2018 IL App (4th) 140058-UB

NO. 4-14-0058

FILED
July 23, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
ANTON M. CLARK,	)	No. 13CF1233
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

PRESIDING JUSTICE HARRIS delivered the judgment of the court.
Justices Holder White and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court committed no error when questioning the jury venire in connection with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012).

(2) Defendant's claim that his counsel was ineffective for failing to impeach two of the State's witnesses with their prior convictions is without merit.

(3) Defendant suffered no prejudice as a result of comments made by the prosecutor during closing argument and he was not denied a fair trial.

(4) The trial court committed no error and relied on only appropriate factors when imposing defendant's sentencing.

¶ 2 A jury found defendant, Anton M. Clark, guilty of being an armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2012)) and the trial court sentenced him to 30 years in prison. Defendant appealed his conviction and sentence, arguing (1) the court violated Illinois Supreme Court Rule 431(b) (eff. July 1, 2012) when questioning the jury venire, (2) defense counsel was

ineffective for failing to impeach two of the State's eyewitnesses with their prior convictions, (3) he was denied a fair trial where the State repeatedly misstated the evidence during its closing argument, and (4) his 30-year prison sentence was excessive.

¶ 3 In February 2016, this court affirmed defendant's conviction and sentence on direct appeal. However, we declined to address defendant's ineffective-assistance claim—based on his counsel's failure to impeach two of the State's eyewitnesses with their prior convictions—finding the claim was more appropriate for postconviction proceedings, where a complete record could be made. Defendant filed a petition for leave to appeal to the Illinois Supreme Court. In September 2017, the supreme court denied defendant's petition; however, in the exercise of its supervisory authority, it directed this court to vacate its judgment and, in light of *People v. Veach,* 2017 IL 120649, 89 N.E. 3d 366, consider whether defendant's ineffective-assistance-of-counsel claim could properly be addressed on direct appeal. *People v. Clark*, No. 120563, 89 N.E.3d 758 (Ill. Sept. 27, 2017) (nonprecedential supervisory order on denial of petition for leave to appeal). Accordingly, we vacated our original judgment, and we again affirm the trial court's judgment.

¶ 4 I. BACKGROUND

¶ 5 On July 30, 2013, the State charged defendant with being an armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2012)) (count I), alleging he knowingly possessed a handgun after having previously been convicted of aggravated battery, a Class 3 felony, and unlawful possession with intent to deliver a controlled substance, a Class 1 felony. It also charged him with aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2012)) (count II), alleging he knowingly discharged a firearm in the direction of Jordan Brooks.

¶ 6 On December 4 and 5, 2013, defendant's jury trial was conducted. Immediately prior to trial the State moved to bar the impeachment of two of its witnesses, Cora Davis and Tina Gordon, with each witness's prior conviction for unlawful delivery of a controlled substance. Defendant's counsel expressed his desire to impeach Davis and Gordon with those convictions if they were called to testify and the trial court denied the State's request.

¶ 7 The matter next proceeded to jury selection. During *voir dire,* the trial court questioned potential jurors in panels of four regarding the basic principles of law applicable to criminal prosecutions. Substantially the same colloquy occurred between the court and all potential jurors:

> "THE COURT: All right. *** [T]he four of you understand that the Defendant is presumed to be innocent of the charges against him. That before the Defendant can be convicted, the State must prove him guilty beyond a reasonable doubt. That the Defendant is not required to offer any evidence on his own behalf. And if the Defendant does not testify, it cannot be held against him in any way. The four of you understand those instructions. Is that correct?
>
> FOUR JURORS: (Indicating in the affirmative).
>
> THE COURT: And they answer in the affirmative. And the four of you will follow those instructions. Is that correct?
>
> FOUR JURORS: (Indicating in the affirmative).
>
> THE COURT: And again, they answer in the affirmative."

¶ 8 At trial, the State presented evidence regarding a shooting that occurred on July 28, 2013, near 1210 Carver Drive in Champaign, Illinois. Cora Davis testified she resided at that address. She stated she had known defendant since 2008 and knew him "pretty good because he used to come over to the house and stuff." Davis testified defendant's mother lived across the street at 1213 Carver Drive and, at times, defendant also resided there. She denied having any problems with either defendant or his mother prior to July 28, 2013.

¶ 9 On the date at issue, Davis was outside her home putting gas in a weed eater. Also present were Davis's daughter, Tina Gordon, and Gordon's three daughters, Shyteisha Hedrick, Shyteira Hedrick, and Shykeira Hedrick. Davis testified that she and Shyteisha were "getting the weed eater together" near a recreational vehicle (RV) on her property while the other people present were "around in the front part of the house." While outside, Davis observed defendant "on the sidewalk directly in front of [her] yard." She heard defendant say " 'bitch ass nigger, you think this is a game' " while reaching into his back pocket. Davis testified she screamed "no" and then slipped and fell. She stated she screamed because she saw defendant "coming up out of his back pocket with a gun." She also observed defendant shoot the gun, which she described as a black revolver.

¶ 10 Davis testified that "right around the area with" defendant were Shyteisha, Shyteira, Shykeira, Gordon, Jordon Brooks, Brooks's sister Holly, and a man called "Boots." She noticed that Brooks was backing away from defendant toward her front door and then "trying to get in [her] door" to get away from defendant. Davis stated that by the time Brooks got the door open, "everything was going crazy." When asked how close her family members were to the incident, she testified that two of her granddaughters were standing "to the side of" defendant

and Shyteira "was coming out of the house at the time that [Brooks] was backing into the house." Davis testified Brooks pushed Shyteira down to the floor and covered her. She further stated that, during the shooting, she tried to find her four-year-old grandson, who was also present, but "slipped and fell trying to locate him."

¶ 11 Davis testified defendant was shooting at Brooks. The other people in the area were "scattering and screaming." She stated Brooks backed into her house and she "finally got up off the ground and ran towards the door and told [Brooks] to get up out of [her] house." Davis testified Brooks went out her front door. Further, she testified she observed defendant jump in a black car with tinted windows and leave the scene.

¶ 12 On cross-examination, Davis denied seeing Brooks with a gun or seeing him shoot across the street. However, she acknowledged telling police that she heard shots fired that sounded like they were coming from two different guns. Davis stated two different people were shooting at her house. One of the people shooting was defendant. She could only describe the other shooter as a young black man whom she had never seen before. Davis further stated that a man on her side of the street was shooting back. That person was standing in her door and shooting at the same time as defendant. Davis testified she did not know who the third shooter was because she never saw his face.

¶ 13 Gordon testified that, on July 28, 2013, she and her three daughters visited Davis at 1210 Carver Drive. Also present were Gordon's brother, Allen; Brooks; Holly; and two other people who accompanied Brooks. Gordon stated Davis was doing yard work and located next to a "trailer that was parked in her driveway" while everyone else was "mingling and talking." She observed Brooks talking with Allen. Approximately five minutes after Brooks arrived at Davis's

home, Gordon observed defendant cross the street and begin a discussion with Brooks. Gordon stated that when defendant and Brooks were interacting, defendant was located on the sidewalk in front of Davis's house. She testified everyone else was "lined up" on "a sidewalk that walks to the [front] door" of Davis's home because they wanted to see and hear what was happening between defendant and Brooks.

¶ 14 Gordon testified she heard defendant say " 'so what you think, I'm playing' " and observed him reach behind his back and retrieve a small black handgun. Defendant then started shooting at Brooks. Gordon testified she told one of her daughters to run and observed Brooks lying on top of Shyteira, who had been positioned "right in front of the center part of the door" of Davis's home. Gordon hid in the RV. She denied seeing anyone return fire but stated she heard "lots of shots." Ultimately, Gordon saw Brooks run "behind the house area" and saw defendant go "[b]ack towards his house." She denied having any previous problems or confrontations with defendant.

¶ 15 On cross-examination, Gordon testified she saw Brooks and two males who were with him run behind Davis's home. Further, she acknowledged that shortly after the incident occurred she told a police officer that she saw defendant leave the area in a black vehicle with tinted windows. Gordon also testified that defendant had been with only one other person, whom she believed was defendant's cousin. She stated she did not see anyone besides defendant firing a gun at Davis's house. Although Gordon was aware that there was return fire, she did not see who was shooting.

¶ 16 Shykeira testified she was 19 years old. On July 28, 2013, she was in the front yard of 1210 Carver Drive with her grandmother, mother, sisters, uncle, and Brooks. Shykeira

saw defendant walk across the street from 1213 Carver Drive. She testified he looked at Brooks and said " 'what you think this a game, you think I won't shoot you.' " Shykeira observed that defendant had his hand behind his back and she saw him pull out a gun and start shooting at Brooks. She testified defendant was on the sidewalk in front of Davis's house and shot toward the door of the house. Shykeira stated she had been positioned "kind of away from the door, like, by the side of the house." She testified her sister Shyteira was positioned "right in the front of the screen door." Shykeira stated that when the shooting started she ran down the street. She did not see what Brooks was doing. Shykeira testified she heard two guns firing but did not see who besides defendant was shooting. Further, she denied having any previous problems with defendant. On cross-examination, Shykeira testified she was not sure where the gunfire from the second gun originated.

¶ 17 Shyteisha testified she was 16 years old and was present at Davis's home on July 28, 2013, with her sisters, Davis, and Gordon. Brooks was also present. Shyteisha stated she saw defendant cross the street from 1213 Carver Drive to the sidewalk in front of Davis's home. Initially, Shyteisha testified she was standing next to Davis "by the camper." She also testified that when she observed defendant she was located in front of Davis's house and Gordon and Davis were in the same general area. Shyteisha testified her sister Shyteira was in Davis's house.

¶ 18 Shyteisha recalled hearing defendant confront Brooks. She did not remember what defendant said but knew "it was mean." Shyteisha also observed defendant "pull[] out his gun" and begin shooting at Brooks who "was in front of the door." When the shooting began, Shyteisha heard Gordon tell her to get out of the way and Shyteisha ran "back by the camper." She did not see what anyone else was doing. However, Shyteisha testified she did see Brooks

shooting a gun. She stated Brooks "went in the house, [and] came right back out and started to shoot *** back [at defendant]." After the shooting, she saw her sister Shyteira with glass in her hair and stated Shyteira had been by the door near where a window had shattered. Shyteisha did not see where either defendant or Brooks went.

¶ 19 On cross-examination, Shyteisha testified Brooks's sister, Holly, was also present at Davis's home. Further, she observed two or three people outside the home across the street. Shyteisha reiterated that she saw both defendant and Brooks shooting at each other. She denied seeing anyone else shooting. Additionally, she recalled that after everything had happened Brooks "hopped on someone's motorcycle and left." She did not see what Brooks did with his gun.

¶ 20 Ben Newell testified he was a police officer for the City of Champaign. On July 28, 2013, he was called to document, collect, and process evidence at 1210 Carver Drive. Newell stated he took photographs and recovered fired bullets from the front area of the residence. He also placed trajectory rods in bullet holes found in Davis's home to help determine the direction the bullets came from and the path they travelled. Newell observed as follows: "If I was looking at these trajectory rods in place, the rods would be pointing back in the direct[ion] of 1210—I'm sorry—1213 Carver, just standing at 1210 Carver." He agreed that direction of the bullets as shown by the trajectory rods was "consistent with an individual standing on the sidewalk area in front of 1210 Carver and firing towards the house" and "consistent with the person firing there having approached from the same path that would take them directly toward the house from the 1213 address."

¶ 21 On cross-examination, Newell testified he found one 9-millimeter bullet casing at

the scene. He also found three projectiles but did not identify their brand or caliber, which he testified was done at the Illinois State Police crime lab. Newell stated he further found a Hi-Point, 9-millimeter, semiautomatic handgun in the backyard of 1210 Carver Drive underneath a piece of plywood.

¶ 22 Timothy Atteberry testified he was a patrolman for the City of Champaign police department. On July 28, 2013, he was the first police officer on the scene following the incident at issue on Carver Drive. When he arrived, Atteberry observed vehicles moving slowly on the street and several people "milling about" in front of 1210 Carver Drive. People at that address directed him to 1213 Carver Drive and he participated "in clearing the residence at 1213 Carver." As Atteberry approached 1213 Carver Drive, two individuals exited the residence and he directed them to other officers. He stated police officers learned another person was still inside the residence, Adriene Dillon. Ultimately, police officers made telephone contact with Dillon and he agreed to voluntarily exit the residence.

¶ 23 Atteberry testified he collected statements from witnesses and participated in securing the scene and checking for physical evidence. He stated he worked with Davis to find bullet holes in her residence. Atteberry further testified that he believed Brooks was also arrested in connection with the incident at issue.

¶ 24 On cross-examination, Atteberry testified he spoke briefly with Dillon. Dillon reported that the residence at 1213 Carver Drive belonged to his aunt and he was the last adult present in the home. Atteberry also testified he spoke with Gordon who related that Brooks "shot back" at defendant and then Brooks and two males who were with him ran behind 1210 Carver Drive.

¶ 25 Following the presentation of the State's witnesses a stipulation of the parties was read to the jury and entered into evidence. The stipulation provided that, on July 28, 2013, defendant "was a convicted felon, having been previously convicted of a combination of two of the felonies set forth in" the armed habitual criminal statute.

¶ 26 At trial, defendant presented Dillon's testimony. Dillon stated he was defendant's cousin and, on July 28, 2013, he was present at 1213 Carver Drive. Dillon testified he was outside talking with defendant and an individual named Andrew, whose last name Dillon did not know. He stated he could not see 1210 Carver Drive from his location because there was a truck in front of the house blocking his view. Dillon testified he had been at 1213 Carver Drive approximately 20 to 30 minutes when a shooting incident occurred. He heard several shots and took cover. Dillon denied any knowledge of where the bullets were coming from or going to.

¶ 27 Dillon testified defendant was "a couple feet apart from" him and was also taking cover. He denied that defendant had a gun in his hand or that he ever saw defendant take out a gun and shoot it. After the shooting, Dillon went inside the residence at 1213 Carver Drive to check on children that were inside the home. He stayed inside the residence and saw the police arrive at the scene. Ultimately, Dillon talked with his cousin Carolyn on the telephone and asked her to inform the police that he was not armed and not to shoot him. After speaking with Carolyn, Dillon exited the residence and was arrested on a city warrant. He denied that police officers ever spoke with him about the shooting incident.

¶ 28 On cross-examination, Dillon testified he was not aware that the police had been "trying to find [him] for some time." Further, he reiterated that he did not see who was shooting and did not try to look to find out who it was. Dillon testified a truck, which he described as a

blue Expedition, was blocking his view and he took cover "on the side of the truck." He stated multiple guns were being fired, which he knew based on hearing multiple gunshots; however, he denied that any of the gunshots were "coming from the side [he] was on." According to Dillon, Andrew "took cover on the side of the house." He further denied that defendant ever crossed the street toward Davis's home.

¶ 29 Andrew Bell testified he was 19 years old and on probation for a burglary that occurred in 2012. He stated he was a friend of defendant's family and had known defendant for a few years. On July 28, 2013, he was at 1213 Carver Drive talking with defendant and Dillon when a shooting occurred. Bell denied being able to see where the shooting was coming from and did not know how many shots were fired. When the shooting started, he ran to "the side of somebody's house." Bell denied seeing defendant with a gun in his possession or shooting a gun. Once the shooting started, defendant also ran but Bell did not see where defendant went.

¶ 30 On cross-examination, Bell testified he had known Dillon for approximately five years. He described them as "pretty close" and testified they would "hang out" together about once every other week. Bell testified Dillon knew who he was, as well as his last name. He further stated he could see the front of the house at 1210 Carver Drive and nothing was obstructing his view. Bell denied seeing anything "going on" or anyone "hanging out" in front of that residence. He noted that his blue Expedition was parked in front of 1213 Carver Drive but he could still see across the street to 1210 Carver Drive. Defendant and Dillon were both standing next to him.

¶ 31 Bell denied hearing any raised voices, argument, or bad words coming from 1210 Carver Drive prior to the shooting. He stated he heard nothing that drew his attention to the resi-

dence. He agreed he heard gunshots but testified that he did not look to see where they were coming from. Bell stated that everyone ran off separately and he did not see where defendant or Dillon ran. He also denied seeing defendant cross the street toward Davis's home.

¶ 32 Beverly Clark testified she resided at 1213 Carver Drive and was defendant's mother. On July 28, 2013, she was away from her home at work when the shooting incident at issue occurred. Clark received a telephone call at work and returned home. She observed damage to her home in the form of four or five bullet holes. Clark testified her home was across the street from 1210 Carver Drive. She stated she knew the people who lived there and they were "always fighting." Clark stated they also had "[a] lot of company in and out," which she did not like. However, she denied ever fighting with the residents of 1210 Carver Drive.

¶ 33 Defendant testified on his own behalf. He stated he was 23 years old and, when not in custody, resided with his mother at 1213 Carver Drive. On July 28, 2013, defendant was at home with Dillon and Bell. The three were standing and talking by Bell's truck when defendant observed a car and a motorcycle pull up to 1210 Carver Drive. He stated he recognized Brooks as one of the individuals from the car or motorcycle. After the vehicles arrived, defendant heard shots being fired. He testified the shooter was a man who had come walking up from his side of the street but he did not know who the man was. Defendant stated the man went by him and had been "like next door to [his] mom[']s house." He did not know where the man went. Defendant further testified that he "s[aw] bullets" and that there were two shooters because he saw someone from 1210 Carver Drive shooting back. He denied knowing either shooter, seeing any guns, having a gun, or that he did any shooting.

¶ 34 Defendant testified that when the shooting started, he and Dillon "took cover" by

Bell's truck. After the shooting, defendant ran off, stating he "jumped the fence, and *** was gone."

¶ 35 On cross-examination, defendant testified he knew Brooks. Although they were "[n]ot necessarily" friends, he stated he had nothing against him. Defendant also stated he did "not really" have anything against the people associated with 1210 Carver Drive but noted they had been "starting stuff *** with [his] people[] on [F]acebook." Defendant also testified that, although two people were shooting, he did not see the person who was shooting from the direction of 1210 Carver Drive.

¶ 36 On re-direct examination, defendant testified he saw two people shooting before he ducked down. On re-cross-examination, he again acknowledged seeing two shooters but stated he did not know who they were. Following defendant's testimony and at the State's request, the trial court informed the jury that defendant had previously been convicted of the offense of possession of a controlled substance with intent to deliver.

¶ 37 Following defendant's presentation of evidence, the parties presented closing arguments to the jury. Defendant raised no objections during the State's closing.

¶ 38 During jury deliberations, the jury sent a note stating it could not come to a unanimous decision regarding the armed habitual criminal charge and asking how to proceed. Upon agreement of the parties, the trial court gave a *Prim* instruction (*People v. Prim*, 53 Ill. 2d 62, 289 N.E.2d 601 (1972)) to the jury. Later, the jury sent a second note, stating jurors had reached a decision with respect to the armed habitual criminal charge but could not reach a decision as to the charge of aggravated discharge of a firearm. Ultimately, the jury found defendant guilty of being an armed habitual criminal and the court declared a mistrial as to the charge of aggravated

discharge of a firearm.

¶ 39 In December 2013, and January 2014, defendant filed motions for a new trial, raising claims not relevant to this appeal. On January 15, 2014, the trial court denied defendant's request for a new trial and immediately proceeded with sentencing.

¶ 40 Initially, the trial court noted it received and considered a presentence investigation report filed on January 10, 2014. The report showed defendant had a criminal history that included a juvenile conviction for aggravated battery in 2007; adult felony convictions for aggravated battery with great bodily harm in 2010 for shooting another individual, and unlawful possession with intent to deliver a controlled substance in 2012; and adult convictions for traffic-related offenses, including driving without a license, failure to reduce speed to avoid an accident, and fleeing or attempting to elude an officer. In connection with his adult conviction for aggravated battery, defendant had been sentenced to three years in prison.

¶ 41 The presentence investigation report identified defendant as being 23 years old and having community support that included his parents, girlfriend, two siblings, and several extended family members. Defendant reported he had been in a relationship with his girlfriend, Holly Brooks, for the previous six years. He and Holly had two daughters together; however, one daughter, who was born in November 2012, died approximately one month after her birth from sudden infant death syndrome.

¶ 42 The report further showed defendant completed high school through the tenth grade. He later made two attempts to obtain his general equivalency degree (GED) but was unsuccessful as he failed to complete the necessary classes on either occasion. The report stated defendant had been employed by Domino's for two months in 2006 or 2007, but had no "other

verifiable employment in his lifetime." Defendant was described as having no income due to his incarceration. Prior to being taken into custody, he received $200 a month in social assistance for food. His parents otherwise paid all of his living and monthly expenses. Defendant reported having "excellent" physical and mental health. Further, he acknowledged that, when not incarcerated, he had consumed alcohol on a daily basis since the age of 17 and used cannabis on a daily basis since the age of 15.

¶ 43 At sentencing, neither party presented any further evidence. However, defendant elected to make a statement in allocution. He noted the births of his children and recent deaths in his family and asserted as follows: "You know, it's just been hard for me. And since I've been in the county, I just been, you know, staying away from people and trying to change my life."

¶ 44 The trial court sentenced defendant to the statutory maximum of 30 years in prison. In reaching its sentencing decision, the trial court stated it considered defendant's comments, the evidence presented at trial, and statutory factors in aggravation and mitigation. The court noted defendant's age was a nonstatutory mitigating factor. It noted factors in aggravation included defendant having a prior criminal history and "the deterrent factor."

¶ 45 The trial court determined "the deterrent factor ha[d] to come across loudly and clearly," stating it needed to fashion a sentence that would "not only deter this defendant, but this defendant and the Jordan Brooks of the world and other young men from arming themselves and engaging in gunfights." The court acknowledged it also had to look at defendant's rehabilitative potential, which involved "basically the history, the character, [and] the condition of defendant." It noted defendant was 23 years of age, had no education, had been employed for only two months "[i]n his 23 years," smoked marijuana on a daily basis, brought "children into this world

*** with absolutely no way to support" them, and had "been convicted of aggravated battery in that he shot someone a couple of years ago." Ultimately, the court reiterated that deterrence was an important factor that "must come across loudly and clearly." It found that based on "everything that's been presented" and given defendant's criminal history a sentence of 30 years in prison was the appropriate sentence.

¶ 46 This appeal followed.

¶ 47 II. ANALYSIS

¶ 48 A. Rule 431(b) Questioning

¶ 49 On appeal, we first address defendant's contention that the trial court erred when questioning potential jurors during *voir dire*. Specifically, he maintains the court violated Illinois Supreme Court Rule 431(b) (eff. July 1, 2012) by collapsing the four principles set forth in the rule and failing to ask potential jurors about each principle individually. Defendant acknowledges this issue was not properly preserved for review because he failed to object to the court's questioning, but maintains we may reach the merits of his claim pursuant to the plain-error doctrine.

¶ 50 Generally, a defendant forfeits an issue on appeal where he failed to object to the alleged error or include the issue within a posttrial motion. *People v. Belknap*, 2014 IL 117094, ¶ 47, 23 N.E.3d 325. However, forfeited errors may be reviewed under the plain-error doctrine "where a clear and obvious error occurred" and (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, regardless of the closeness of the evidence."

Id. ¶ 48. "The first step of plain-error review is to determine whether error occurred" and "[t]he burden of persuasion rests with the defendant." *People v. Curry*, 2013 IL App (4th) 120724, ¶ 62, 990 N.E.2d 1269.

¶ 51 Rule 431(b) (eff. July 1, 2012) provides as follows:

> "The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that if a defendant does not testify it cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's decision not to testify when the defendant objects.
>
> The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section."

Whether the trial court complied with the requirements of Rule 431(b) is subject to a *de novo* standard of review. *People v. Wrencher*, 2011 IL App (4th) 080619, ¶ 37, 959 N.E.2d 693.

¶ 52 Here, defendant relies on *People v. Thompson*, 238 Ill. 2d 598, 939 N.E.2d 403 (2010), to support his position that the trial court was required to pose questions to address each Rule 431(b) principle individually. In that case, the supreme court found the trial court failed to

comply with Rule 431(b) in several respects, noting it entirely failed to address one of the four Rule 431(b) principles and did not ask prospective jurors whether they both understood and accepted another principle. *Id.* at 607. It pointed out that Rule 431(b) requires that courts "address each of the enumerated principles" and determine "whether the potential jurors both understand and accept each of the enumerated principles." *Id.*

¶ 53 In so holding, the supreme court pointed out that the committee comments to Rule 431(b) "emphasize that trial courts may not simply give 'a broad statement of the applicable law followed by a general question concerning the juror's willingness to follow the law.' " *Id.* (quoting Ill. S. Ct. R. 431(b) (eff. July 1, 2012), Committee Comments). The court further held, as follows:

> "Rule 431(b) *** mandates a specific question and response process. The trial court must ask each potential juror whether he or she understands and accepts each of the principles in the rule. The questioning may be performed either individually or in a group, but the rule requires an opportunity for a response from each prospective juror on their understanding and acceptance of those principles." *Id.*

¶ 54 We disagree with both defendant's interpretation of *Thompson* and his position on appeal, and find no error occurred. Specifically, we find nothing in *Thompson* that suggests Rule 431(b) requires a trial court address each Rule 431(b) principle individually when questioning prospective jurors. Rather, in *Thompson*, the supreme court was concerned with the trial court's failure to address one principle in its entirety and to determine each juror's acceptance of another

principle—circumstances that are readily distinguishable from those presented in this case.

¶ 55 Moreover, in *Thompson*, the court noted the language of Rule 431(b) was "clear and unambiguous." *Id.* We find nothing in the plain language of Rule 431(b) which supports defendant's position. Rule 431(b) requires that the trial court ask potential jurors—either individually or as a group—whether each juror understands and accepts the four principles set forth therein and that jurors have the "opportunity to respond to specific questions concerning the principles." Ill. S. Ct. R. 431(b) (eff. July 1, 2012). The rule sets forth no precise method of inquiry in which a court must engage and certainly contains no requirement that a court must separately recite each principle when determining a prospective juror's understanding and acceptance of the principles.

¶ 56 In the present case, the trial court's method of inquiry was compliant with Rule 431(b). The record shows the trial court questioned potential jurors in panels of four. With respect to each panel, the court recited the four Rule 431(b) principles and asked if the four prospective jurors "understood those instructions." Each juror affirmatively indicated his or her understanding. The court then asked each panel of four if they would follow the four principles. Again, each prospective juror answered affirmatively. Consistent with both Rule 431(b) and *Thompson*, the trial court engaged in a "specific question and response process." The court clearly addressed each Rule 431(b) principle and gave the prospective jurors an opportunity to respond to specific (and separate) questions about whether they understood and accepted those principles.

¶ 57 We note defendant also cites two First District cases—*People v. McCovins*, 2011 IL App (1st) 081805, 957 N.E.2d 1194, and *People v. Johnson*, 408 Ill. App. 3d 157, 945 N.E.2d

610 (2010)—to support his position on appeal. However, those cases do not warrant a finding that a "clear and obvious error" occurred in the present case.

¶ 58 First, to the extent the cases cited by defendant interpret *Thompson* as requiring that a trial court recite and question jurors about each Rule 431(b) principle individually, for the reasons discussed, we disagree. Second, we also find the circumstances in those cases are clearly distinguishable from what occurred in the case at bar. See *McCovins*, 2011 IL App (1st) 081805, ¶ 36 (finding "the trial court failed to abide by the mandatory question and response process required by Rule 431(b)" and, instead, "merely provided the prospective jurors with a broad statement of legal principles interspersed with commentary on courtroom procedure and the trial schedule, and then concluded with a general question about the potential jurors' willingness to follow the law"); *Johnson*, 408 Ill. App. 3d at 171 (finding error where the trial court "failed to ascertain whether the potential jurors understood and accepted each of the four [Rule 431(b)] principles" and "entirely omitted the fourth principle"). Third, we note that, more recently, a separate division of the First District has interpreted Rule 431(b) consistently with our holding in this case. See *People v. Smith*, 2012 IL App (1st) 102354, ¶ 105, 978 N.E.2d 324 (rejecting a defendant's argument that the trial court improperly collapsed three Rule 431(b) principles into a single question and noting that, while "it may be appropriate to question the venire about each *** principle in a piece-meal fashion, *** separate questions are not mandated").

¶ 59 Here, the trial court committed no error by failing to pose separate questions addressing each Rule 431(b) principle. Further analysis under the plain error doctrine is unwarranted.

¶ 60 B. Defense Counsel's Failure To Impeach State Witnesses

¶ 61 On appeal, defendant also argues his defense counsel was ineffective for failing to impeach two of the State's eyewitnesses, Davis and Gordon, with their prior convictions for delivery of a controlled substance. He argues that impeachment would have damaged the credibility of those witnesses and "level[ed] the playing field" with the defense witnesses, whom the State did impeach with prior convictions or arrests. Defendant also maintains he was prejudiced by his counsel's inaction. As stated, when initially considering this issue, we determined defendant's ineffective-assistance claim was more appropriate for postconviction proceedings and declined to address the merits on direct appeal. After reconsidering the claim in light of *Veach*, we find the record in this case is sufficient to permit review.

¶ 62 An ineffective-assistance-of-counsel claim is analyzed under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), which requires that a defendant demonstrate (1) "that counsel's performance fell below an objective standard of reasonableness," and (2) "a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v. Henderson*, 2013 IL 114040, ¶ 11, 989 N.E.2d 192. The failure to establish either *Strickland* prong precludes a finding of ineffective assistance of counsel. *Id.*

¶ 63 "To establish deficient performance, the defendant must overcome the strong presumption that counsel's action or inaction was the result of sound trial strategy." *People v. Ramsey*, 239 Ill. 2d 342, 433, 942 N.E.2d 1168, 1218 (2010). "To overcome this strong presumption, defendant must demonstrate trial counsel's decision was so unreasonable and irrational that no reasonably effective defense attorney faced with similar circumstances would pursue that strategy." *People v. Shelton*, 401 Ill. App. 3d 564, 583-84, 929 N.E.2d 144, 163 (2010). "The decision

whether to impeach a witness is generally considered a matter of trial strategy, and failure to do so is therefore not objectively unreasonable." *People v. Campbell*, 332 Ill. App. 3d 721, 730, 773 N.E.2d 776, 783 (2002); see also *People v. Pecoraro*, 175 Ill. 2d 294, 326, 677 N.E.2d 875, 891 (1997) ("Generally, the decision whether or not to cross-examine or impeach a witness is a matter of trial strategy which will not support a claim of ineffective assistance of counsel."). Additionally, "[t]hat another strategy may have been better, or that another lawyer would have *** handled the case differently, is not proof [the] defendant's trial counsel was incompetent." *Campbell*, 332 Ill. App. 3d at 731.

¶ 64 Here, defendant correctly points out that, during pretrial proceedings, his counsel expressed a desire to impeach Davis and Gordon with their prior drug-related convictions. In fact, defense counsel was effective in persuading the trial court to deny a request by the State to bar such impeachment. Although there is no explicit explanation in the record for defense counsel's ultimate failure to impeach Davis and Gordon, as argued by the State, the record does suggest that defense counsel employed a strategy of arguing that a witness's prior convictions did not make the witness unbelievable. If counsel had elected to impeach Davis and Gordon, he might have undercut his own argument that defendant's prior conviction did not render him incredible. Additionally, we note that defendant concedes on remand that his "counsel did attack [Davis's] and [Gordon's] credibility on cross-examination, pointing out prior inconsistent statements to the police."

¶ 65 Given these circumstances, we find defendant has not overcome the strong presumption that his counsel's inaction was the result of sound trial strategy. In other words, the record fails to reflect defense counsel's performance was "so unreasonable and irrational that no

reasonably effective defense attorney faced with similar circumstances would pursue that strategy." *Shelton*, 401 Ill. App. 3d at 583-84.

¶ 66 Moreover, even assuming that defense counsel's performance was deficient, we find no prejudice. In particular, Davis and Gordon were just two of the four eyewitnesses who testified as part of the State's case. The State also presented the testimony of Shykeira and Shyteisha, neither of whom was impeached with a prior conviction. Both Shykeira and Shyteisha testified to observing a confrontation between defendant and Brooks in front of Davis's home, as well as defendant in possession of a gun. Contrary to defendant's assertions on appeal, testimony from each of the State's eyewitnesses was largely consistent—both with the other eyewitness accounts and trajectory evidence presented by the State. Conversely, testimony from defendant and his witnesses contained inconsistencies regarding what they observed at the time of the incident, or had the ability to observe from their vantage point at 1213 Carver Drive. Accordingly, we find no reasonable probability exists that, but for counsel's failure to impeach Davis and Gordon with their prior convictions, the result of the proceeding would have been different.

¶ 67 C. The State's Closing Argument

¶ 68 Defendant next argues the prosecutor repeatedly misstated the evidence during his closing argument and, as a result he was denied a fair trial. He acknowledges he failed to properly preserve this issue for appellate review by failing to object at trial or raise the issue in a posttrial motion but maintains his forfeiture may be excused under the plain-error doctrine. Alternatively, defendant contends his trial counsel was ineffective for failing to object to the prosecutor's comments.

¶ 69 "Prosecutors are afforded wide latitude in closing argument and may comment on

the evidence and any fair, reasonable inferences it yields." *People v. Curry*, 2013 IL App (4th) 120724, ¶ 73, 990 N.E.2d 1269. They "may not argue assumptions or facts not contained in the record." *People v. Glasper*, 234 Ill. 2d 173, 204, 917 N.E.2d 401, 419-20 (2009). "When determining the propriety of a prosecutor's closing argument, a reviewing court must evaluate the comments in the context in which they were made." *People v. Ramsey*, 239 Ill. 2d 342, 441, 942 N.E.2d 1168, 1222 (2010). "A reviewing court will find reversible error based upon improper comments during closing arguments only 'if a defendant can identify remarks of the prosecutor that were both improper and so prejudicial that "real justice [was] denied or that the verdict of the jury may have resulted from the error." ' [Citations.]" *People v. Evans*, 209 Ill. 2d 194, 225, 808 N.E.2d 939, 956 (2004). "Whether statements made by a prosecutor at closing argument were so egregious that they warrant a new trial is a legal issue this court reviews *de novo*." *People v. Wheeler*, 226 Ill. 2d 92, 121, 871 N.E.2d 728, 744 (2007).

¶ 70 As stated, defendant argues the prosecutor misstated evidence in several respects during his closing argument. On appeal, the State disputes many of defendant's alleged misstatements by the prosecutor. Although it also concedes that certain remarks by the prosecutor constituted misstatements of the evidence, it maintains defendant was not substantially prejudiced and no reversible error occurred. We agree with the State.

¶ 71 Initially, defendant argues the prosecutor stated facts that were not in evidence in an attempt to create consistency in the testimony of the State's witnesses and bolster their testimony. He first complains about comments by the prosecutor that the State's witnesses testified consistently regarding their own positions and the positions of other individuals during the shooting incident. Defendant argues the State's witnesses were "largely inconsistent" with respect to

such testimony. We disagree and find the witnesses' testimony was largely *consistent* and the prosecutor's comments represented a fair argument based on the evidence presented. In particular, each of the State's four eyewitnesses—Davis, Gordon, Shyteisha, and Shykeira—placed herself and the other eyewitnesses at or near the front of Davis's home and in view of an incident occurring between defendant and Brooks. All four eyewitnesses also placed defendant on the sidewalk in front of the residence and Shyteira (who did not testify) at or near the front door to Davis's home. Davis, Gordon, and Shyteisha also placed Brooks near the front door of Davis's home at some point during the incident (Shykeira testified she did not see where Brooks was during the shooting). Additionally, both Davis and Gordon placed the other individuals present as generally being in front of Davis's home.

¶ 72 Thus, the prosecutor did not significantly misstate the evidence when arguing that the State's witnesses testified consistently with one another. Any inconsistencies in their testimony were minor and a reflection that the incident in question was not a static event but one which involved several people and, ultimately, chaotic circumstances.

¶ 73 Second, defendant complains about comments by the prosecutor indicating that Brooks testified at trial and placed himself by Davis's front door. The record shows Brooks did not testify at defendant's trial. However, we find the prosecutor's misstatement was brief, isolated, and caused no prejudice to defendant.

¶ 74 Third, defendant argues the prosecutor improperly attempted to create consistency in the eyewitness testimony by stating all of the State's eyewitnesses reported seeing defendant "reach behind his back and pull out a gun." Davis, Gordon, and Shykeira each testified they observed defendant retrieve a gun from behind his back. Although Shyteisha did not specify from

where defendant retrieved his gun, she also testified that she saw him "pull[] out his gun." Thus, Shyteisha testified consistently with the other eyewitnesses that defendant had a gun in his possession. We agree with the State's argument on appeal that the prosecutor's emphasis during closing "was on the four witnesses' consistency that defendant was the one who pulled out a gun and started shooting." Any misstatement by the prosecutor in attributing a location from where defendant pulled his gun to Shyteisha was minor and not prejudicial to defendant.

¶ 75 Defendant also argues on appeal that the prosecutor distorted witness testimony in an effort to create a false dichotomy between the State's witnesses as credible and defense witnesses as being untruthful. First, he maintains the prosecutor misstated the evidence by remarking that individuals associated with 1210 Carver Drive "stayed and they talked to the police" while individuals "across the street" and associated with 1213 Carver Drive "appear[ed] to have scattered." Evidence presented at defendant's trial showed Atteberry was the first police officer on the scene. He testified that, upon his arrival, he observed several people "milling about" in front of 1210 Carver Drive and was then directed across the street to 1213 Carver Drive. Bell testified that the individuals who had been standing outside 1213 Carver Drive during the shooting ran off in separate directions. Defendant testified on his own behalf that he ran off, "jumped the fence, and *** was gone." Evidence showed Dillon, who had been standing outside with defendant and Bell, was inside the residence at 1213 Carver Drive when police arrived. He voluntarily agreed to exit the residence after the police made telephone contact with him.

¶ 76 Based on the evidence presented, we find the prosecutor's comments were not necessarily inconsistent with the evidence presented at trial. Rather, they were based on a reasonable inference that could be drawn from the witness testimony. Specifically, the evidence

showed people were present outside 1210 Carver Drive after the shooting and when police arrived on the scene while individuals who had admittedly been outside 1213 Carver Drive at the time of the shooting either ran from the scene (defendant and Bell) or were later located inside the residence (Dillon). Further, when viewing the prosecutor's comments in their entirety, we note that when arguing that individuals outside 1213 Carver Drive "scattered," he emphasized testimony from Bell and defendant that they "[j]umped fences and ran away" and "[d]idn't stick around." Thus, we find no error in the prosecutor's description of the conduct of the parties' witnesses.

¶ 77 Second, defendant complains about a remark by the prosecutor that Dillon had to be "pulled" from the "empty" residence at 1213 Carver Drive. As discussed, evidence at trial showed Dillon was inside the residence when police arrived on the scene. He testified he was checking on children who were also in the home. Dillon agreed to voluntarily exit the home after police officers made telephone contact with him. Nevertheless, to the extent the prosecutor mischaracterized Dillon's exit from the home, we find no error. Again, the prosecutor's comment was isolated and his emphasis was on the fact that individuals who had been outside 1213 Carver Drive prior to the shooting no longer remained there after the shooting and upon the arrival of police. We find defendant suffered no prejudice.

¶ 78 Third, defendant complains the prosecutor misstated evidence by implying that Dillon, defendant's cousin, participated in the shooting. Specifically, the prosecutor commented as follows:

> "[Davis] tells you, there's gunfire going back the other way. She also tells you, [Davis] says, I think I can see another shooter across

> the street. And she says, I think I can identify it as his cousin. And nobody else saw that. Cousin's not on trial here. The gentleman who identified himself as the Defendant's cousin did testify, but that's not an issue for us to decide here."

However, the record shows Davis actually testified that, although two different people were shooting at her house and one of the shooters was defendant, she could not identify the other shooter and had never seen him before.

¶ 79 Clearly, Davis did not identify defendant's cousin as a possible shooter. However, although we find the prosecutor did misstate the evidence, he acknowledged that "nobody else saw that" and we find no prejudicial error.

¶ 80 Fourth, defendant argues the prosecutor erred in stating Davis testified that defendant had "never been in [her] house" and was "not allowed through [her] house." Specifically, the prosecutor argued as follows:

> "That revolver that the Defendant had doesn't eject casings. The .9 [*sic*] millimeter does. You heard testimony that Brooks was in that house [at 1210 Carver Drive]. That he had permission to be in that house. And we heard testimony about that .9 [*sic*] millimeter being found behind the house. We heard testimony that the Defendant, from *** Davis, never been in that house, he's not allowed through that house, he didn't go through the house. And everybody agrees, that when he fled, it's in the other direction. He didn't put that .9 [*sic*] millimeter behind the house."

Defendant argues the "misstatement created the false implication that [Davis] had reasons to prohibit [defendant] from entering her home."

¶ 81 The record shows, at trial, Davis actually testified that defendant "used to come over to [her] house and stuff" and that she had no problems with him prior to the incident at issue. Thus, we agree the prosecutor misstated the evidence. However, we disagree that any reversible error occurred and note that, throughout his closing argument the prosecutor actually emphasized that there had been no animosity between defendant and the State's witnesses. Specifically, he also argued as follows:

> "And none of [the State's] witnesses have a bone to pick with him either. They all told you, and there's no evidence otherwise, that every single one of them got upon the stand and they say, no, before this, we didn't have an issue with them. Shyteisha and Shykeira, and [Davis] and [Gordon], those people did not have an issue with [defendant] at all before this thing happened. They got no ax to grind aside from this event."

Later during closing argument, the prosecutor again asserted that none of the State's witnesses "have an ax to grind with [defendant] before this." Finally, in rebuttal, he reiterated that the witnesses "had no ax to grind, because we have no evidence of that whatsoever." Thus, given the entirety of the prosecutor's closing argument, we find no prejudice to defendant.

¶ 82 Here, defendant was not substantially prejudiced by any portion of the prosecutor's closing argument. We find several of the remarks defendant alleges as error were actually fair comments by the prosecutor on the evidence presented. Although defendant also identified

misstatements by the prosecutor, such remarks were either isolated or contradicted by the prosecutor's argument as a whole. In any event, defendant suffered no substantial prejudice and no reversible error occurred.

¶ 83 As discussed, defendant forfeited his challenge to the prosecutor's remarks during closing argument by failing to object at trial or include the issue within his posttrial motion. He argues the issue may be reviewed under the plain-error doctrine or because his counsel was ineffective for failing to object at trial. First, "[i]f no objection was made, a prosecutor's statements during closing argument will constitute plain error only if they were ' "so inflammatory that defendant could not have received a fair trial or so flagrant as to threaten deterioration of the judicial process." ' [Citations.]" *People v. Boling*, 2014 IL App (4th) 120634, ¶ 126, 8 N.E.3d 65. However, when no reversible error occurs there is also no plain error. *People v. Sims*, 192 Ill. 2d 592, 623, 736 N.E.2d 1048, 1065 (2000); see also *People v. Sharp*, 391 Ill. App. 3d 947, 958, 909 N.E.2d 971, 980 (2009) (refusing to address the defendant's challenge to the prosecutor's remarks under the plain-error doctrine where, "[e]ven accepting [the] defendant's contention that the complained-of remarks were improper *** they did not result in substantial prejudice to [the] defendant or compromise the fairness or integrity of the trial process"); *People v. Brooks*, 345 Ill. App. 3d 945, 953, 803 N.E.2d 626, 632 (2004) (finding "the limited comment made during the State's opening closing statement [did not] affect[] [the] defendant's substantial rights or cause[] sufficient harm to have compromised the fairness or integrity of the trial process" and holding that because the "defendant was not prejudiced, there [was] no ground to excuse [his] procedural default"). For the reasons stated, we find no reversible error occurred as a result of the prosecutor's comments during closing argument and, thus, no plain error.

¶ 84 Second, a defendant can only show ineffective assistance of counsel under *Strickland* where he establishes both that his counsel's performance was deficient and that he suffered prejudice. *Henderson*, 2013 IL 114040, ¶ 11. For all the reasons discussed, defendant cannot establish prejudice and is unable to meet his burden of proving that his counsel was ineffective.

¶ 85 D. Sentencing Issues

¶ 86 Finally, on appeal, defendant argues his 30-year prison sentence is excessive. He contends the trial court (1) failed to take into account mitigating factors related to his rehabilitative potential when imposing his sentence, including his youth, his expressed desire to "change [his] life," and his family ties; (2) improperly considered his decision to have children and his unemployment as negatively impacting his rehabilitative potential; (3) failed to give any consideration to the financial costs of incarcerating him; and (4) improperly considered elements of the armed habitual criminal offense, *i.e.*, two of his prior criminal convictions, as aggravating factors at sentencing.

¶ 87 Defendant acknowledges he failed to file a postsentencing motion. See *People v. Kitch*, 392 Ill. App. 3d 108, 118, 915 N.E.2d 29, 37 (2009) ("A defendant forfeits the appeal of a sentencing issue when he fails to (1) timely object during the sentencing hearing and (2) has failed to raise the issue in a postsentencing motion."). However, he maintains that, in the event this court finds he forfeited his sentencing claims on appeal, they may be reviewed under the plain-error doctrine or because his counsel was ineffective for failing to file a motion to reconsider his sentence.

¶ 88 "The Illinois Constitution provides penalties are to be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizen-

ship." *People v. Daly*, 2014 IL App (4th) 140624, ¶ 26, 21 N.E.3d 810 (citing Ill. Const. 1970, art. I, § 11). "This constitutional mandate calls for balancing the retributive and rehabilitative purposes of punishment, and the process requires careful consideration of all factors in aggravation and mitigation." *Id.* Although the legislature prescribes permissible sentencing ranges, the trial court has great discretion to fashion an appropriate sentence within the applicable statutory range. *People v. Fern*, 189 Ill. 2d 48, 53, 723 N.E.2d 207, 209 (1999).

¶ 89 "The trial court must base its sentencing determination on the particular circumstances of each case, considering such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age." *Id.* A reviewing court "must not substitute its judgment for that of the trial court merely because it would have weighed the factors differently." *Id.* "A sentence within statutory limits will not be deemed excessive unless it is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense." *Id.* at 54.

¶ 90 Additionally, "[s]imply because rehabilitative and mitigating factors are present does not entitle them to greater weight than the seriousness of the offense." *People v. Harris*, 2015 IL App (4th) 140696, ¶ 58, 32 N.E.3d 211. Further, "[a] court is not required to expressly outline every factor it considers for sentencing and we presume the court considered all mitigating factors on the record in the absence of explicit evidence to the contrary." *Id.* ¶ 57. Absent evidence to the contrary, we may also presume the trial court performed its obligations and considered the financial impact of sentencing the defendant. *People v. Canizalez-Cardena*, 2012 IL App (4th) 110720, ¶ 24, 979 N.E.2d 1014.

¶ 91 Finally, "it is well established a trial court may not consider a factor inherent in an

offense as an aggravating factor in sentencing." *Daly*, 2014 IL App (4th) 140624, ¶ 37. "This is because it is reasonable to presume the legislature already considered the factor in establishing the penalty for the offense." *Id.* However, "[a]lthough the trial court may not consider the bare elements of the offense in aggravation, the nature and circumstances of the offense may properly be considered in imposing sentence." *People v. Carter*, 272 Ill. App. 3d 809, 813, 651 N.E.2d 248, 251 (1995).

¶ 92 Additionally, in *People v. Saldivar*, 113 Ill. 2d 256, 268, 497 N.E.2d 1138, 1143 (1986), the supreme court held that the rule against using an element of the offense as an aggravating factor at sentencing should not be rigidly applied to "restrict[] the function of a sentencing judge by forcing him to ignore factors relevant to the imposition of sentence." It stated as follows:

> "The Illinois Constitution provides that '[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship.' [Citation.] A reasoned judgment as to the proper penalty to be imposed must therefore be based upon the particular circumstances of each individual case. [Citations.] Such a judgment depends upon many *relevant* factors, including the defendant's demeanor, habits, age, mentality, credibility, general moral character, and social environment [citations], as well as ' "the nature and circumstances of the offense, including the nature and extent of each element of the offense as committed by the defendant" ' [citations]." (Emphasis in

original.) *Id.* at 268-69.

¶ 93 In *People v. Thomas*, 171 Ill. 2d 207, 226, 664 N.E.2d 76, 86 (1996), the supreme court was called upon to determine whether a sentencing court's use of prior convictions to impose a Class X sentence precluded it from considering those same prior convictions as an aggravating factor. It analogized its decision in *Saldivar* to the circumstances before it, stating as follows:

> "[A]lthough the legislature considered the prior convictions of certain defendants in establishing their eligibility for Class X sentencing, the legislature did not intend to impede a sentencing court's discretion in fashioning an appropriate sentence, within the Class X range, by precluding consideration of their criminal history as an aggravating factor. Rather, while the *fact* of a defendant's prior convictions determines his eligibility for a Class X sentence, it is the *nature and circumstances* of these prior convictions which, along with other factors in aggravation and mitigation, determine the exact length of that sentence." (Emphasis in original.) *Id.* at 227-28.

¶ 94 Applying this authority to the present case, we find no error. Rather, we find the record reflects the trial court considered appropriate sentencing factors that included the nature and circumstances of the offense at issue and defendant's demeanor, habits, age, mentality, credibility, general moral character, and social environment.

¶ 95 Initially, the record shows the trial court expressly identified and considered de-

fendant's age as a mitigating factor. It also clearly considered his rehabilitative potential. The court's comments indicate it found the evidence presented reflected negatively on defendant's potential for rehabilitation. Specifically, it noted defendant's lack of education or significant employment history, his inability to financially support his child, his reported daily use of marijuana, and that he had previously been convicted of an offense that involved shooting another individual. The court's comments further reflect that it gave significant weight to the seriousness of the offense and the need for deterrence. In fact, the court reiterated the need for deterrence in the case when setting forth its rationale, indicating it relied heavily on that factor when sentencing defendant.

¶ 96 On appeal, defendant essentially takes issue with the manner in which the trial court weighed the relevant sentencing factors. However, the court had discretion in fashioning an appropriate sentence within the applicable statutory range and we find no abuse of that discretion. Although defendant maintains his rehabilitative potential was demonstrated through his youth, community ties, and assertion at sentencing that he wanted to "change [his] life," such evidence was not necessarily entitled to greater weight than other evidence in the record, nor was the court required to accept without question defendant's claim that he wanted to change his past behavior.

¶ 97 Additionally, although the fact of defendant's two prior felony convictions were elements of the charged offense, relying on *Saldivar* and *Thomas*, we find no error in the trial court's consideration of the nature of those offenses when fashioning defendant's sentence. Specifically, the court was permitted to consider the nature and extent of each element of his offense. Considering the totality of the court's comments, we find that, rather than using the mere fact of

defendant's previous convictions to impose a harsher sentence, the court considered the nature of those previous convictions as they related to the circumstances before it. At a minimum, evidence at defendant's trial showed he possessed and brandished a handgun during a shooting incident that involved multiple shooters in a residential area with several individuals present at the scene. When considering the nature and character of defendant and his rehabilitative potential, the court looked to defendant's prior convictions, one of which included a conviction for shooting another individual and resulted in a three-year prison sentence. The record reflects no sentencing error.

¶ 98 For the reasons stated, we find no error in the trial court's sentencing decision. As a result, we also find defendant's contentions of plain error and ineffective assistance are without merit.

¶ 99 III. CONCLUSION

¶ 100 For the reasons stated, we vacate our original judgment and affirm the trial court's judgment. We also grant the State's request that defendant be assessed $50 as costs for this appeal.

¶ 101 Affirmed.