2016 IL App (2d) 140220-U
No. 2-14-0220
Order filed March 23, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 99-CF-1512
SANDRA LOPEZ,	)	Honorable John T. Phillips,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hutchinson and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's convictions of home invasion and armed robbery were affirmed where the prosecutor's comments in opening statements and closing arguments did not amount to reversible error; defendant's sentences were not excessive, and the trial court did not consider an improper factor in aggravation.

¶ 2 Defendant, Sandra Lopez, was convicted of three counts of home invasion (720 ILCS 5/12-11(a)(1), (a)(2) (West 1998)) and two counts of armed robbery (720 ILCS 5/18-2(a) (West 1998)). The court sentenced her to 19 years' imprisonment on one count of home invasion and two counts of armed robbery, with the sentences to run concurrently. In this direct appeal, defendant argues that she was denied a fair trial due to certain comments in the State's opening

statement and rebuttal closing argument. She also contends that her sentences were excessive in light of her minor criminal history and the court's reliance on an improper aggravating factor. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 On April 5, 1999, two women armed with knives entered Herlinda Vargas's and Soledad Avila's Park City, Illinois residence. Vargas sustained a serious cut to her finger in the process of struggling with one of the offenders. The perpetrators bound Vargas and Avila with duct tape and ransacked and robbed the home before leaving. After the attack, Vargas and Avila had conversations with Isaias Cervantes (Vargas's brother and Avila's husband) to figure out who the perpetrators might have been. Cervantes suspected that his former co-worker, Lizeth Dominguez, and Dominguez's aunt may have been involved. These suspicions were relayed to police, who compiled photographic lineups that included pictures of Dominguez and defendant. Avila identified Dominguez from the lineup that was shown to her. Vargas identified defendant as the other perpetrator, the one who had cut her.

¶ 5 In May 1999, defendant and Dominguez were charged in an eight-count indictment with home invasion, armed violence (720 ILCS 5/33A-2 (West 1998)), armed robbery, and aggravated battery (720 ILCS 5/12-4(b)(1) (1998)). Defendant left the country around that time and did not return for more than a decade. Dominguez, however, was arrested almost immediately and cooperated in the investigation. She admitted her role in the crimes and implicated defendant (her aunt) as the second offender. Dominguez pleaded guilty to the reduced charge of robbery, a class 2 felony, with the agreement that she would testify against defendant when the time came.

¶ 6 Defendant was ultimately located and arrested in March 2013. At trial, the State nolle

prossed the aggravated battery and armed violence counts along with one count of home invasion. Vargas and Avila were among the State's witnesses. They recounted the events of April 5, 1999, along with their subsequent efforts to identify the perpetrators. Vargas identified defendant in court as the woman who had cut her. Dominguez also testified for the State, generally corroborating the victims' testimony and implicating herself along with defendant. Neither Dominguez nor defendant were linked to the crime scene by forensic evidence; however, testimony showed that the perpetrators wore gloves during at least part of the time that they were in the victims' residence. Two of the items of evidence that were tested contained minor DNA profiles that could not be accounted for. Defendant did not introduce any evidence.

¶ 7 The jury found defendant guilty on all counts: three counts of home invasion (counts I, II, and IV) and two counts of armed robbery (counts VI and VII). After the court denied defendant's posttrial motion, it sentenced her on counts IV, VI, and VII, finding that the other counts merged into count IV. Defendant was sentenced to 19 years' imprisonment on each count, with the sentences to be served concurrently. Following the denial of her motion to reconsider the sentences, defendant timely appealed. We provide additional facts in the analysis section as necessary to address defendant's specific contentions on appeal.

¶ 8 II. ANALYSIS

¶ 9 Defendant argues that she was denied a fair trial due to certain comments in the State's opening statement that allegedly infringed on her right to not testify. She also contends that the State improperly attempted to define "reasonable doubt" in its rebuttal closing argument. Finally, defendant argues that her 19-year sentences of imprisonment were excessive considering her minor criminal history and the court's reliance on an improper aggravating factor.

¶ 10 (A) Opening Statement

¶ 11 Defendant first argues that she was denied a fair trial due to comments in the State's opening statement. She contends that these comments infringed upon her right to not testify.

¶ 12 "The purpose of a prosecutor's opening argument is to inform the jury about what the prosecution intends in good faith to prove through the evidence to be presented." *People v. Flax*, 255 Ill. App. 3d 103, 108 (1993). Incidental and uncalculated remarks do not form the basis of reversal, absent deliberate misconduct. *People v. Cloutier*, 156 Ill. 2d 483, 507 (1993). An improper remark during an opening statement merits reversal only if it substantially prejudices the defendant. *Flax*, 255 Ill. App. 3d at 108. "The test for determining whether there was reversible error because a remark resulted in substantial prejudice to the defendant is whether the remark was a material factor in the conviction, or whether the jury might have reached a different verdict had the prosecutor not made the remark." *Flax*, 255 Ill. App. 3d at 109.

¶ 13 The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." Accordingly, the prosecution may not comment on the defendant's silence at trial, nor may the court instruct the jury that such silence is evidence of guilt. *Griffin v. California*, 380 U.S. 609, 615 (1965). To that end, it is inappropriate for the prosecution to either directly reference the defendant's failure to testify or to "accomplish indirectly what it could not do directly." *People v. Hopkins*, 52 Ill. 2d 1, 6 (1972). In determining whether a particular comment was improper, the relevant question is whether " 'the reference [was] intended or calculated to direct the attention of the jury to the defendant's neglect to avail himself of his legal right to testify.' " *People v. Dixon*, 91 Ill. 2d 346, 350 (1982) (quoting *Hopkins*, 52 Ill. 2d at 6).

¶ 14 In his opening statement, in the context of describing Dominguez's anticipated testimony, the prosecutor asserted that "[t]here were four people in that trailer, and you're going to hear

from three of them." Defense counsel did not immediately object. Later in his opening statement, the prosecutor again said: "There were three – four people in that trailer. You're about to hear from three of them." Defense counsel then objected. Outside the presence of the jury, the following exchange occurred:

"[Defense counsel]: I am objecting.

THE COURT: I will hear you. You are talking a fine line shifting the burden. But objection is noted. I was about to stop him, so you want to make a motion?

[Defense counsel]: I do, for the record, if I may. Now he has twice stated four people were present during the crime, and you're going to hear from three. Only person obviously that remains is my client who has the right to not testify. So he said that and he made the comment twice. I want, for the record, I am asking for declaratory judgment.

THE COURT: I will deny the motion. I don't think it is over the line. Now to give you an option at this point I will propose to try to get on the guide [*sic*] side of that line. At this time [the prosecutor] is doing that. If you want me to again remind him about, you know, the presumption of innocence and the burden of proof as well as the defendant not presenting evidence, I will do that before either of you make statements or after, or I will do it right after he is done with his opening statement. It's up to you.

[Defense counsel]: You denied my motion. Can I do it at the close before I give my opening?

THE COURT: All right."

Immediately thereafter, co-counsel, a different assistant State's attorney, concluded the State's opening statement and told the jury, in relevant portion:

> "You will hear from the three in the People's case in chief. The defendant has no burden in this case. You said when you were picked as jurors you understand the burden of proof. It is firmly on the People of the State of Illinois' shoulders. We accept that burden. We welcome that burden. The People's case in chief is you will hear from the two victims and Lizeth Dominguez."

Before defense counsel presented his opening statement, the court instructed the jury that defendant was presumed to be innocent throughout every stage of trial, that the State had the burden of proving defendant's guilt beyond a reasonable doubt, and that defendant was not required to present evidence or to prove her innocence.

¶ 15 After the evidence was presented and the parties gave their closing arguments, the court instructed the jury with Illinois Pattern Instructions, Criminal [I.P.I.], 2.03 (4th ed. 2000), which provides:

> "The defendant is presumed to be innocent of the charges against her. This presumption remains with the defendant throughout every stage of trial and during your deliberations on the verdict and is not overcome unless from all the evidence in this case you are convinced beyond a reasonable doubt that she is guilty.
>
> The People have the burden of proving the guilt of the defendant beyond a reasonable doubt, and this burden remains on the People throughout the case. A defendant is not required to prove her innocence."

The court also gave the jury I.P.I. 2.04: "The fact that the defendant did not testify must not be considered by you in any way in arriving at your verdict."

¶ 16 Defendant argues that the prosecutor's comments "completely destroyed" her right to not testify and that the court's instructions to the jury "were insufficient to cure the problem." The

State responds that the comments were "not intended to emphasize the fact that Defendant was not going to testify, but [were] more a statement that the jury would hear the complete story from the State's point of view." According to the State, the prosecutor merely intended to "introduce the *dramatis personae*" and to "suggest to the jury that the State would give a complete and uncontradicted account of what happened." The State also argues that even if the comments were questionable, the harm was ameliorated by the court's immediate instructions about the presumption of innocence and the burden of proof.

¶ 17 It is not entirely clear whether the prosecutor intended to direct the jury's attention to the State's expectation that defendant would not testify. Our supreme court has recognized that the line between proper and improper commentary in this respect may not always be obvious. See *People v. Barrow*, 133 Ill. 2d 226, 268 (1989) ("It is often not easy to determine the line between permissible comments on evidence or testimony that stands uncontradicted and references to a defendant's failure to testify."). The prosecutor twice mentioned that there were four people in the trailer and that the jury would hear from three of them. It is possible that he meant to highlight defendant's expected silence, which would unquestionably be improper. Of course, at the time of its opening statement, the State could not have known whether defendant would actually testify, so it would seem that the prosecutor would have no reason to comment on her silence. Accordingly, it is equally, if not more plausible, that the prosecutor was merely attempting to explain that the State would call Vargas, Avila, and Dominguez to testify in its case-in-chief. As noted above, the State is entitled to prepare the jury in its opening statement for the evidence that will be presented.

¶ 18 Irrespective of the State's intentions, the remarks could have had the effect of highlighting to the jury that defendant might not testify. To the extent that the comments did so,

they were inappropriate. The question then becomes whether any error was harmless. "To establish that an error was harmless, the 'State must prove beyond a reasonable doubt that the jury verdict would have been the same absent the error.' " *People v. Ealy*, 2015 IL App (2d) 131106, ¶ 81 (quoting *People v. Thurow*, 203 Ill. 2d 352, 363 (2003)). One way for a reviewing court to decide whether an error was harmless is to "focus on the error to determine whether it might have contributed to the conviction." *Ealy*, 2015 IL App (2d) 131106, ¶ 81.

¶ 19 We agree with the State that the trial court ameliorated any harm by appropriately instructing the jury about the burden of proof and that defendant's failure to testify could not be considered in arriving at a verdict. See *Barrow*, 133 Ill. 2d at 269 (in holding that the prosecutor's statements did not constitute reversible error, the court noted that the trial court had instructed the jury that it could not consider defendant's failure to testify in arriving at a verdict). The fact that any error was immediately addressed distinguishes the matter from *People v. Wollenberg*, 37 Ill. 2d 480 (1967), on which defendant relies. Additionally, in *Wollenberg*, the State blatantly referenced in its closing arguments the defendant's failure to testify. *Wollenberg*, 37 Ill. 2d at 487 ("On behalf of the defendant, just two witnesses, Mr. LaBuda and Mr. Lazendorf. No one else testified. Let's get that straight."). In contrast, the remarks in the present case were made in an opening statement before any witnesses were called. They were much more subtle and were arguably directed only toward the evidence that the State anticipated eliciting in its own case-in-chief. Moreover, we cannot say that the jury's verdict would have been different absent the isolated remarks at issue. The victims testified consistently regarding the events of April 5, 1999, and Dominguez corroborated their testimony and described how defendant took the lead in orchestrating the robbery. Although defense counsel attempted to cast doubt on the reliability of Vargas's identification of defendant and emphasized both the lack of

DNA evidence linking defendant to the crime and Dominguez's incentive to testify falsely, the jury rejected those arguments. Under these circumstances, we cannot say that the two remarks in the State's opening statement contributed to defendant's conviction or substantially prejudiced her, particularly where any error was immediately addressed by the trial court.

¶ 20 (B) Closing Arguments

¶ 21 Defendant next argues that she was denied a fair trial by comments in the State's rebuttal closing argument that allegedly misstated and improperly defined the reasonable doubt standard.

¶ 22 A prosecutor is given great latitude in making a closing argument. *People v. Woods*, 2011 IL App (1st) 091959, ¶ 42. The State is entitled to comment on and draw legitimate inferences from the evidence, even if they are unfavorable to the defendant. *Woods*, 2011 IL App (1st) 091959, ¶ 42. It is also appropriate for the State to "respond to comments made by defense counsel that invite response." *People v. Burman*, 2013 IL App (2d) 110807, ¶ 25. We must review the State's closing argument in its entirety and consider any allegedly improper remarks in context. *Burman*, 2013 IL App (2d) 110807, ¶ 25. When a defendant challenges comments made in the State's closing argument, the question is whether the remarks "engender substantial prejudice against [the] defendant such that it is impossible to say whether or not a verdict of guilt resulted from them." *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007). "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." *Wheeler*, 226 Ill. 2d at 123.

¶ 23 Although providing a definition of "reasonable doubt" is not prohibited by the United States Constitution, Illinois courts have "long and consistently held that neither the trial court nor counsel should define reasonable doubt for the jury." *People v. Downs*, 2015 IL 117934, ¶¶ 18-

19. This is because the term is "self-defining and needs no further definition." *Downs*, 2015 IL 117934, ¶ 19. Attempting to define a term that needs no elaboration is a futile endeavor. *People v. Malmenato*, 14 Ill. 2d 52, 61 (1958). Although an ill-advised attempt to define reasonable doubt does not always require reversal (see *Burman*, 2013 IL App (2d) 110807, ¶ 47), improper analogies may be prejudicial to the defendant if they mislead the jury (see *People v. Jenkins*, 89 Ill. App. 3d 395, 398 (1980)).

¶ 24 In defense counsel's opening statement, he asserted that "[t]here is more reasonable doubt than you can fill a shopping cart [*sic*]." Defense counsel returned to this theme in his closing argument: "I told you in my opening statement you will have reasonable doubt, enough to fill a shopping cart and you should, and we do." Among his arguments, defense counsel thereafter (1) mentioned that Avila did not identify defendant as being one of the perpetrators, (2) questioned Dominguez's credibility, and (3) emphasized the lack of DNA evidence linking defendant to the crime scene.

¶ 25 In his rebuttal closing argument, the prosecutor responded as follows to defense counsel's comment that Avila could not identify defendant:

> "[Avila] did not come in here, point the finger at [defendant]. She did not tell you she circled [defendant's] photo in the photo line-up. But she did tell you she circled Lizeth Dominguez in the photo lineup. So you can consider that. It's looking at a suit, a nice suit, brushing off a little stain. That is all that is. That is arguing there is a little stain on the suit. It's not a shopping cart full of reasonable doubt. It's taking a grape out of it and throwing it, if anything."

Furthermore, addressing defense counsel's attempt to discredit Dominguez, the prosecutor argued:

> "[Dominguez] gives details that were not contradicted. That were not [*sic*] shopping carts full of reasonable doubt. [Dominguez] came in here and she went to her aunt Sandra and talked about what her her [*sic*] aunt had her do. That is what the evidence shows."

With respect to the lack of forensic evidence linking defendant to the crime, the prosecutor noted that defense counsel blamed Dominguez for the crime but that Dominguez's DNA was not found at the scene either. The prosecutor continued:

> "DNA is important evidence in some cases. In some case [*sic*] it explains things. In some cases it's just a grape you have to throw out of the shopping cart because you have to look at all the evidence in the totality * * *."

In concluding his rebuttal closing argument, the prosecutor said:

> "Now this awesome responsibility is to you [*sic*]. I ask that you go back, pick your foreman, eat your sandwich, deliberate. You talk about all the evidence. Determine is there a two minor profiles [*sic*], shopping cart full of reasonable doubt or grape [*sic*] can go out. Go back. Deliberate. Find Sandra Lopez guilty of all counts of home invasion, guilty of all counts of armed robbery. Thank you."

Defense counsel did not object to any of these remarks.

¶ 26 Defendant argues that she was denied a fair trial by the prosecutor's attempts "to define the reasonable doubt burden of proof as being a 'shopping cart of reasonable doubt' from which 'grapes' of doubt could be tossed." According to defendant, the prosecutor "improperly defined the State's burden of proof" and "sought to have the jury cast aside serious problems within its own case." The State responds that the prosecutor was not attempting to define reasonable doubt, but instead was expressing "that the State's case contained either sufficient or ample

evidence of guilt and the doubts the defense argued existed were minor." Noting that defense counsel first used the grocery cart analogy, the State contends that the prosecutor's remarks in rebuttal were directed to defense counsel's comments.

¶ 27 Defendant recognizes that she did not preserve this issue for appeal and asks us to review the matter for plain error. "The plain-error doctrine allows a reviewing court to consider an unpreserved error when either: '(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error; or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.' " *Burman*, 2013 IL App (2d) 110807, ¶ 33 (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)). Defendant argues that the errors in this case warrant reversal under either prong. In determining whether the plain-error doctrine applies, we must first ascertain whether any error occurred. *Burman*, 2013 IL App (2d) 110807, ¶ 33. Absent any error, there is no plain error. *People v. Thompson*, 2015 IL App (1st) 122265, ¶ 34.

¶ 28 Reviewing the prosecutor's remarks in context, it is clear that he was not attempting to define reasonable doubt. Instead, he was responding to defense counsel's comments that there was enough doubt to fill a shopping cart. When the prosecutor talked about "stains on a suit" or "grapes in a shopping cart," it was in the context of explaining why specific purported weaknesses in the State's case were trivial matters. Unlike many of the cases cited by the parties, the prosecutor simply was not commenting on the State's burden of proof; nor did his remarks threaten to mislead the jury about the State's burden. Accordingly, we find no error.

¶ 29 Even if we were to accept defendant's premise that the comments were somehow improper, it would not amount to plain error. In *Burman*, we held that a prosecutor's comment that the State's burden was beyond a reasonable doubt—not "beyond all doubt" or "beyond an unreasonable doubt"—was improper, but nevertheless did not constitute plain error. *Burman*, 2013 IL App (2d) 110807, ¶¶ 40, 47. We explained that "[i]f we do not automatically reverse in light of a preserved misstatement, certainly we may not automatically reverse in light of a forfeited one." *Burman*, 2013 IL App (2d) 110807, ¶ 46. To that end, we reasoned that because the jury was properly instructed with I.P.I. Nos. 2.03 and 2.04, "the prosecution's brief, isolated comments about reasonable doubt were unlikely to mislead the jury." *Burman*, 2013 IL App (2d) 110807, ¶ 47. The same reasoning applies here, because, as detailed above, the trial court gave those same instructions to the jury.

¶ 30 (C) Sentencing

¶ 31 Finally, defendant argues that her 19-year sentences of imprisonment were excessive and the result of an abuse of discretion in light of her minor criminal history and the court's improper reliance on a finding in aggravation that her conduct caused harm.

¶ 32 In determining an appropriate sentence, the trial judge must consider many factors, "including the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age." *People v. Perruquet*, 68 Ill. 2d 149, 154 (1977). The trial court is in a better position than a reviewing court to consider such factors, and its decisions with respect to sentencing are accorded great weight and deference. *Perruquet*, 68 Ill. 2d at 154. Accordingly, the trial court has discretion in imposing a sentence (*Perruquet*, 68 Ill. 2d at 154), and there is a strong presumption that the sentence is based on proper legal reasoning (*People v. Morrow*, 2014 IL App (2d) 130718, ¶ 14). A court abuses its discretion only if the sentence is

"manifestly disproportionate to the crime" or "greatly at variance with the spirit and purpose of the law." *People v. Watt*, 2013 IL App (2d) 120183, ¶ 49.

¶ 33 Defendant criticizes the perceived weight that the court placed on her prior criminal record and asks us to exercise our authority under Illinois Supreme Court Rule 615(b) (eff. Jan. 1, 1967) to reduce her sentences. Specifically, although she acknowledges that the court was entitled to consider her prior offenses, she claims that they "were not of such a character that they would seriously aggravate the sentence in this case." However, the trial court did not remotely suggest that defendant's criminal record was a "serious" aggravating factor. Quite the opposite, the court said that the offenses in defendant's background were "not of a serious sort." Additionally, the sentences of 19 years' imprisonment were within the permissible range and well under the statutory maximum. In light of the nature and circumstances of defendant's conduct, we cannot say that the sentences were manifestly disproportionate to the crimes or at variance with the spirit and purpose of the law.

¶ 34 Defendant also argues that the trial court considered an improper factor in sentencing her. Section 5-5-3.2(a) of the Unified Code of Corrections (Code) lists various factors to consider in aggravation when imposing a term of imprisonment, including that "the defendant's conduct caused or threatened serious harm." 730 ILCS 5/5-5-3.2(a)(1) (West 2014). Nevertheless, defendant contends that it was improper for the court to rely on the fact that her conduct caused harm, because that was inherent in one of the charges for which she was being sentenced. Specifically, she notes that count IV of the indictment (home invasion) included an allegation that defendant intentionally caused injury to Vargas by cutting her with a knife. Defendant recognizes that she did not preserve this argument by raising it below, but she proposes that it amounts to plain error under the second prong.

¶ 35 It is inappropriate for a court to consider in aggravation a factor that is inherent in the offense. *People v. Dowding*, 388 Ill. App. 3d 936, 942 (2009). The defendant bears the burden of affirmatively establishing that her sentence was based on improper considerations, and the reviewing court should consider the record as a whole rather than focusing on isolated statements by the trial court. *Dowding*, 388 Ill. App. 3d at 943. Determining whether the trial court relied on improper considerations in imposing the sentence involves a question of law, and our review is *de novo*. *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 8.

¶ 36 When we consider the court's statements in the context of the entire sentencing hearing, it is clear that the court did not commit error. After denying defendant's posttrial motion, the court entertained arguments as to whether defendant's conduct "resulted in great bodily harm to a victim" within the meaning of section 5-4-1(c-1) of the Code (730 ILCS 5/5-4-1(c-1) (West 2014)) so as to require her to serve 85% of the sentence imposed (see 730 ILCS 5/3-6-3(a)(2)(iii) (West 2014)). The court also heard arguments as to whether defendant "inflicted severe bodily injury" so as to merit consecutive sentences. See 730 ILCS 5/5-8-4(d)(1) (West 2014). The court found that defendant's conduct resulted in great bodily harm but that she did not inflict severe bodily injury. In so concluding, the court stated:

> "When I consider the testimony that this jury heard that it was a cut with a knife, that it did result in multiple stitches, that there was significant bleeding, that there was an effect immediately after and until the healing, that the healing itself has resulted even 15 years later in permanent scarring that still has lingering effects to the time that the witness testified on the stand, I am going to find that the injury to Herlinda Vargas was great bodily harm. I decline to make a finding that it was severe bodily harm under the circumstances that were given and the evidence that was presented to this jury."

¶ 37 The court then invited the parties to present evidence in aggravation and mitigation. The State did not present any evidence in aggravation. After the court heard defendant's statement in allocution along with testimony from her family, the parties argued regarding the appropriate sentences. In its argument, the State repeatedly emphasized the terror that defendant had inflicted on Vargas and Avila. With respect to the statutory aggravating factor that "defendant's conduct caused or threatened serious harm" (730 ILCS 5/5-5-3.2(a)(1) (West 2014)), the State suggested: "And certainly the home invasion and armed robbery caused significant physical harm, actually great bodily harm as Your Honor has determined to [Vargas], but also significant psychological harm to these two women that should of [*sic*] felt safe in their home and didn't and don't."

¶ 38 The court then sentenced defendant. In addressing the aggravating and mitigating factors, the court found that the statutory factor that "defendant's conduct caused or threatened serious harm" applied. On this point, the court said: "The Court after I consider all the statutory factors in aggravation, and I do believe that there is a statutory factor in aggravation that I can consider, and that is that there is by what was presented here the defendant's conduct caused harm as well as threatened serious emotional harm as well." The court did not elaborate further on this point.

¶ 39 A court may consider as an aggravating factor that the defendant's conduct caused or threatened serious harm, even where the charged offense by its very nature involves harm to a victim or the threat of harm. However, in doing so, the court must focus on the *gravity* of the defendant's specific conduct rather than on any *result* that is inherent in the offense as charged. This point is illustrated by *People v. Saldivar*, 113 Ill. 2d 256 (1986). In that case, while sentencing the defendant for voluntary manslaughter, the trial court emphasized " 'the terrible

harm that was caused to the victim' " as an aggravating factor, mentioning that "the defendant's conduct caused death and that a human life was taken." *Saldivar*, 113 Ill. 2d at 264. On appeal, the defendant argued that this was an improper consideration, because threat or causation of serious harm was implicit in the offense of which he was convicted. *Saldivar*, 113 Ill. 2d at 265. The court explained:

> "Sound public policy demands that a defendant's sentence be varied in accordance with the particular circumstances of the criminal offense committed. Certain criminal conduct may warrant a harsher penalty than other conduct, even though both are technically punishable under the same statute. Likewise, the commission of any offense, regardless of whether the offense itself deals with harm, can have varying degrees of harm or threatened harm. The legislature clearly and unequivocally intended that this varying quantum of harm may constitute an aggravating factor. While the classification of a crime determines the sentencing range, the severity of the sentence depends upon the *degree of harm* caused to the victim and as such may be considered as an aggravating factor in determining the exact length of a particular sentence, *even in cases where serious bodily harm is arguably implicit in the offense for which a defendant is convicted.*" (Emphasis in original.) *Saldivar*, 113 Ill. 2d at 269.

Accordingly, the court clarified that it would be appropriate to consider "the degree or gravity of the defendant's conduct, *i.e.*, the force employed and the physical manner in which the victim's death was brought about or the nature and circumstances of the offense, including the nature and extent of each element of the offense as committed by the defendant." *Saldivar*, 113 Ill. 2d at 271-72. However, the court determined that the trial court had erred by focusing "primarily on

the end result of the defendant's conduct, *i.e.*, the death of the victim," because that was implicit in the offense of voluntary manslaughter. *Saldivar*, 113 Ill. 2d at 272.

¶ 40 The trial court in the present case did not violate *Saldivar*. When the court stated that "by what was presented here the defendant's conduct caused harm as well as threatened serious emotional harm," it was clearly (1) referencing its earlier finding that defendant's conduct resulted in great bodily harm to Vargas and (2) adding that the manner by which defendant accomplished the armed robbery and home invasion terrorized the victims. The court was *not* merely focusing on a result that was implicit in the offense of home invasion as charged (*i.e.*, the fact that physical harm resulted to Vargas). Instead, the court was appropriately considering the *degree* of harm, both emotional and physical, that resulted from defendant's conduct, in light of the nature and circumstances of the offenses.

¶ 41 The matter is similar to *People v. Garry*, 323 Ill. App. 3d 292 (2001), a case that was not cited by the parties. In that case, the defendant was convicted of home invasion, armed robbery, and armed violence. *Garry*, 323 Ill. App. 3d at 294. He was sentenced to concurrent terms of imprisonment and was ordered to serve 85% of his sentences pursuant to a finding that he had inflicted great bodily harm. *Garry*, 323 Ill. App. 3d at 294. At the sentencing hearing, the trial court considered in aggravation that the defendant's conduct caused or threatened serious harm, reasoning that he was the perpetrator who caused most of the physical harm to the victim. *Garry*, 323 Ill. App. 3d at 302. One of the defendant's arguments on appeal was that, "because (1) great bodily harm is a factor implicit in the offense of armed violence and (2) 'any injury' is a factor implicit in the offense of home invasion, the court improperly considered the infliction of great bodily harm as an aggravating factor in determining defendant's sentences for armed violence and home invasion." *Garry*, 323 Ill. App. 3d at 301. Viewing the comments at the

sentencing hearing in context, the appellate court held that the trial court's remark that defendant had caused most of the physical harm to the victim was "an entirely proper consideration of (1) the nature of the force defendant employed in attacking [the victim] and (2) the degree of harm defendant caused to [the victim]." *Garry*, 323 Ill. App. 3d at 302-03.

¶ 42 As in *Garry*, it was entirely appropriate for the trial court in the present case to consider the degree of harm, both physical and emotional, that resulted from defendant's actions. Accordingly, we reject defendant's argument that the court considered an improper factor in sentencing her. Absent any error, there is no plain error. *Thompson*, 2015 IL App (1st) 122265, ¶ 34.

¶ 43 III. CONCLUSION

¶ 44 For the reasons stated, we affirm the judgment of the circuit court of Lake County. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 45 Affirmed.