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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Du Page County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 11-CF-2699
)	
MICHAEL M. HALL,)	Honorable
)	George J. Bakalis,
Defendant-Appellant.)	Judge, Presiding.

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

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion (and thus committed no plain error) in sentencing defendant to a total of 13 years' imprisonment for home invasion and armed violence: even if defendant had committed three prior felonies instead of the five suggested by the presentence report and noted by the court, that error did not produce a greater sentence, as defendant's criminal history was very extensive in any event and the sentence imposed was only three years over the minimum; one codefendant's lesser sentence was justified by his lesser criminal history, and, lacking details about the other codefendant's background, we could not say that his lesser sentence was unjustified.

¶ 2 Defendant, Michael M. Hall, appeals his sentence of concurrent terms of 13 years' incarceration for home invasion (720 ILCS 5/12-11(a)(2) (West 2010)) and armed violence with

a category II weapon (720 ILCS 5/33A-2(a) (West 2010)). He contends that the trial court plainly erred by considering nonexistent past felonies in aggravation and that his sentence is unfairly disparate to the sentences of two others involved in the crimes. We affirm.

¶ 3

I. BACKGROUND

¶ 4 On June 27, 2012, defendant pleaded guilty to home invasion and armed violence. In exchange, other charges against defendant were dismissed, but there was no agreement as to sentencing. The charges were based on defendant's accountability for the actions of Shane Smith and Francisco Esparza, who entered a home with weapons and struck a resident. Defendant had driven the men to the home, knew that they had been discussing robbing the victim, and saw that they had masks and weapons with them. He later said that he dropped them off at a corner near the home and left.

¶ 5 The presentence report showed that defendant had a lengthy criminal history with a juvenile offense in 1995 followed by 31 convictions between 1996 and 2007. He also had 11 arrests between 1996 and 2008 and 5 pending cases in which bond had been forfeited. Among defendant's listed convictions were the following felonies: (1) unlawful use of a weapon by a felon; (2) unlawful possession of a stolen motor vehicle (two counts); (3) unlawful possession of a controlled substance; and (4) unlawful possession of a controlled substance with intent to deliver. No felonies were listed before the item labeled as unlawful use of a weapon by a felon, and the narrative portion of the report referred to unlawful use of a weapon instead of unlawful use of a weapon by a felon. Defendant was sentenced to two years' probation for that offense. Defendant was asked at sentencing if there were any additions or corrections to the report. He did not present any complaints about how his criminal history was listed.

¶ 6 At sentencing, the State argued defendant's criminal history in aggravation and asked for a 25-year sentence. The defense presented a class completion certificate, a letter from defendant, and two letters attesting to his positive qualities. Defendant sought a 10-year sentence, arguing that he was minimally involved in the crimes, desired drug treatment, and had a wife and child. Defendant also argued that Esparza, who actually entered the victim's home and committed the acts, had received a 10-year sentence and a concurrent 7-year sentence. Smith's case was still pending at the time, but he later received an 11½-year sentence and a concurrent 4-year sentence.

¶ 7 The trial court noted that the harm inflicted was not extensive or life-threatening and noted other mitigating factors. The court then stated:

“The most aggravating factor here for [defendant] is his prior history. Numerous, numerous misdemeanor offenses, and by my count, five prior felony offenses that he has had.

I would note that he was released from mandatory supervised release on his last felony from the Department of Corrections in June of 2011, and five months later he is now committing another more—much more serious offense. So, apparently, there wasn't a lot learned during his stay in the Department of Corrections, nor during his period of mandatory supervised release.”

The court further noted that “there isn't really a lot in mitigation.”

¶ 8 The court also observed that Esparza had a much more limited criminal history with only one prior felony, while defendant had an extensive history with five prior felonies. The court then sentenced defendant to concurrent terms of 13 years' incarceration.

¶ 9 Defendant moved for reconsideration, arguing that the sentence was excessive when Esparza received a 10-year sentence. He did not contend that he actually had fewer than five

prior felony convictions. The trial court denied the motion, noting again that defendant had an extensive history with five prior felonies and that “it wasn’t exactly the first time he’s been in the system.” Defendant appeals.

¶ 10

II. ANALYSIS

¶ 11 Defendant first contends that resentencing is required because the trial court considered nonexistent felony convictions. He argues that he was not actually convicted of unlawful use of a weapon by a felon, but instead was convicted of misdemeanor unlawful use of a weapon. He also suggests that the trial court considered the listing of two counts of unlawful possession of a stolen motor vehicle as two separate felonies when it was actually a single act. Second, defendant asserts that his sentence is disproportionate to those of Esparza and Smith.

¶ 12 “[T]he trial court is in the best position to fashion a sentence that strikes an appropriate balance between the goals of protecting society and rehabilitating the defendant.” *People v. Risley*, 359 Ill. App. 3d 918, 920 (2005). Thus, we may not disturb a sentence within the applicable sentencing range unless the trial court abused its discretion. *People v. Stacey*, 193 Ill. 2d 203, 209-10 (2000). A sentence is an abuse of discretion only if it is at great variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense. *Id.* at 210. We may not substitute our judgment for that of the trial court merely because we might weigh the pertinent factors differently. *Id.* at 209.

¶ 13 In determining an appropriate sentence, relevant considerations include the nature of the crime, the protection of the public, deterrence, and punishment, as well as the defendant’s rehabilitative prospects. *People v. Kolzow*, 301 Ill. App. 3d 1, 8 (1998). The weight to be attributed to each factor in aggravation and mitigation depends upon the particular circumstances of the case. *Id.* There is a presumption that the 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 or relied on improper aggravating factors. *People v. Payne*, 294 Ill. App. 3d 254, 260 (1998).

¶ 14 Here, there is no dispute that the sentence was within the applicable statutory range. However, defendant contends that the trial court considered aggravating factors that did not exist. The State notes that defendant failed to raise the issue in the trial court, contends that the record does not definitively show that an error occurred, and argues that, even if error were found, defendant has not shown that the precise number of prior felonies was a significant factor in the court's overall basis for the sentence.

¶ 15 As the State correctly notes, defendant did not raise this issue to the trial court at sentencing or in his motion for reconsideration of his sentence. "To the extent that either the defendant or the State may believe that the presentence report contains inaccuracies, they have the burden to call any such inaccuracy to the court's attention at the start of the sentencing hearing." *People v. Yeast*, 236 Ill. App. 3d 84, 92 (1992). Further, the general rule is that any sentencing issues not raised in a motion to reconsider the sentence are forfeited. *People v. Yaworski*, 2011 IL App (2d) 090785, ¶ 5 (quoting *In re Angelique E.*, 389 Ill. App. 3d 430, 432 (2009)). However, defendant asks that we review the issue for plain error.

¶ 16 "The plain-error doctrine is a narrow and limited exception." *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). "To obtain relief under this rule, a defendant must first show that a clear or obvious error occurred." *Id.* "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.* "Under both prongs of the plain-error

doctrine, the defendant has the burden of persuasion.” *Id.* If the defendant fails to meet his burden, plain error will not be found. *Id.*

¶ 17 Here, defendant was specifically asked if he had any corrections to make to the presentence report, and he did not report any issues with how his prior history was described. Nevertheless, defendant argues that he was denied a fair sentencing hearing because the record shows that he was actually convicted of three prior felonies instead of five. The record does suggest that a discrepancy occurred; however, even if we assume that defendant had three prior felonies instead of five, he has failed to satisfy his burden to establish plain error.

¶ 18 Reliance on an improper factor in aggravation does not require that we remand for resentencing. *People v. White*, 114 Ill. 2d 61, 66-67 (1986). If we can determine from the record that the weight placed on an improper factor was so insignificant that it did not result in a greater sentence, then we need not remand for resentencing. *Id.* at 67. “In determining whether a sentence was improperly imposed, a reviewing court should not focus on a few words or statements of the trial judge. Instead, it should consider the record as a whole.” *People v. Dal Collo*, 294 Ill. App. 3d 893, 897 (1998). We will not remand for resentencing when the weight placed on the improper factor did not result in a harsher sentence than might otherwise have been imposed. See *People v. Freeman*, 404 Ill. App. 3d 978, 997 (2010).

¶ 19 Here, even if defendant had “only” three prior felonies, he was not denied a fair sentencing hearing when that factor would not have made a difference. See *id.* Although the trial court mentioned five felonies several times, each time was in the context of noting defendant’s extensive criminal history, which included numerous misdemeanors and the fact that he committed the present offenses, his most serious, shortly after the termination of his mandatory supervised release for another offense. As the court noted, there were few mitigating

circumstances, yet it sentenced defendant to an aggregate term of only three years over the minimum and much less than what the State asked for. See 720 ILCS 5/33A-3(a-5) (West 2010). Looking at the record as a whole, we cannot imagine that the trial court would have imposed a lesser sentence had it realized that the current offenses were “only” defendant’s fourth and fifth felonies.

¶ 20 Defendant next argues that his sentence is excessive because it is disproportionate to the sentences received by Esparza and Smith.

¶ 21 Generally, similarly situated defendants should not receive grossly disparate sentences. *People v. Tate*, 122 Ill. App. 3d 660, 668 (1984). However, fundamental fairness is not violated simply because one defendant is sentenced to a greater term than another. *People v. McCann*, 348 Ill. App. 3d 328, 339 (2004). “A disparity in sentencing may be justified by differences in the relative degree of involvement by the codefendants in the offense or any differences in their criminal histories, character or potential for rehabilitation.” *Id.*

¶ 22 Here, defendant has failed to show that his sentence is unfairly disparate to the sentence of either Smith or Esparza. As the trial court observed, Esparza had less of a criminal history than defendant, who had numerous past offenses and showed a pattern of recidivism. Nevertheless, as previously noted, defendant was sentenced to only three years over the minimum sentence for his convictions. See 720 ILCS 5/33A-3(a-5) (West 2010). As to Smith, we have no information about his background. Absent that information, we cannot say that defendant’s sentence was unfairly disparate to that of Smith.

¶ 23 III. CONCLUSION

¶ 24 The trial court did not abuse its discretion in imposing a 13-year sentence. Accordingly, the judgment of the circuit court of Du Page County is affirmed.

¶ 25 Affirmed.