2020 IL App (1st) 171831-U

No. 1-17-1831

November 4, 2020

Third Division

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 CR 20425
	)	
CHARLES WEST,	)	Honorable
	)	Arthur F. Hill, Jr.,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE HOWSE delivered the judgment of the court.
Justices McBride and Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm defendant's convictions for unlawful possession of a weapon by a felon and possession of cannabis, as the prosecutor's purported misstatement of the law during closing argument was not reversible error. We affirm his sentence of eight years and six months' imprisonment for unlawful possession of a weapon by a felon. However, we remand for resentencing with respect to his cannabis possession offense, because defendant was not informed of his option to elect to be sentenced under the law in effect at the time of the offense or at the time of sentencing.

¶ 2 Following a jury trial, defendant Charles West was convicted of unlawful possession of a weapon by a felon (UPWF) (720 ILCS 5/24-1.1(a) (West 2012)) and possession of more than 10 grams but less than 30 grams of cannabis (720 ILCS 550/4(c) (West 2012)).[1] He was sentenced to respective, concurrent terms of eight years and six months and two years in prison. On appeal, defendant contends that his convictions should be reversed and the case remanded for a new trial because the prosecutor misstated the law during closing argument. Alternatively, defendant argues that his sentence for UPWF was excessive. Finally, defendant argues, and the State concedes, that we should remand for resentencing with respect to the cannabis possession offense because he was not informed of his choice to be sentenced under either the law existing at the time of the offense or at the time of sentencing. For the following reasons, we affirm defendant's convictions as well as his sentence for UPWF, and remand for resentencing with respect to the cannabis possession offense.

¶ 3 Defendant was charged by indictment with UPWF (count 1), possession of more than 10 grams but not more than 30 grams of cannabis (count 2), and possession of more than 10 grams but not more than 30 grams of cannabis with intent to deliver (count 3).

¶ 4 At trial, Chicago police officer Robert Gallas testified that on the evening of September 27, 2013, he and several other officers executed a search warrant at a residence in the 7100 block of South May Street. Gallas was the "evidence officer" responsible for taking custody of any contraband found in the home.

---

[1] The full title of section 24-1.1 is "Unlawful Use or Possession of Weapons by Felons or Persons in the Custody of the Department of Corrections Facilities." 720 ILCS 5/24-1.1 (West 2012). "Whether labeled as unlawful use of a weapon by a felon * * * or as unlawful possession of a weapon by a felon, as here, there is only one offense under this section." *People v. Williams*, 2016 IL App (3d) 120840, n. 1. For clarity, we will refer to the offense as UPWF.

¶ 5 Gallas described the residence as a single-family home with a first and second floor. Police knocked on the door and, after receiving no response, forcibly entered the home. Gallas entered the living room area, where defendant and two other individuals were detained by other officers. Defendant "stated that this was his house, and he sells a little bit of weed." Defendant pointed to a dining room table, where Gallas observed suspect cannabis in "Ziploc packages."

¶ 6 Gallas read defendant his *Miranda* rights, and defendant agreed to speak with him. When Gallas asked if there was any contraband in the residence, defendant responded "there's a gun in my second floor bedroom in the closet in the shoebox." Defendant led Gallas and another officer, Sean Brandon, upstairs to a bedroom closet. There, Brandon entered the closet and opened a shoebox, which contained a nine millimeter semi-automatic pistol. Gallas recovered the weapon and unloaded it. On a headboard in the same bedroom, Gallas found a voter registration card issued to defendant. On top of a dresser, Gallas found an Illinois state identification card issued to defendant.

¶ 7 Gallas returned to the first floor, where he recovered suspect cannabis from the table he previously observed. In the same living room area, he observed suspect cannabis in a black bag on top of a cabinet. In the basement of the home, he recovered additional suspect cannabis as well as a digital scale. Gallas identified various photographs, including photographs of the suspect cannabis, the shoebox in which the firearm was found, and the locations where defendant's identification card and voter registration card were found. Gallas identified People's Exhibit 28 as a photocopy of defendant's Illinois identification card and People's Exhibit 29 as a copy of defendant's voter registration card. He identified People's Exhibit 30 as the firearm that was recovered from the shoebox.

¶ 8 On cross-examination, Gallas acknowledged that the police were not specifically looking for defendant when they executed the search warrant. Gallas had not previously known who owned the house, but testified that defendant told him that he owned it.

¶ 9 Brandon testified that 16 police officers executed the search warrant, and that a number of officers entered the home before he did. Inside, he saw "numerous small bags of cannabis on a table." He observed three males, including defendant, who had been detained in the "living room/dining room area." Brandon heard defendant say that "he had a gun upstairs in his bedroom closet, on the second floor." Brandon testified that he, together with Officers Gallas and Stegmiller, "had [defendant] lead us to the bedroom, to the closet." Brandon looked in the closet because "that's where the Defendant told us the gun was at." Defendant pointed toward an Adidas shoebox on the floor; Brandon looked in the box and observed a blue steel handgun. Brandon identified photographs of the shoebox in the closet as well as the handgun. On redirect examination, Brandon testified that after the firearm was recovered, defendant said "that's my gun, and that's all that's in here."

¶ 10 Detective Bittner testified that he also took part in the execution of the search warrant. Bittner found a bundle of $116 in cash in a cigar box, as well as $105 in a "Pictionary box." On top of a china cabinet, he found a black plastic bag containing 13 clear Ziploc baggies containing suspect cannabis. He identified photographs of these items.

¶ 11 The parties stipulated that, if called, a forensic chemist with the Illinois State Police Crime Lab would testify that she tested 18 items containing cannabis, weighing a total of 17.6 grams. The parties also stipulated that defendant had been "previously convicted of a qualifying offense."

¶ 12 Defense counsel's motion for a directed verdict was denied. Defendant elected not to testify, and the defense rested without calling any witnesses.

¶ 13 Before closing arguments, the court admonished the jury that closing arguments are "an opportunity for the lawyers to stand in front of you and argue to you what they believe the evidence has shown plus reasonable inferences to be drawn from that evidence" and that "[w]hat the lawyers say in closing arguments is not evidence."

¶ 14 The prosecutor began his closing argument as follows:

> "When you're 15, you can't drive. When you're 17, you can't vote. When you're 20, you can't drink at least not legally.
>
> When you've been convicted of the previous qualifying offense as this Defendant has, as this Defendant has stipulated to, you cannot possess a gun. You cannot have a gun in your house. You cannot live with a gun; you can't live with someone else who lawfully possesses a gun. You cannot have a gun."

¶ 15 The prosecutor subsequently argued that the State had proven the elements of UPWF, including possession, as follows:

> "The law * * * is a person commits the offense of unlawful possession of a weapon by a felon when he, having been previously convicted of a qualifying offense, knowingly possesses a firearm.
>
> To sustain the charge of unlawful possession of a weapon by a felon, the State must prove the following propositions:
>
> The first. That the Defendant knowingly possessed a firearm; and the second, that the Defendant has been previously convicted of a qualifying offense.

The second's easy. It's not in doubt. No one denies it, no one's going to argue that he doesn't have that previous qualifying offense.

So then the first proposition is really what we're looking at, that the Defendant was in possession of that firearm; that, at that time, it was in his abode.

There's another law, or rule of law, that the Judge is going to read to you and that you'll have a copy of: Possession may be actual or constructive.

A person has actual possession when he has immediate and exclusive control over a thing; a person has constructive possession when he lacks actual possession of a thing, but has both the power and the intention to exercise control.

He told you, he told you through the officers. The officers came in; they saw the cannabis; he immediately says, I sell a little weed out of here. This is my house. And they ask him: Are we going to find anything else, anything else in the house? Just tell us now because we're going to find it.

The officers described the systematic search that's done of each room by each officer. * * * They open everything, so they give him an opportunity, am I going to find anything. He takes them right to it. Takes them right to it. They don't go to bedroom 2; they don't go to bedroom 3; they go right away to the bedroom that this Defendant leads them to.

He leads them right to the closet, he leads them right to the blue Adidas shoebox. He leads them right to the gun that's inside. It's his gun.

How do we know? He says it. That's my gun and that's all you're going to find in here. You heard Officer Brandon, that you heard the Defendant say, I got a

> gun in my closet; that he walked them directly to that bedroom, and that he showed them exactly where that gun was. And then says, that's my gun. That's the intent to control the gun. That's constructive possession.
>
> Nobody's going to say it was in his hand; nobody's going to say it was in his pocket; no one's going to say he waved it around, he pulled it on anybody or did anything with it. But he told you, through these officers, that's my gun.
>
> That's how the first proposition has been proven. And again, the second one, no one's denying."

¶ 16 Defense counsel argued to the jury that the officers' testimony lacked credibility, to the extent they claimed that defendant voluntarily led them to the gun. Counsel also urged that there was insufficient proof that the firearm belonged to defendant, noting the lack of fingerprint evidence, the fact that other individuals were in the house, and that defendant was found "nowhere near this gun."

¶ 17 After closing arguments, the court told the jury that "[t]he law that applies to this case is stated in these instructions, and it is your duty to follow all of them." Among other instructions, the court stated:

> "Possession may be actual or constructive. A person has actual possession when he has immediate and exclusive control over a thing. A person has constructive possession when he lacks actual possession of a thing, but he has both the power and the intention to exercise control over a thing."

¶ 18 During deliberations, the jury submitted a note to the court, which contained several separate questions.[2] The jury asked: (1) "what was the intention for the search warrant?"; (2) whether defendant's purported statement to Gallas that "this is my house" was recorded in a "written report"; (3) whether the other two males in the house had been arrested; (4) whether the jury could see the search warrant; (5) whether the jury could see the police report. Finally, the jury asked: "Who was the gun registered to? Did the gun have a serial number?" After conferring with counsel, the court informed the jury that it had received all of the evidence and instructed them to continue to deliberate.

¶ 19 The jury found defendant guilty of UPWF (count 1) and possession of cannabis (count 2). The jury found defendant not guilty of possession of cannabis with the intent to deliver (count 3). Defendant's motion for a new trial was denied.

¶ 20 Defendant's presentence investigative report (PSI) reflected two prior felony convictions as an adult.[3] In 2002, he was convicted of manufacture and delivery of a controlled substance in case 01CR2879101. He successfully completed two years' probation in that case. In 2009, he was convicted of possession of a controlled substance in case 07CR1596901; defendant completed two years' probation for that offense.

¶ 21 The PSI reflected that both of defendant's parents were deceased. Defendant reported a "good relationship" with his two sisters. The PSI also reflected that defendant has a girlfriend and that he fathered three children from a prior relationship, who live with their mother out of state. Defendant did not graduate high school but desired to obtain his "GED." Since 2004 he

---

[2] The jury's note is not contained in the record, but the trial court read aloud its contents in discussing the note with counsel.

[3] The PSI reflected that, as a juvenile, defendant completed five years' probation in connection with an aggravated criminal sexual assault (case 94JD10012).

had worked “rehabbing houses.” Defendant also reported that he was involved in “community work such as mowing lawns in the neighborhood.”

¶ 22 At the sentencing hearing, the court confirmed that the sentencing range for defendant’s UPWF offense was 3 to 14 years. In aggravation, the State pointed out that defendant had two prior felony convictions, for which he completed probation. The State asked the court to sentence the defendant to “the middle of that 3 to 14 range.”

¶ 23 In mitigation, defense counsel noted that the firearm was recovered in a different area of the home from where defendant was found. Counsel argued that defendant’s criminal history was “minimal,” that he successfully completed probation for both prior offenses, and that he had no other offenses within the last several years. Counsel stated that defendant has three children and a grandchild, and that defendant was involved in community volunteer work. Defense counsel asked that the court impose the minimum sentence.

¶ 24 In announcing sentence, the court stated that it had considered “the totality of the presentence investigation, all the factors in aggravation and mitigation.” The court imposed a sentence of eight years and six months’ imprisonment for the UPWF offense and a sentence of two years on the cannabis possession offense, to run concurrently.

¶ 25 The written sentencing order was entered on June 7, 2017. On July 11, 2017, defendant’s motion to reconsider sentence was denied. On the same date, defendant filed a notice of appeal.[4]

¶ 26 In this appeal, defendant first contends that, in closing argument, the State “misstated the law,” requiring reversal and a new trial. Specifically, with respect to the UPWF offense, he

---

[4] Defendant subsequently filed a postconviction petition on August 1, 2017. On September 11, 2017, the circuit court dismissed the postconviction petition as frivolous. That dismissal is the subject of a separate pending appeal, no. 1-17-3141.

claims that the prosecutor erroneously "defined possession as requiring neither knowledge nor intent." Defendant focuses on the prosecutor's statements to the jury that "[w]hen you've been convicted of a previous quality offense * * * you cannot possess a gun. You cannot have a gun in your house. You cannot live with a gun; you can't live with someone else who lawfully possesses a gun." Defendant claims that the prosecutor suggested to the jury "that the mere fact that there was a gun in [defendant's] home" was sufficient to prove the possession element of UPWF, regardless of defendant's knowledge. Defendant argues that these comments amount to a "plain misstatement of the law, which requires both knowledge and an intent to exercise control over an item in order to establish constructive possession." He claims that the prosecutor "presented the jury with a version of the law that would have allowed it to convict based on [his] mere presence in the house" where the gun was found, regardless of his mental state. Defendant maintains that the misstatement of the law was prejudicial, as the element of possession was the sole issue at trial for the charge of UPWF and the evidence was "closely balanced."

¶ 27 In setting forth this argument, defendant acknowledges that he did not properly preserve this issue, as his counsel did not object to the comments during trial, and this issue was not raised in a post-trial motion. See *People v. Woods*, 214 Ill.2d 455, 470 (2005) ("Ordinarily, a defendant must both specifically object at trial and raise the specific issue again in a posttrial motion to preserve any alleged error for review. [Citation.]") Nevertheless, he maintains that we may review this issue under either prong of the plain-error doctrine.

¶ 28 The State responds that neither prong of the plain-error doctrine applies, as the challenged remarks do not amount to reversible error, when the prosecutor's argument is considered in its totality. The State suggests that, to the extent the prosecutor's opening remarks

initially suggested that possession could be shown by being in the same home, those remarks do not support reversal. The State points out that, although those "introductory remarks" did not refer to any mental state with respect to possession, the remainder of its argument "unequivocally informed the jury" that the State had to prove that defendant "knowingly" possessed a firearm.

¶ 29 As defendant acknowledges, his argument was not preserved for review. Thus, he seeks review under the plain-error doctrine, which "bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved claims of error in specific circumstances." *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). The plain-error doctrine applies when " '(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 defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.' " *Id.* (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)). "The first step of plain-error review is determining whether any error occurred." *Thompson*, 238 Ill. 2d at 613; see also *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005) ("Before we may apply either prong of the plain error doctrine * * * there must be plain error.)." Thus, we first consider whether the prosecutorial comments at issue constituted error.

¶ 30 We note that the parties disagree as to the standard of review in assessing the propriety of the prosecutor's remarks. Defendant argues that *de novo* review applies, citing *People v. Wheeler*, 226 Ill. 2d 92 (2007). The State responds that recent precedent dictates application of an abuse of discretion standard of review.

¶ 31 This court has acknowledged confusion regarding the applicable standard of review, in light of "seemingly contradictory statements" from supreme court precedent. *People v. Phagan*, 2019 IL App (1st) 153031, ¶ 47. In 2000, our supreme court stated that the trial court's determination of the propriety of remarks during closing argument "will not be disturbed absent a clear abuse of discretion. [Citation.]" *People v. Blue*, 189 Ill. 2d 99, 128 (2000). However, our supreme court subsequently stated that "[w]hether 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*." *Wheeler*, 226 Ill. 2d at 121. In *Phagan*, this court determined that *Blue*'s abuse of discretion standard was better supported by precedent. *Phagan*, 2019 IL App (1st) 153031, ¶ 54 ("We follow *Blue* and review claims of prosecutorial misconduct in closing arguments under the abuse of discretion standard."). Other decisions of this court have concluded that there is no conflict between *Blue* and *Wheeler*, and that the two decisions can be reconciled. See, *e.g., People v. Taylor*, 2019 IL App (3d) 160708, ¶¶ 30-32 (explaining there is a "two-step analysis" under which the reviewing court first applies an abuse of discretion standard in determining "whether prosecutorial error is present in the record" and that the "second step * * * applies a *de novo* standard of review to decide whether the prosecutorial error * * * created substantial prejudice to defendant"); *People v. Cook*, 2018 IL App (1st) 142134, ¶ 64 ("Whereas a reviewing court applies an abuse of discretion analysis to determinations about the propriety of a prosecutor's remarks during argument [citations] a court reviews *de novo* the legal issue of whether a prosecutor's misconduct, like improper remarks during argument, was so egregious that it warrants a new trial.").

¶ 32 Given the record in this case, we need not decide whether *Wheeler* or *Blue* defined the precise standard of review. That is because under either standard, we determine that the prosecutor's purported misstatements did not constitute reversible error.

¶ 33 "It is well established that prosecutors are afforded wide latitude in closing argument, and improper remarks will not merit reversal unless they result in substantial prejudice to the defendant." *People v. Moody*, 2016 IL App (1st) 130071, ¶ 60 (citing *People v. Kitchen*, 159 Ill. 2d 1, 38 (1994)); see also *People v. Nieves,* 193 Ill. 2d 513, 533 (2000) (prosecutorial comments "constitute reversible error only when they engender substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilt resulted from those comments."). "In reviewing whether comments made during closing argument are proper, the closing argument must be viewed in its entirety, and remarks must be viewed in context." *Moody*, 2016 IL App (1st) 130071, ¶ 60 (citing *Kitchen*, 159 Ill. 2d at 38). "Reviewing courts will consider the closing argument as a whole, rather than focusing on select phrases or remarks." *People v. Perry*, 224 Ill.2d 312, 347 (2007).

¶ 34 "Although a prosecutor is allowed wide latitude during closing argument, a misstatement of law can be grounds for reversal. *People v. Jackson*, 2012 IL App (1st) 092833, ¶ 36 (citing *People v. Gutirrez*, 205 Ill. App. 3d 231, 265 (1990)). However, a "misstatement of the law during closing argument does not normally constitute reversible error if the circuit court properly instructs the jury on the law, as counsel's arguments are construed to carry less weight with the jury than do instructions from the circuit court." *Jackson*, 2012 IL App (1st) 092833, ¶ 36 (Internal quotation marks omitted.). "The test to determine whether the misstatement constituted

substantial prejudice to the defendant is whether the jury would have reached a contrary verdict had the misstatement not been made. [Citation.]" *Id.*

¶ 35 In order to assess whether substantial prejudice could have resulted from the purported misstatements at issue in this case, we first note the law regarding the offense of UPWP. To sustain a conviction for that offense, the State must prove that defendant (1) "knowingly possess[ed]" a weapon, and (2) was previously convicted of a felony. 720 ILCS 5/24-1.1(a) (West 2012). In this case, defendant argues that the prosecutor misstated the law regarding the mental state for the possession element of the offense.

¶ 36 Where, as here, a defendant is not found in actual possession of a weapon, the State must prove constructive possession. *People v. Sams*, 2013 IL App (1st) 121431, ¶ 10. "To establish constructive possession, the State must prove beyond a reasonable doubt that a defendant (1) knew a firearm was present; and (2) exercised immediate and exclusive control over the area where the firearm was found. [Citations.]" *Id.* "The State may establish knowledge through evidence of a defendant's acts, declarations, or conduct, from which it may be inferred that he knew of the firearm's presence. [Citation.] A defendant's control over the location where a weapon is found gives rise to an inference that he possesses that weapon. [Citation.]" *Id.* "Control is established when a person has the 'intent and capability to maintain control and dominion' over an item, even if he lacks personal present dominion over it." *People v. Spencer*, 2012 IL App (1st) 102094, ¶ 17 (quoting *People v. Frieberg*, 147 Ill.2d 326, 361 (1996)). "Habitation in the residence in which the firearm is found is sufficient evidence of control to establish constructive possession. [Citation.]" *Sams*, 2013 IL App (1st) 121431, ¶ 10; see also

Spencer, 2012 IL App (1st) 102094, ¶ 17 (proof of residency is relevant to show the defendant lived on the premises and therefore controlled them).

¶ 37 We acknowledge that certain of the prosecutor's statements, viewed in isolation, could be construed as suggesting that defendant's mere presence in the residence satisfied the element of "possession." Specifically, the opening portion of prosecutor's closing argument stated: "You cannot have a gun in your house. You cannot live with a gun; you can't live with some else who lawfully possesses a gun. You cannot have a gun." However, after viewing the challenged remarks in context of the entire closing argument, we cannot say that they resulted in substantial prejudice so as to amount to reversible error.

¶ 38 First, the record reflects that the circuit court correctly instructed the jury regarding the UPWF offense, including the requisite mental state with respect to the possession element. The court instructed the jury that "[a] person commits the offense of unlawful possession of a weapon by a felon when he, having been previously convicted of a qualifying offense, *knowingly* possesses a firearm." (Emphasis added). The court then instructed that:

> "To sustain the charge of unlawful possession of a weapon by a felon, the State must prove the following propositions:
>
> First proposition. That the Defendant *knowingly* possessed a firearm; and
>
> Second. That the Defendant had previously been convicted of a qualifying offense." (Emphasis added).

¶ 39 The court also explained:

> "Possession may be actual or constructive. A person has actual possession when he has immediate and exclusive control over a thing. A person has constructive

> possession when he lacks actual possession of a thing, but he has both the power and the intention to exercise control over a thing."

This language tracks the Illinois Pattern Instruction defining possession. IPI Criminal 4th, No. 4.16.

¶ 40 Because the court gave proper instructions, we presume that the jury gave them more weight than any misstatement by the prosecutor. See *Jackson*, 2012 IL App (1st) 092833, ¶ 36 (a "misstatement of the law during closing argument does not normally constitute reversible error if the circuit court properly instructs the jury on the law, as counsel's arguments are construed to carry less weight with the jury than do instructions from the circuit court."); see also *People v. Glasper*, 234 Ill. 2d 173, 201 (2009) (The jury is presumed to follow the instructions that the court gives it). The record reflects that the court properly instructed the jury that closing arguments were merely the attorneys' arguments about the evidence and reasonable inferences therefrom, and that the jury was bound to follow the law as stated in the court's instructions.

¶ 41 Further, despite the challenged introductory remarks, subsequent portions of the prosecutor's closing argument repeatedly and explicitly acknowledged the requisite mental state of the possession element. The prosecutor stated that "a person commits the offense of unlawful possession of a weapon by a felon when he, having been previously convicted of a qualifying offense, *knowingly* possesses a firearm" and acknowledged that the State must prove "[t]hat the Defendant *knowingly* possessed a firearm." (Emphases added.). Elsewhere, the prosecutor's argument accurately stated that "a person has constructive possession when he lacks actual possession of a thing, but has both the power *and the intention to exercise control*." (Emphasis added). These portions of the State's argument, which properly referenced the mental state

aspect of the possession element, mitigated any potential prejudice from the prosecutor's prior challenged remarks.

¶ 42 Notably, these additional remarks clarifying the requisite mental state similarly distinguish this case from *People v. Burnside*, 212 Ill. App. 3d 605 (1991), relied upon by defendant. In *Burnside*, this court reversed defendant's conviction for unlawful use of a weapon by a felon where the prosecutor's closing argument in rebuttal repeatedly suggested that the State need only prove the presence of a gun in a convicted felon's home. In that case, the prosecutor stated, in part: "If you are a convicted felon, you can't have guns and you can't have bullets. And if you have got them in your house, it's against the law." *Id*. at 606-07. Critically, nothing in the *Burnside* decision suggests that, elsewhere in closing, the prosecutor also made *correct* statements of the law regarding the requisite mental state for the offense. Thus, this case is distinguishable.

¶ 43 Further, the substance of the prosecutor's argument makes clear that the State did not suggest that the jury should convict him of UPWF merely based on his presence in the home where the gun was found. Rather, the State explicitly argued that evidence of defendant's conduct and statements demonstrated his awareness and control of the firearm, amounting to constructive possession. The prosecutor noted that defendant led the police "right to the closet, he leads them right to the blue Adidas shoebox. He leads them right to the gun that's inside." The prosecutor referenced the officers' testimony that defendant "showed them exactly where that gun was" and then acknowledged that it belonged to him. The prosecutor explicitly argued that this showed defendant's "intent to control the gun. That's constructive possession." Thus, the

record belies defendant's suggestion that the State invited the jury to find that he "possessed" the gun based merely on his presence in the home, without the requisite mental state.

¶ 44 In reaching this conclusion, we recognize that the jury submitted a number of questions before convicting defendant of UPWF. However, we decline defendant's suggestion to assume that those questions meant that the evidence was close in the minds of the jury, so that we may infer defendant was prejudiced from the prosecutor's statements. Notwithstanding the note, we "cannot identify what occurred in the minds of the individual jurors that led them ultimately to reach a consensus." See *People v. Johnson* 408 Ill. App. 3d 157, 172-73 (2010) (rejecting suggestion that juror's note indicated that evidence was closely balanced, or that jury would have reached different conclusion had defendant testified at trial); *People v. Downs*, 2015 IL 117934, ¶ 28 (courts may not "view jury questions as a key to the jury's actual deliberations").

¶ 45 In sum, it is apparent that the jury was correctly instructed, and that, viewed in context, the prosecutor properly urged the jury to find constructive possession based on the evidence of defendant's conduct and statements indicating his knowledge of the gun, not merely his presence in the home. Thus, to the extent the prosecutor's opening remarks misstated the law regarding the element of possession, given the record in this case we cannot say the jury would have reached a contrary verdict had the misstatement not been made. As such, there was no resulting substantial prejudice, and the remarks do not constitute reversible error. *Jackson*, 2012 IL App (1st) 092833, ¶ 36. As we have determined that the challenged remarks do not amount to reversible error, we need not additionally discuss whether either prong of the plain-error doctrine applies. See *People v. Naylor*, 229 Ill. 2d 584, 602 (2008) ("Absent reversible error, there can be no plain error. [Citations.]").

¶ 46 Defendant next challenges his sentence of eight years and six months for UPWF. He argues that this sentence was excessive and that he was subject to an impermissible "double enhancement." He claims that since the 2009 conviction for delivery of a controlled substance was applied as the predicate felony for the UPWF offense, it "was already taken into account" and could not be used as an aggravating factor to impose a harsher sentence.

¶ 47 In response, the State's brief initially contends that defendant forfeited any claims of error in sentencing. The State asserts that defendant failed to object at the sentencing hearing and that, "although defendant filed a motion to reconsider sentence, he did not include these particular issues in his motion." The State otherwise contends that, apart from any forfeiture, there was no error with respect to sentencing.

¶ 48 In his reply brief, defendant contends that his motion to reconsider sentence was adequate to preserve the alleged sentencing error, as "the issue of the excessiveness of [his] sentence was before the circuit court, satisfying the purpose of the forfeiture rule." Alternatively, he argues that, even if forfeited, his sentencing claims are still reviewable under either prong of plain-error review.[5]

¶ 49 Generally, "to preserve a claim of sentencing error, both a contemporaneous objection and a written postsentencing motion raising the issue are required." *People v. Hillier*, 237 Ill.2d 539, 544-45 (2010). However, even if forfeited, we may review a claim of sentencing error under the plain-error doctrine pursuant to Supreme Court Rule 615. *Id.*; Ill. S. Ct. R. 615. "To obtain

---

[5] The State suggests that defendant forfeited any argument for plain-error review of the alleged sentencing errors, because defendant did not address plain error in his opening brief on appeal. However, our supreme court has held that plain-error review is not forfeited, even if not raised in defendant's opening brief. *People v. Williams*, 193 Ill. 2d 306, 347 (2000) (rejecting argument that court could not consider plain error argument raised for first time in reply brief).

relief under this rule, a defendant must first show that a clear or obvious error occurred." *Hillier*, 237 Ill.2d at 545. "In the sentencing context, a defendant must then show either that (1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing." *Id.* (citing *People v. Hall*, 195 Ill. 2d 1, 18 (2000)).

¶ 50 We recognize that, even if we found forfeiture and engaged in plain-error review, we would first need to determine whether any sentencing error occurred. See *Thompson*, 238 Ill. 2d at 613 ("The first step of plain-error review is determining whether any error occurred."); see also *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005) ("Before we may apply either prong of the plain error doctrine * * * there must be plain error.). For the following reasons, we find that there was no error with respect to sentencing. We thus need not discuss the State's assertion of forfeiture in order to affirm the trial court.

¶ 51 We first address the argument that defendant's 2009 conviction, which served as a predicate for the UPWF offense, was used as an improper double enhancement in sentencing. "Generally, a factor implicit in the offense for which the defendant has been convicted cannot be used as an aggravating factor in sentencing for that offense. [Citation.] Stated differently, a single factor cannot be used both as an element of an offense and as a basis for imposing 'a harsher sentence than might otherwise have been imposed.' " *People v. Phelps*, 211 Ill.2d 1, 11-12 (2004). Whether the trial court considered an improper double enhancement in sentencing is a question of law, which we review *de novo*. *People v. Brown*, 2018 IL App (1st) 160924, ¶ 19.

¶ 52 We do not find that defendant was subjected to an improper "double enhancement" at sentencing. We find applicable the reasoning in *Brown*, 2018 IL App (1st) 160924, which in turn relied on our supreme court's decision in *People v. Thomas*, 171 Ill. 2d 207 (1996):

> "In *Thomas*, 171 Ill.2d at 224-25, our supreme court explained, 'the discretionary act of a sentencing court in fashioning a particular sentence tailored to the needs of society and the defendant, within the available parameters, is a requisite part of every individual sentencing determination.' Thus, '[t]he judicial exercise of this discretion, in fashioning an appropriate sentence within the framework provided by the legislature, is not properly understood as 'enhancement.' [Citation.] As part of that framework, the trial court must consider a number of aggravating and mitigating factors in imposing its sentence, including the defendant's criminal history. [Citation.] *Thomas*, therefore, found the trial court's use of prior convictions to impose a Class X sentence did not preclude it from 'reconsidering' the same prior convictions and using them a second time as an aggravating factor in sentencing. [Citation.]" *Brown*, 2018 IL App (1st) 160924, ¶ 20.

¶ 53 In *Brown*, we applied this reasoning to hold that:

> "although Brown's prior UUWF conviction was used as a predicate offense for the AHC conviction, the trial court could properly consider the UUWF conviction as part of Brown's criminal history. [Citation.] To paraphrase *Thomas*, while the *fact* of Brown's prior UUWF conviction determined his eligibility for an AHC charge, it is the *nature and circumstances* of that conviction which, along with other factors in aggravation and mitigation, determined the exact length of his sentence." *Id.* ¶ 21. (Emphases in original).

Similarly, in this case, although defendant's 2009 felony conviction was a predicate offense for the UPWF conviction, the trial court could consider the nature and circumstances of that prior

conviction, along with other factors in aggravation and mitigation, in determining his UPWF sentence within the statutory range. See *id.* Moreover, nothing in the record indicates that the court gave undue emphasis to that particular prior conviction to impose a harsher sentence. See *id.* ¶ 22 (finding no error where the trial court "did not expressly state that it considered Brown's prior UUWF conviction as an aggravating factor" but merely "mentioned the conviction to provide an accurate description of Brown's criminal history"). In this case, the trial court simply stated that it had considered "defendant's history," the PSI, and "all the factors in aggravation and mitigation." Thus, we reject defendant's challenge to his UPWF sentence, to the extent he claims an improper double enhancement.

¶ 54 We turn to address defendant's remaining contentions that the eight year and six month sentence for UPWF was excessive under the particular circumstances of this case. For the following reasons, we do not find error.

¶ 55 "The Illinois Constitution requires a trial court to impose a sentence that achieves a balance between the seriousness of the offense and the defendant's rehabilitative potential." *People v. Knox*, 2014 IL App (1st) 120349, ¶ 46. The court must consider aggravating and mitigating factors including "the nature and circumstances of the crime, the defendant's conduct in the commission of the crime, and the defendant's personal history, including his age, demeanor, habits, mentality, credibility, criminal history, general moral character, social environment, and education." *Id*.

¶ 56 "A reviewing court gives great deference to the trial court's judgment regarding sentencing because the trial judge, having observed the defendant and the proceedings, has a far better opportunity to consider these factors than the reviewing court, which must rely on the

'cold' record." *People v. Alexander*, 239 Ill. 2d 205, 212-13 (2010). "[T]he reviewing court must not substitute its judgment for that of the trial court merely because it would have weighed these factors differently." *People v. Stacey*, 193 Ill. 2d 203, 209 (2000).

¶ 57 "A reviewing court may only reduce a sentence under Illinois Supreme Court Rule 615 when the record shows that the trial court abused its discretion. [Citation.]" *People v. Busse*, 2016 IL App (1st) 142941, ¶ 20. "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*.

¶ 58 After reviewing the record in this case, we find that the trial court did not abuse its discretion in sentencing defendant to eight years and six months in prison for the UPWF offense. The parties acknowledge that, because defendant had a prior Class 2 felony conviction, the applicable sentencing range for the UPWF offense was between three and 14 years. 720 ILCS 5/24-1.1 (e) (West 2012). Thus, the sentence imposed, eight years and six months, was at the exact midpoint of the applicable sentencing range. A sentence within statutory guidelines is "presumed to be proper and will not be disturbed absent an affirmative showing that the sentence is at variance with the purpose and spirit of the law or is manifestly disproportionate to the nature of the offense." *Knox*, 2014 IL App (1st) 120349, ¶ 46. Defendant has not made that affirmative showing.

¶ 59 Defendant acknowledges that the applicable sentencing range was 3 to 14 years but contends that the trial court abused its discretion in imposing "more than double the minimum sentence" under the record in this case. He argues that his sentence was excessive because his UPWF offense "injured no one," and the "mitigating evidence showed his great rehabilitative

potential." He emphasizes that he was not found holding the weapon or threatening anyone with it, and thus contends that his sentence was disproportionate to his conduct. Defendant also emphasizes that the "only aggravation" presented by the State were his two prior felony convictions, yet both were for non-violent drug offenses for which he successfully completed probation. On the other hand, he claims that mitigating evidence, such as his supportive family and steady employment history, showed "great rehabilitative potential."

¶ 60 We initially note that, since all of the factors defendant raises on appeal were discussed in defendant's PSI or in arguments in mitigation, defendant essentially asks this court to reweigh the sentencing factors and substitute our judgment for that of the trial court. As noted above, this we cannot do. See *Busse*, 2016 IL App (1st) 142941, ¶ 20 (explaining that a reviewing court must not substitute its judgment for that of the trial court merely because it would have weighed these factors differently).

¶ 61 That aside, we find no support in the record for defendant's suggestion that the trial court did not adequately consider the complained-of factors. "There is a presumption that a trial court considered all relevant factors in determining a sentence, and that presumption will not be overcome without explicit evidence from the record that the trial court did not consider mitigating factors." *People v. Flores*, 404 Ill. App. 3d 155, 158 (2010). Here, defendant cannot overcome that presumption. To the contrary, in sentencing defendant, the trial court stated:

> "I've considered all the facts of this case. I've considered the defendant's history. His background of the totality of the presentence investigation, all the factors in aggravation and mitigation."

The court thus expressly acknowledged that it had considered all relevant factors. The court was not required to "explicitly analyze each relevant factor or articulate the basis for the sentence imposed." *Knox*, 2014 IL App (1st) 120349, ¶ 46. The record supports the presumption that, in assessing a sentence in the middle of the applicable sentencing range, the trial court exercised its discretion in balancing aggravating and mitigating circumstances. Thus, we cannot conclude that the sentence imposed was excessive, and we affirm defendant's sentence with respect to the UPWF conviction.

¶ 62 Finally, we turn to defendant's contention regarding his two-year sentence for cannabis possession. Defendant asserts, and the State agrees, that he is entitled to a new sentencing hearing on that offense, because he was not informed of his choice to elect to be sentenced either under the law as it existed when he committed the offense or under the law as it existed at the time of sentencing. See *People v. Hollins*, 51 Ill.2d 68, 71 (1972) (In the absence of a showing that defendant was advised of his right to elect under which statute he should be sentenced, and an express waiver of that right, defendant is denied due process of law).

¶ 63 As acknowledged by the State, at the time of defendant's arrest in 2013, the offense of possession of 10 to 30 grams of cannabis, if a subsequent offense, was a Class 4 felony with a sentencing range of one to three years, or an extended term of three to six years. 720 ILCS 550/4(c) (West 2012) (a person in possession of more than 10 grams but not more than 30 grams of any substance containing cannabis "is guilty of a Class A misdemeanor; provided, that if any offense under this subsection (c) is a subsequent offense, the offender shall be guilty of a Class 4 felony"); 730 ILCS 5/5-4.5-45(a) (West 2012) (specifying sentencing range for a Class 4 felony). Prior to defendant's 2017 sentencing, the Cannabis Control Act was amended, so that possession

of 10 to 30 grams became a Class B misdemeanor (720 ILCS 550/4(b) (West 2016)), subject to a sentence of not more than six months in prison, in addition to a fine "not to exceed $1,500 for each offense or the amount specified in the offense, whichever is greater." 730 ILCS 5/5-4.5-60(a),(e) (West 2016).

¶ 64 The State concedes that, at defendant's sentencing hearing, he was not informed that he could elect to be sentenced under the law in effect in 2013 that made his conviction a Class 4 felony, or under the amended statute that made it a Class B misdemeanor. Thus, pursuant to *Hollins*, we vacate his sentence on count 2 only, and remand for a new sentencing hearing with respect to that count.

¶ 65 For the foregoing reasons, we affirm defendant's convictions, and we affirm his sentence of eight years and six months' imprisonment for unlawful possession of a weapon by a felon (count 1). However, we remand for resentencing only with respect to the offense of possession of more than 10 grams but less than 30 grams of cannabis (count 2).

¶ 66 Affirmed in part; remanded in part.