter and return the money, and then receive $1,000 to $1,500 as his part of the split. Defendant had known Hughes, who was a member of the Vice Lords street gang, for about 10 or 15 years and claimed to have successfully executed a similar heist with him about 5 years earlier. Defendant contacted Anthony Williams to drive him to Hughes' location because defendant did not have a car. Defendant, however, did not tell Williams about the plan to steal

the drug money. At the apartment building, Hughes gave defendant a brown paper bag filled with "a lot of money," and told him there was $40,000 in the bag. Williams and defendant returned to their car, drove away, and were stopped by the police. When Williams and defendant were taken into custody, the bag of money was left on the floor of the car. When Hughes implicated defendant at the scene of the arrest, defendant told the police that the incident was a "fake robbery." Defendant further testified that he did not possess a gun during the incident and did not need one. After the arrest, he talked about the bag of money with Officer Diblich, who said there was no money at the scene.

¶13 During deliberations, the jury sent notes asking for, *inter alia*, a transcript of Hughes' testimony and his written statement to ASA Baker. Because the trial court had previously ruled that Hughes' entire written statement would not be entered into evidence, the court proposed providing the jury with a redacted version of the statement that included only those portions which were admitted as substantive evidence. According to the record, the trial court told counsel for the State and the defense to collaborate to submit a redacted statement, but if they were not able to do it, then the trial court would redact it. Thereafter, the trial court confirmed on the record that counsel for both the State and the defense had a copy of the redacted statement and had no objections. The redactions were made by striking out text with a black marker.

¶14 The jury found defendant guilty of armed robbery and armed habitual criminal, and the trial court sentenced him to a 25-year prison term for armed robbery and a 20-year prison term for armed habitual criminal, to be served concurrently.

¶15 Defendant timely appealed.

¶16 II. ANALYSIS

¶17 A. Inadequate Redaction of Hughes' Written Statement

¶18 Defendant contends he was denied a fair trial when the trial court failed to properly redact inadmissible portions of Willie Hughes' written statement and thereby exposed the jury to prejudicial information. Specifically, defendant contends the improper redaction allowed the jury to read that: (1) Hughes "was in Southwestern Correctional Facility located in East St. Louis Illinois with [defendant]" and; (2) "Willie Hughes states that he is not friends with [defendant]." Defendant argues the failure to properly redact this information exposed the jury to information about defendant's relationship with Hughes that weakened the entire theory of the defense that defendant and Hughes were working together to steal drug money from Hughes' supplier. Defendant also argues that Hughes' statement about spending time in prison with defendant alerted the jury to their criminal background and, thus, damaged their credibility.

¶19 Our review of the record establishes that although the two contested statements were stricken by a black marker, the marker's ink was faint and the text of the redacted portions was still visible and readable. Defendant, however, has forfeited review of this issue by failing to object at trial and include the issue in his posttrial motion. *See People v. Hillier*, 237 Ill. 2d 539, 544 (2010). Application of the forfeiture rule is less rigid where the basis for the objection is the trial court's conduct. *People v. McLaurin*, 235 Ill. 2d 478, 485 (2009). Nevertheless, our supreme court has clarified that forfeiture would only be excused under extraordinary circumstances such as when the trial judge makes inappropriate comments to the jury or relies on social commentary instead of evidence in sentencing a defendant to death. *Id*. at 488. Our review of the record establishes that extraordinary circumstances are not present in this case. Moreover, because defendant has not presented any extraordinary or compelling reason to relax the forfeiture rule

where he was represented by counsel and had the opportunity to raise contemporaneous objections but did not, we decline to relax the forfeiture rule.

¶20 Defendant argues this issue should be considered as plain error because the error denied him a fair trial where the evidence in this case was closely balanced and the error seriously affected his substantial rights. The plain error doctrine is a narrow and limited exception. *Hillier*, 237 Ill. 2d at 545. Under the plain error rule, "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded" unless the appellant demonstrates plain error. Ill. S. Ct. R. 615. The plain-error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error when either (1) 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) the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). In both instances, the burden of persuasion remains with the defendant. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008). The first step in plain error review is to "determine whether a 'clear or obvious' error occurred at all." *McLaurin*, 235 Ill. 2d at 489.

¶21 The trial court properly ruled that Willie Hughes' written statement would not be admitted into evidence in its entirety because it contained information about which he was never questioned. See *People v. Radovick*, 275 Ill. App. 3d 809, 821 (1005) (a transcript of a witness's grand jury testimony was inadmissible in its entirety because it contained matters about which she was never questioned). Hughes was never questioned about serving time in prison with defendant, so the trial court's failure to adequately redact that statement before allowing the jury to view the written statement was error.

¶22 Hughes' written statement that defendant was not a friend was inconsistent with his trial testimony, and a prior inconsistent statement is substantively admissible under section 115-10.1 of the Code of Criminal Procedure (725 ILCS 5/115-10.1 (West 2010)) if the statement is inconsistent with the witness's testimony at trial, the witness is subject to cross-examination, and the statement narrates an event of which the witness has personal knowledge and is signed by the witness. However, a party seeking to admit a prior inconsistent statement must lay a proper foundation by asking the witness whether he made the statement, and such a foundation is required whether the inconsistent statement is introduced as impeachment or as substantive evidence. *People v. Hallbeck*, 227 Ill. App. 3d 59, 62 (1992). According to the record, Hughes was neither confronted on the stand with his prior statement that defendant was not a friend, nor directed to the time, place, circumstances and substance of the prior statement, nor given an opportunity to explain the inconsistency. Consequently, the trial court's failure to adequately redact that statement before allowing the jury to view the written statement was error.

¶23 Defendant, however, does not meet his burden of persuasion under the first prong of plain error analysis because the evidence in this case was not closely balanced. The credible and consistent testimony of Officers Hughes and Rojas established that defendant and Williams arrived at an area under narcotics surveillance; 30 seconds after defendant and Williams entered a building, individuals were seen running from the area; and defendant was seen holding a gun as he and Williams returned to their car. When the police stopped the car, defendant attempted to conceal the gun in the car but the police recovered the weapon. When Hughes arrived at the scene and identified defendant as the gunman who had robbed him of $260, a search of defendant produced $260 from defendant's pants pocket. No additional money was found in the

car. Furthermore, Hughes' written statement corroborated the credible testimony of the officers, and ASA Baker's testimony corroborated Hughes' initial statement to the police.

¶24 In contrast to the officers' credible testimony, Hughes' trial testimony was incredible and contradicted portions of defendant's testimony, which also lacked credibility. Whereas Hughes claimed the small paper bag contained about $27,000, defendant asserted that Hughes told him the bag contained $40,000. Whereas Hughes claimed the plan was to split the drug proceeds evenly, defendant claimed he was supposed to return all the money to Hughes except for his share of about $1,500. Furthermore, the testimony of Hughes and defendant about their plan to conduct a fake robbery was unbelievable where Hughes, despite acknowledging that his life would be in danger for stealing the drug proceeds from his employer and the Vice Lords, tried to convince the jury that he would risk such danger and share half of the stolen $27,000 with defendant simply because defendant was a friend with whom Hughes had "hung a few times." In light of the overwhelming evidence of defendant's guilt, we do not find that the two redaction errors tipped the scales of justice against defendant and led to the jury's guilty verdict.

¶25 Defendant also fails to meet his burden of persuasion under the second prong of plain error analysis. Under this prong, "[p]rejudice to the defendant is presumed because of the importance of the right involved, regardless of the strength of the evidence." (Internal quotation marks omitted.) (Emphasis omitted.) *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). The supreme court has equated the second prong of the plain-error doctrine with structural error, which is "a systemic error which serves to erode the integrity of the judicial process and undermine the fairness of the defendant's trial." (Internal quotation marks omitted.) *Id.* at 613–14 (quoting *People v. Glasper*, 234 Ill. 2d 173, 197–98 (2009)). The trial court's failure to redact the information concerning Hughes' and defendant's shared prison time and friendship status

does not constitute an error of such a magnitude as to have denied defendant a fair trial. The knowledge that Hughes met defendant in prison was unlikely to have further eroded Hughes' or defendant's credibility because the jury was already aware that both Hughes and defendant had criminal histories. The jury was properly informed that defendant was a convicted felon for purposes of the armed habitual criminal charge, and Hughes testified at trial to his prior felony conviction of possession of a controlled substance with intent to deliver. Moreover, Hughes' prior inconsistent statement that defendant was not a friend was not sufficiently prejudicial where Hughes' trial testimony qualified his friendship with defendant as someone he merely "hung [with] a few times." We do not find that either statement affected the fairness of defendant's trial or challenged the integrity of the judicial process to the severity required by plain error.

¶26 Based on our analysis, we conclude that the trial court's failure to redact certain information from Hughes' written statement does not require reversal under either the first or second prong of the plain-error doctrine.

¶27 B. Accomplice Testimony Jury Instruction

¶28 Defendant contends he was denied a fair trial when the trial court gave, over defendant's objection, Illinois Pattern Jury Instructions, Criminal, No. 3.17 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 3.17) concerning the testimony of an accomplice. This instruction provides:

> "When a witness says he was involved in the commission of a crime with the defendant, the testimony of that witness is subject to suspicion and should be considered by you with caution. It should be carefully examined in light of the other evidence in the case." IPI Criminal 4th No. 3.17.

The Committee Note of this instruction states:

> "In *People v. Rivera*, 166 Ill. 2d 279, 292 *** (1995), the supreme court held that an accomplice's testimony should be cautiously scrutinized regardless of which side he testifies for. As a result, the Committee now recommends that this instruction be given any time an accomplice testifies." *Id.*

¶29 According to the record, the trial court ruled the instruction was appropriate because Hughes testified that he and defendant were involved in a theft from another individual. Defendant included this issue in his posttrial motion, and argued at the hearing on the motion that the instruction was improper where Hughes and defendant did not commit a crime because the drug dealer from whom they were allegedly stealing the drug proceeds did not have a legal interest in the proceeds from the drug sales.

¶30 On appeal, defendant argues that the instruction was improper because Hughes provided testimony that exonerated defendant. Specifically, defendant contends that although Hughes and defendant both admitted that they attempted to steal from the Vice Lords, defendant was not charged with that offense. Defendant also argues that Hughes completely exonerated him by testifying that he (Hughes) gave the money to defendant, never saw defendant with a gun, and was forced by the police to accuse defendant of robbery. The State argues defendant has forfeited review of this issue because his posttrial motion did not specify this same basis of alleged error. See *Brown v. Decatur Memorial Hospital*, 83 Ill. 2d 344, 349 (1980) (issues concerning jury instructions are forfeited if the posttrial motion lacks the specific grounds upon which the alleged errors were based); *accord Micklos v. Highsmith*, 149 Ill. App. 3d 779, 788 (1986). However, we find that defendant's argument at the hearing on the posttrial motion sufficiently preserved this issue for review.

¶31 Nevertheless, we conclude that the trial court's decision to give the accomplice testimony jury instruction did not deprive defendant of a fair trial. Jury instructions convey the legal rules applicable to the evidence presented at trial and thus guide the jury's deliberations toward a proper verdict. *People v. Mohr*, 228 Ill. 2d 53, 65 (2008). There must be some evidence in the record to justify a jury instruction. *Id*. Generally, the giving or withholding of jury instructions is a matter within the trial court's discretion (*People v. Jones,* 219 Ill. 2d 1, 31 (2006)), and a trial court abuses its discretion if the jury instructions are not clear enough to avoid misleading the jury (*In re Timothy H*., 301 Ill. App. 3d 1008, 1015 (1998)).

¶32 The plain language of the jury instruction indicates that it applies when a witness testifies that he "was involved in the commission of *a crime* with the defendant" (emphasis added) (IPI Criminal 4th No. 3.17); nothing in the language of the jury instruction indicates that it only applies when the witness testifies that he was involved in the commission of *the charged crime* with the defendant. Moreover, contrary to defendant's argument on appeal, Hughes' testimony did not exonerate defendant where Hughes testified they agreed to steal money from Hughes' employer. In addition, defendant corroborated Hughes' testimony about stealing the money and added that he and Hughes had executed a similar heist about five years earlier. We find that the trial court did not abuse its discretion because the evidence in the record justified giving the accomplice testimony jury instruction.

¶33 Defendant cites *People v. Szydloski*, 283 Ill. App. 3d 274 (1996), to support his claim of error, but that case is distinguishable. In *Szydloski*, the court held it was error to give IPI Criminal 4th No. 3.17 where the defendant's wife testified that she stole the merchandise while her husband was not looking and that he had no knowledge of her plans. *Id*. at 277. Here, in contrast, both Hughes and defendant testified that they planned and attempted to steal money

from another person, and defendant testified that he and Hughes had executed a similar heist before. Under these circumstances, IPI Criminal 4th No. 3.17 was not confusing to the jury and did not prejudice the defense by unfairly discrediting the testimony of a key witness.

¶34 In further support of his claim of error, defendant cites supreme court cases which have stated that "the test for determining whether a witness is an accomplice for purposes of the accomplice-witness instruction is whether there is probable cause to believe that the witness was guilty of the offense at issue as a principal, or as an accessory under an accountability theory." *People v. Caffey*, 205 Ill. 2d 52, 116 (2001); *accord People v. Kirchner*, 194 Ill. 2d 502, 541 (2000). Defendant, emphasizing the supreme court's use of the phrase *offense at issue*, argues that under this test Hughes would not qualify as an accomplice, either as the principal or an accessory, because he was the alleged victim in the offense at issue. We disagree. Unlike defendant, we do not read so narrowly the supreme court's use of the phrase *offense at issue* to mean the charged offense. Our holding is not in conflict with the above-referenced accomplice-witness test because, under the unique facts of this case, the alleged theft of Hughes' employer by Hughes and defendant was an offense at issue where both Hughes and defendant testified that they attempted to steal the drug proceeds from Hughes' employer. Consequently, in addition to the armed robbery offense charged by the State, the testimony of Hughes and defendant placed before the jury the issue of the credibility of their testimony concerning their alleged attempt to steal the drug proceeds.

¶35 Moreover, neither *Caffey* nor *Kirchner* stand for the proposition that the accomplice-witness instruction applies only when the witness testifies that he was involved in the commission of the charged crime with the defendant. In *Caffey*, the court found no abuse of discretion by the trial court in refusing the accomplice-witness instruction regarding the

testimony of witness Patrice Scott, who witnessed the defendant and codefendant strangle and stab Joshua, the seven-year-old-kidnapping and murder victim. *Caffey*, 205 Ill. 2d at 116-17. The defendant argued the accomplice-witness instruction was warranted because Scott could have been charged with Joshua's murder on an accountability theory. *Id*. at 116. The court disagreed, finding there was no evidence that Scott participated in the planning or commission of Joshua's murder and her mere presence at the scene of the crime was insufficient to render her liable for the acts of the defendant and codefendants. *Id*. at 117. Although there was evidence that, at most, made Scott an accessory to the crimes after the fact, the court held that the accomplice-witness instruction "need not be given where the witness was not involved in any way until after the commission of the crime." *Id*. (citing *People v. Turner*, 92 Ill. App. 3d 265, 268 (1980)).

¶36 In *Kirchner*, the defendant, who was charged with the murder of three members of the Brewer family, argued the accomplice-witness instruction should have been given because witness Dyno Warner could have been indicted as a principal under a theory of accountability. *Kirchner*, 194 Ill. 2d at 541. Specifically, the defendant argued that the murder weapon, a knife, belonged to Warner and, after the murders, Warner helped the defendant burn his bloody clothing, threw the knife into the river, and did not speak to the police for five days after the murders. *Id*. The court found the evidence was insufficient to support giving the accomplice-witness instruction because Warner did not give the defendant permission to use Warner's knife; Warner was not present at the scene of the murders; Warner's mere knowledge that the defendant planned to commit a crime was not enough to show he was an accomplice; and Warner's admission to performing acts that constituted obstruction of justice—helping the defendant conceal evidence related to the Brewer murders after they occurred—did not make him an accomplice. *Id*. at 542-43.

¶37 Both *Caffey* and *Kirchner* involved situations where the witness was an admitted participant in a related but distinct offense, such as accessory to the crimes after the fact or obstruction of justice. See *People v. Henderson*, 142 Ill. 2d 258, 314 (1990) (an accomplice is not one who was an admitted participant in a related but distinct offense; an accomplice must take some part, perform some act, or owe some duty to the person in danger that makes it incumbent on him to prevent the commission of the crime). Here, in contrast, the testimony presented to the jury required it to determine whether the single event at issue was a robbery of Hughes by defendant or a theft of drug proceeds by Hughes and defendant. "Whether one was an accomplice depends entirely on the facts of the case" (*Henderson*, 142 Ill. 2d at 316), and our finding that the trial court here did not abuse its discretion by giving the accomplice-witness instruction is not in conflict with *Caffey* and *Kirchner*.

¶38 C. Prosecutor's Closing Argument

¶39 Defendant contends the State engaged in prosecutorial misconduct during rebuttal when it: (1) shifted the burden of proof by arguing that defendant's failure to call Anthony Williams as a corroborating witness must be weighed against him; and (2) misstated the law by arguing that armed robbery occurs regardless of whether the victim consents to the taking of property.

¶40 Whether statements made by a prosecutor at closing argument were so egregious that they warrant a new trial is a legal issue subject to *de novo* review. *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007). In reviewing a defendant's claims of prosecutorial misconduct in closing argument, the court considers closing arguments in their entirety in order to place the challenged remarks in context (*People v. Johnson*, 385 Ill. App. 3d 585, 604 (2008)), and "asks whether or not the comments engender substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilt resulted from them." *Wheeler*, 226 Ill. 2d at 123.

"Misconduct in closing argument is substantial and warrants reversal and a new trial if the improper remarks constituted a material factor in a defendant's conviction." *Id*. "If the jury could have reached a contrary verdict had the improper remarks not been made, or the reviewing court cannot say that the prosecutor's improper remarks did not contribute to the defendant's conviction, a new trial should be granted." *Id*.

¶41 Defendant concedes that he failed to preserve this issue for review by including it in his posttrial motion (*see Hillier*, 237 Ill. 2d at 544), but asks this court to review the issue for plain error because the evidence was close and the State's errors in shifting the burden of proof and misstating the law were serious.

¶42 As discussed above, the evidence in this case was not closely balanced. See *supra* ¶¶ 23-24. Furthermore, defendant fails to show a substantial error to overcome his forfeiture where both the challenged statements were immediately objected to and such objections were sustained by the trial court. According to the record, the defense urged the jury to reject the officers' fabricated testimony about a robbery, arguing, *inter alia*, that Officer Diblich must have lied because it would have been illogical for defendant to take his unarmed driver, Williams, out of the get-away car to accompany him as he went to rob Hughes. The defense argued that defendant was charged with armed robbery because he insisted to the police that there was money in the car, whereas the police inexplicably gave the drug dealing Hughes "a free pass" and defendant's driver, Williams, traffic tickets.

¶43 During rebuttal argument, the prosecutor discussed Officer Diblich's credible testimony, Hughes' credible written statement and incredible trial testimony, and defendant's self-serving testimony. The prosecutor stated:

> "Defense asks you where is Mr. Williams today? Where is Mr. Williams today? Now the State has the burden of proving the Defendant guilty beyond a reasonable doubt. That burden carries with us throughout this whole trial. The Defendant doesn't have to put on any evidence at all. He can just sit there. Judge Porter gave you the example before we started the trial regarding the presumption of innocence, no duty to do anything. What the Defendant did do is he did present evidence, and the only evidence he presented was the self-serving biased evidence of the Defendant, his story to try to get off. Where is Mr. Williams, the only other witness that would corroborate the Defendant's story?"

¶44 The defense objected, and the trial court sustained the objection and instructed the jury to disregard the arguments. The prosecutor then discussed the officers' credible testimony, how the facts did not support a theory that the police framed defendant, and the State's burden to prove defendant took the money from Hughes by the use of force. The prosecutor stated:

> "Nothing in this instruction that's going to tell you unless Willie Hughes otherwise consented, unless there was some fake robbery, and the only - -"

The defense objected, and the trial court sustained the objection and instructed the jury that the court would instruct the jury on the law. The prosecutor then discussed Hughes' lack of credibility concerning his assertion about the fake robbery.

¶45 Viewing the prosecutor's two solitary improper remarks in the context of the entire closing argument, we conclude that the two challenged statements were not so egregious that they created an unfair trial or were a material factor in the verdict. Furthermore, the trial court's act of sustaining the defense's objections and properly admonishing the jury was sufficient to cure any prejudice engendered by the State's two

improper statements (see *People v. Edwards*, 195 Ill. 2d 142, 168 (2001)), and the prosecutor did not persist in continuing those improper remarks (see *People v. Weinstein*, 35 Ill. 2d 467, 471 (1966)). It is presumed that the jury will follow the jury instructions (*People v. Illgen*, 145 Ill. 2d 353, 376 (1991)), and improper arguments can be corrected by proper jury instructions, which carry more weight than the arguments of counsel. *People v. Willis*, 409 Ill. App. 3d 804, 814 (2011). The record establishes the jury was properly instructed on the burden of proof and the elements of the offense of armed robbery. We conclude that the prosecutor's challenged statements do not require reversal under either the first or second prong of the plain-error doctrine.

¶46 D. Sentencing

¶47 Finally, defendant contends the trial court imposed excessive concurrent sentences of 25 years for armed robbery and 20 years for armed habitual criminal in light of strong mitigating factors concerning defendant's strong family ties, non-violent criminal history, history of drug addiction, and remorse for his actions. Specifically, defendant argues he has a strong relationship with his wife of 12 years, was actively involved in the upbringing of his three grown children, who now have careers, and regularly spent time with his grandchildren. Furthermore, the majority of defendant's felony convictions were drug offenses and, thus, directly attributable to his lifelong battle with drug addiction. In addition, his other felony convictions—criminal trespass in 2003 and burglary in 1993—were non-violent in nature. In addition, defendant told the court that he made a lot of stupid decisions, was sorry for what he got into on this case and would take it back if he could.

¶48 Defendant has forfeited review of this issue by failing to make a contemporaneous objection and include the issue in a written postsentencing motion. *Hillier*, 237 Ill. 2d at 544; see

also 730 ILCS 5/5-8-1(c) (West 2010) ("a defendant's challenge to the correctness of a sentence or to any aspect of the sentencing hearing shall be made by a written motion filed within 30 days following the imposition of sentence"). Consequently, we may review this claim of error only if defendant has established plain error. To obtain relief under the narrow and limited plain-error doctrine, defendant must first show that a clear or obvious error occurred. *Hillier*, 237 Ill. 2d at 545. "In the sentencing context, a defendant must show either that (1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing. *Id*. Defendant has the burden of persuasion under both prongs of the plain-error doctrine, and his failure to meet his burden means the procedural default will be honored. *Id*.

¶49 A trial court's sentence may not be disturbed absent an abuse of discretion. *People v. Perruquet*, 68 Ill. 2d 149, 154 (1977). A sentence must be balanced between the seriousness of the offense at issue and the potential for the defendant's rehabilitation. *See* Ill. Const. 1970, art. I, §11. A trial court's sentence is entitled to great deference and weight because the trial court is in a superior position to make such a determination. *Perruquet*, 68 Ill. 2d at 154. The trial court weighs the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). A reviewing court may not substitute its judgment for that of the trial court simply because it would have weighed those factors differently. *Id*. Moreover, a sentence within the statutory range will not be considered excessive unless it greatly varies with the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. *Id* at 210. Additionally, "the trial court has no obligation to recite and assign value to each factor presented at a sentencing hearing." *People v. Hill*, 402 Ill. App. 3d 920, 928 (2010). Rather, "it is presumed that the trial

court properly considered all mitigating factors and rehabilitative potential before it; and the burden is on the defendant to affirmatively show the contrary." *People v. Garcia*, 296 Ill. App. 3d 769, 781 (1998).

¶50 Defendant does not show any abuse of discretion by the trial court in imposing sentence. Defendant was convicted of armed robbery and armed habitual criminal, both of which are class X offenses. 720 ILCS 5/18-2(a)(2), 5/24-1.7(a) (West 2010). A class X conviction mandates a sentencing range of 6 to 30 years' imprisonment. 730 ILCS 5/5-4.5-25(a) (West 2010). Additionally, because defendant was convicted of armed robbery while carrying a firearm, 15 years were added to the term of imprisonment imposed by the trial court. 720 ILCS 5/18-2(b) (West 2010). Consequently, the sentencing range for defendant's armed robbery conviction is a minimum of 21 years' and a maximum of 45 years' imprisonment. Defendant's 25-year sentence for armed robbery, therefore, falls within the permissive statutory range.

¶51 The sentencing range for defendant's class X armed habitual criminal conviction is 6 to 30 years' imprisonment. 720 ILCS 5/24-1.7(b) (West 2010); 730 ILCS 5/5-4.5-25(a) (West 2010). Defendant's 20-year sentence for armed habitual criminal, therefore, falls within the permissive statutory range.

¶52 Furthermore, the record contradicts defendant's assertion that the trial court failed to take into account his strong family ties, non-violent criminal history, and remorse for his actions. Evidence of a defendant's drug abuse is not necessarily mitigating (*People v. Evangelista*, 393 Ill. App 3d 395, 399 (2009)), and the trial court stated it considered "the nature and circumstances of the offense, character and background of the defendant, the arguments of counsel, statement of defendant, [and] presentence investigation." Additionally, the trial court considered defendant's criminal background, including several felony narcotics convictions, a

burglary conviction, and misdemeanor convictions. Where the evidence showed that several individuals fled the area when defendant displayed the gun, the judge properly noted the need to impose a sentence that protects the public.

¶53 Defendant has not met his burden of persuasion to show that either the evidence at the sentencing hearing was closely balanced or that an egregious error denied him a fair sentencing hearing. The trial court acted well within the statutory guidelines and did not depart from the spirit and purpose of the fundamental law and the constitutional requirement that the sentence be proportionate to the nature of the offense. Therefore, we affirm the sentences imposed on defendant.

¶54 III. CONCLUSION

¶55 We affirm the judgment of the trial court.

¶56 Affirmed.