THIRD DIVISION
June 22, 2011

No. 1-09-3108

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 06 CR 6439
	)	
MARTIZE STARKS,	)	
	)	Honorable
Defendant-Appellant.	)	Neera Lall Walsh,
	)	Judge Presiding.
	)	

JUSTICE MURPHY delivered the judgment of the court.
Quinn, P.J., and Neville, J., concurred in the judgment.

ORDER

HELD: Defendant was not denied his right to a fair and impartial trial where the prosecutor's improper comment did not cause him substantial prejudice. The trial court did not abuse its discretion by failing to instruct the jury that it must find that defendant knowingly and intentionally fired a firearm to also find that he "personally discharged a firearm" where the jury was first required to find that he knowingly and intentionally fired a firearm to find him guilty of first degree murder. Defendant's procedural default of his claim that the trial court considered an improper factor in determining his sentence is not excused under the plain-error doctrine where the record does not show that the court relied on the allegedly improper factor in determining his sentence.

Following a jury trial, defendant Martize Starks was found guilty of first degree murder and armed robbery and found to have personally discharged a firearm that proximately caused the death of the victim during the commission of the murder. Defendant was sentenced to a 50-year term of imprisonment for first degree murder, a 25-year term for having discharged a firearm during the commission of the murder, and a 10-year term for armed robbery, to be served consecutively. On appeal, defendant contends that he was denied his right to a fair and impartial trial by prosecutorial misconduct during rebuttal argument, that the trial court failed to properly instruct the jury regarding the sentencing enhancement for personally discharging a firearm, and that the trial court erred by improperly considering his prior arrests as an aggravating factor in determining his sentence. For the reasons that follow, we affirm.

BACKGROUND

Defendant was charged with the first degree murder and armed robbery of Donald Gooch. At trial, Fredrick Cannon testified that about 10:30 p.m. on February 16, 2006, Gooch picked him up from work and drove him to a bar at 71st Street and Michigan Avenue on the south side of Chicago. Cannon and Gooch remained at the bar for 1½ to 2 hours and noticed that the doors to Gooch's car were frozen shut when they went outside. Gooch put de-icer on the locks, and as they waited for the locks to thaw, defendant, who was wearing a Mickey Mouse jacket, approached them and asked if they had a lighter. Cannon then heard a clicking noise and saw that defendant was holding a gun. Defendant told Cannon and Gooch to go to the back of the car and get on their knees, and they did as they were told.

Defendant walked Cannon and Gooch down Michigan Avenue while holding his gun

against Cannon's side, and they passed a man Cannon knew as they did so. The man asked Cannon if he and Gooch were okay and defendant told him not to respond. After the man asked if they were okay a second time, defendant told Cannon to say something, and Cannon told the man that they were okay.

Defendant took Cannon and Gooch to the backyard of a house at 7148 South Michigan and told them to lean against the gate. Defendant took Cannon's wallet, keys, phone, and money, and then took Gooch's phone, keys, and money. As he did so, defendant put his gun in Gooch's mouth and told him he would "blow his head off" if he kept talking. Defendant received a phone call and told Cannon to walk to the side of the garage after he got off the phone. Gooch and defendant remained at the gate, and Cannon could not see them. A few seconds later, Cannon heard tussling, and then heard Gooch say "[r]un Fred run." Cannon jumped the gate into the alley and heard two or three gunshots as he ran away.

As Cannon ran down the alley, he saw a squad car and told Sergeant O'Malley, who was in the vehicle, that his friend had just been robbed. Sergeant O'Malley searched Cannon and took him to the scene of the robbery in his squad car. When they arrived in the backyard, Cannon saw Gooch lying on the ground by the gate. Cannon went with Sergeant O'Malley to 72nd Street and Michigan Avenue, where he identified the jacket defendant had been wearing, and then to a nearby alley, where he identified defendant, who was on the ground with four police officers and was no longer wearing his jacket.

Chicago police officer Renee Hopkins testified that slightly after 1 a.m. on February 17, 2006, she was in a marked squad car with her partner, Officer Hutchinson, in the vicinity of 71st

Street and Michigan Avenue when a man named Ezell Wilson approached the squad car and told the officers that a couple of his friends were walking down the street and were about to be robbed. Officer Hopkins then heard a couple of gunshots, and Officer Hutchinson drove their car to the vicinity of 72nd and Michigan, where Officer Hopkins saw defendant run out of an alley, throw a gun under a parked car, hold his hands up and say "they went that-away," and then run away. Officer Hopkins exited the vehicle and pursued defendant on foot. Defendant was subsequently apprehended by Officer McCants, who had joined in the chase.

Chicago police officer LaMoine McCants testified that a little after 1 a.m. on February 17, 2006, he responded to a call of a robbery in progress in the vicinity of 72nd Street and Michigan Avenue in a marked squad car with his partner, Officer McCall, and observed Officers Hopkins and Hutchinson confront defendant. The officers had their guns drawn and were telling defendant to step over to their car, and defendant was waving his hands and telling them "it's that way, it's that way; no, it's that way." Defendant then ran toward Officer McCants while Officer Hopkins chased him and turned down an alley. Officer McCants exited his vehicle, chased and caught defendant, handcuffed him, and performed an emergency takedown because he felt him reaching into his pockets. Officer McCants found money, Gooch's wallet, and a mask as he gained control of defendant.

Chicago police sergeant Michael O'Malley testified that shortly after 1 a.m. on February 17, 2006, he responded to a call of a robbery in progress near 71st Street and Michigan Avenue and saw Cannon jump over a fence into an alley. Cannon waved down Sergeant O'Malley, and he patted Cannon down and listened to what he was saying. Sergeant O'Malley then went into

the backyard where Cannon and Gooch had been robbed and saw Gooch's body on the ground. Sergeant O'Malley took Cannon to the location where the suspected offender had been apprehended, and Cannon identified defendant, who was on the ground.

Forensic investigator Carl Brasic testified that he arrived at 7148 South Michigan Avenue about 2:40 a.m. on February 17, 2006, and collected two cartridge cases, a black quilted jacket, and a wallet containing Cannon's identification cards. At 7152 South Michigan, Investigator Brasic discovered a .9-millimeter handgun underneath a silver car and took a swab of blood from the gun with a Q-tip. Investigator Brasic also took a blood swab from a backyard gangway at 7150 South Michigan, recovered a black Mickey Mouse jacket from the corner of 72nd and Michigan, and administered a gunshot residue test to defendant's hands and inventoried the test kit at the Area Two police station.

The parties stipulated that, if called, Dr. J. Lawrence Cogan would testify that he performed a post-mortem examination on Gooch on February 18, 2006, and discovered a gunshot wound to Gooch's neck, recovered the bullet that caused the wound, and submitted the bullet, a blood card, and clothing worn or accompanying Gooch to the police. Dr. Cogan concluded to a reasonable degree of scientific certainty that Gooch was killed by a gunshot wound to the neck.

The parties also stipulated that, if called, forensic scientist Douglas Ridolfi would testify that he collected blood swabs from the gun recovered by Investigator Brasic and shipped the swabs and a blood standard collected from Gooch to Orchid Cellmark Laboratories for DNA analysis. Rick Staub, the laboratory director at Orchid Cellmark Laboratories, testified that DNA analysis was conducted on the blood swabs taken from the gun and the blood standard taken

from Gooch and that a comparison of the DNA profiles obtained from the blood swabs and standard showed that they were identical. Staub opined within a reasonable degree of scientific certainty that Gooch's blood was on the gun. On cross-examination, Staub stated that additional items were tested, including blood stains collected from a jersey, a gangway, and defendant, and that none of those profiles matched that of Gooch.

Aimee Stevens, a forensic scientist specializing in firearms identification and related examinations, testified that she tested the gun recovered by Investigator Brasic and analyzed the bullet recovered from Gooch's body by Dr. Cogan and opined within a reasonable degree of scientific certainty that the bullet discovered in Gooch's body was fired by the gun recovered by Investigator Brasic. Robert Berk, a trace evidence analyst for the Illinois State Police, testified that he analyzed the gunshot residue kit obtained from defendant and identified gunshot residue particles on the sample stubs taken from both of defendant's hands.

The State then rested its case and the parties stipulated that, if called, forensic scientist Nicholas Richert would testify that he compared defendant's DNA profile to that found in a stain from a jersey collected from defendant and blood stains from defendant's hands and would testify to a degree of scientific certainty that the DNA profiles matched.

ANALYSIS

I. Prosecutorial Misconduct

Defendant first contends that the State violated his right to a fair and impartial trial when it engaged in prosecutorial misconduct by making an improper comment during rebuttal argument. It is improper for a prosecutor to argue assumptions or facts not based upon evidence

in the case. *People v. Smith*, 141 Ill. 2d 40, 60 (1990). A jury's verdict will not be disturbed on appeal due to prosecutorial misconduct, however, unless it can be said that the improper comment caused substantial prejudice to the defendant. *People v. Williams*, 192 Ill. 2d 548, 573 (2000). Whether a prosecutor's statement is so egregious that it warrants a new trial is a legal issue, which this court will review *de novo*. *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007).

The record shows that during rebuttal argument, the prosecutor stated that "Fred Cannon said he gets – defendant gets a phone call, he says, I got to kill you." Defense counsel objected to the comment, asserting "[t]hat was not the evidence," and the trial court sustained the objection. The record shows that Cannon did not testify that defendant said "I got to kill you," and that none of the evidence presented at trial showed that he had made such a statement. As such, the prosecutor's comment during rebuttal argument that Cannon testified that defendant had said "I got to kill you" was not based on the evidence and was therefore improper.

Defendant asserts that the prosecutor's improper comment likely contributed to the jury's finding of guilt, and that his conviction should therefore be reversed and the case remanded for a new trial. The State responds that the prosecutor's comment did not affect the jury's verdict because the trial court sustained defense counsel's objection to the comment and subsequently admonished the jury not to consider statements made in closing argument that were not supported by the evidence and the evidence of defendant's guilt was overwhelming.

A trial court is usually able to cure any prejudice arising from improper argument by promptly sustaining an objection to the challenged comment and giving a proper jury instruction. *People v. Johnson*, 208 Ill. 2d 53, 116 (2003). Defendant maintains that although the trial court

sustained defense counsel's objection to the prosecutor's improper comment in this case, it never instructed the jury that the remark should not be considered and was not evidence. The record shows, however, that following closing and rebuttal arguments, the trial court instructed the jury that "[n]either opening statements nor closing arguments are evidence, and any statement or argument made by the attorneys which is not based on the evidence should be disregarded."

Moreover, the evidence of defendant's guilt in this case is overwhelming. Cannon, who had the opportunity to observe the offender from a close distance and for an extended period of time, testified that defendant robbed him and Gooch at gunpoint and that he heard two or three gunshots shortly after defendant took Gooch out of his sight. Officer Hopkins testified that shortly after hearing gunshots, she saw defendant run out of an alley, throw a gun under a parked car, and attempt to flee, and Officer McCants testified that defendant was in possession of money, Gooch's wallet, and a mask when he apprehended him. In addition, the forensic evidence showed that the bullet recovered from Gooch's body was fired by the gun defendant had thrown under the car, that Gooch's blood was on the gun, and that defendant had gunshot residue particles on both his hands following his arrest. Thus, the forensic evidence and the testimony of the police officers corroborates Cannon's testimony, which established that defendant robbed Gooch and Cannon and shot Gooch after removing him from Cannon's presence.

While we agree with defendant that a prosecutor has an ethical obligation to refrain from engaging in improper closing and rebuttal arguments (*People v. Dunsworth*, 233 Ill. App. 3d 258, 269 (1992)), this court may not disturb a jury's verdict unless it can be said that the improper

comment caused substantial prejudice to the defendant such that the result of the trial would have been different had the challenged remark not been made (*Williams*, 192 Ill. 2d at 573). In this case, the improper comment consisted of a single remark (*People v. Brooks*, 345 Ill. App. 3d 945, 951 (2004)); the trial court sustained defense counsel's objection to the comment and later instructed the jury that closing arguments were not evidence and that any argument not based on the evidence should be disregarded; and the evidence of defendant's guilt was overwhelming. As such, we conclude that the prosecutor's comment did not cause defendant sufficient prejudice to justify disturbing the jury's verdict.

In reaching this conclusion, we have considered *People v. Wheeler*, 226 Ill. 2d 92, *People v. Roman*, 323 Ill. App. 3d 988 (2001), and *People v. Armstead*, 322 Ill. App. 3d 1 (2001), cited by defendant, and find them distinguishable from this case. In *Wheeler*, 226 Ill. 2d at 130, our supreme court held that the curative effect of a sustained objection is eliminated where the prosecutor persists in continuing the improper argument. In *Roman*, 323 Ill. App. 3d at 1000-01, this court held that the prosecutor's improper comments required reversal where the trial court did not sustain defense counsel's objections to the remarks and the evidence was closely balanced. In *Armstead*, 322 Ill. App. 3d at 15, this court held that due to the closeness of the evidence, the prosecutor's improper comment, together with other errors, constituted reversible error. In this case, however, the prosecutor's improper argument consisted of a single remark, the trial court sustained defense counsel's objection to the challenged comment, and the evidence of defendant's guilt was overwhelming.

II. Jury Instruction

Defendant next contends that the trial court erred by failing to properly instruct the jury regarding the sentencing enhancement for "personal discharge of a firearm." The purpose of jury instructions is to provide the jury with accurate legal principles to apply to the evidence so it can reach a correct verdict. *People v. Pierce*, 226 Ill. 2d 470, 475 (2007). "In a criminal case, the trial court is required to properly instruct the jury on the elements of the offense, the burden of proof, and the presumption of innocence." *People v. Lovejoy*, 235 Ill. 2d 97, 150 (2009). Any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 489 (2000); *People v. Green*, 225 Ill. 2d 612, 621 (2007). Thus, a trial court must instruct the jury as to the elements of a sentencing enhancement. *People v. Starnes*, 374 Ill. App. 3d 132, 139 (2007).

"A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death," he either intends to kill or do great bodily harm to that individual or knows that such acts will cause death to that individual. 720 ILCS 5/9-1(a)(1) (West 2004). A person who has committed the offense of first degree murder will have 25 years added to his term of imprisonment "if, during the commission of the offense, [he] personally discharged a firearm that proximately caused *** death to another person." 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2004).

The record shows that during the jury instruction conference, defense counsel objected to the trial court's intention to give the jury a modified version of Illinois Pattern Jury Instructions, Criminal No. 7B.07 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 7B.07), provided by the

State, which instructed that:

> "Before the additional fact alleged in connection with the offense of first degree murder may be found to exist, the State must prove the following proposition:
>
> Proposition: That, during the commission of the offense, the defendant personally discharged a firearm that proximately caused death to Donald Gooch.
>
> If you find from your consideration of all the evidence that the above Proposition has been proved beyond a reasonable doubt, then you should return the verdict form stating that you find the fact to exist.
>
> If you find from your consideration of all the evidence that the above Proposition has not been proved beyond a reasonable doubt, then you should return the verdict form stating that the additional fact does not exist."

Defense counsel asserted that the court should instead provide the jury with Illinois Pattern Jury Instructions, Criminal, No. 28.03 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 28.03), which provides that:

> "To sustain the allegation made in connection with the offense of first degree murder, the State must prove the following proposition:
>
> That during the commission of the offense of first degree murder the defendant personally discharged a firearm that proximately caused death to another person. A person is considered to have personally discharged a firearm when he, while armed with a firearm, knowingly and intentionally fires a firearm

causing the ammunition projectile to be forcefully expelled from the firearm.

If you find from your consideration of all the evidence that the above proposition has been proved beyond a reasonable doubt, then you should sign the verdict form finding the allegation was proven.

If you find from your consideration of all the evidence that the above proposition has not been proved beyond a reasonable doubt, then you should sign the verdict form finding the allegation was not proven."

The trial court, however, decided to tender the modified IPI Criminal 4th No. 7B.07 to the jury. Following closing arguments, the jury found defendant guilty of first degree murder and found that "the fact does exist that during the commission of the offense of first degree murder, [he] personally discharged a firearm that proximately caused the death of Gooch."

Defendant asserts that the trial court should have provided the jury with IPI Criminal 4th No. 28.03 because that instruction included the definition of the term "personally discharged a firearm" provided in the Criminal Code (720 ILCS 5/2-15.5 (West 2004) ("A person is considered to have 'personally discharged a firearm' when he or she, while armed with a firearm, knowingly and intentionally fires a firearm causing the ammunition projectile to be forcefully expelled from the firearm")). The State first responds that defendant has waived this issue for review by failing to specifically object to the omission of the cited definition for the term "personally discharged a firearm" from the challenged jury instruction in its posttrial motion for a new trial. The record shows, however, that defendant asserted in its motion for a new trial that the trial court erred by giving the jury the modified IPI Criminal 4th No. 7B.07 and failing to give

the jury IPI Criminal 4th 28.03, and thus properly preserved this issue for appellate review.

Generally, this court will apply the abuse of discretion standard when reviewing a trial court's decision to tender a certain jury instruction. *People v. Mohr*, 228 Ill. 2d 53, 66 (2008). Defendant maintains that this court should instead review this issue *de novo* because that is the correct standard of review where the question is whether the applicable law was accurately conveyed. *Barth v. State Farm Fire & Casualty Co.*, 228 Ill. 2d 163, 170 (2008). However, as the State points out in its brief, the language in the modified IPI Criminal 4th No. 7B.07 mirrors that set forth in the applicable portion of the Unified Code of Corrections (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2004) ("if, during the commission of the offense, the person personally discharged a firearm that proximately caused *** death to another person, 25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court")). Thus, the applicable law was accurately conveyed by the modified IPI Criminal 4th No. 7B.07, and we will therefore review the trial court's decision to provide the jury with that instruction instead of IPI Criminal 4th No. 28.03 to determine whether the court abused its discretion by doing so. A trial court abuses its discretion by providing a certain jury instruction if it is not clear enough to avoid misleading the jury. *Mohr*, 228 Ill. 2d at 66.

In this case, defendant was charged with first degree murder, and the jury was instructed that to sustain that charge, the State must prove that he performed the acts that caused Gooch's death and that when he did so, "he intended to kill or do great bodily harm to Donald Gooch; or he knew that his acts would cause death to Donald Gooch; or he knew that his acts created a strong probability of death or great bodily harm to Donald Gooch." At trial, the parties stipulated

to the testimony of Dr. Cogan that Gooch was killed by a gunshot wound to the neck, and the State presented additional evidence showing that defendant was the person who shot Gooch and inflicted the fatal wound. Thus, in order to find defendant guilty of first degree murder, the jury was required to find that defendant shot Gooch and intended to kill him or cause him great bodily harm when he did so or that he knew his acts created a strong probability of death or great bodily harm to Gooch. 720 ILCS 5/9-1(a)(1), (a)(2) (West 2004). Since the sentencing enhancement could only be applied to defendant if he was first found guilty of first degree murder (730 ILCS 5/5-8-1(a) (West 2004)), there was no need to further instruct the jury that in order to find that the fact existed that he "personally discharged a firearm" it must also find that he fired the firearm intentionally and knowingly because it could not have found him guilty of first degree murder without first finding that he intentionally and knowingly shot Gooch. We therefore conclude that the trial court did not abuse its discretion by tendering the jury the modified IPI Criminal 4th No. 7B.07 instead of IPI Criminal 4th No. 28.03.

In reaching this conclusion, we have considered *People v. Ramey*, 151 Ill. 2d 498 (1992), cited by defendant, and find it distinguishable from this case. In *Ramey*, *id.* at 539-40, the defendant contended that the sentencing jury was improperly instructed at the eligibility phase of the death penalty hearing because the jury was not instructed that the State was required to prove that he acted with the intent to kill or with the knowledge that his acts created a strong probability of death or great bodily harm. Our supreme court held that in order to find the defendant eligible for the death penalty, the jury was required to find that he acted with the requisite intent, and that the defendant's death sentence must be vacated where the challenged

jury instruction did not include that intent requirement, the jury was instructed on various alternative theories of murder including felony murder, and the jury returned a general guilty verdict. *Id.* at 540-41, 544-46.

In this case, however, the jury was only instructed on theories of murder that required the State to prove that defendant acted with the intent to kill Gooch or cause him great bodily harm or the knowledge that his acts created a strong probability of death or great bodily harm to Gooch. Thus, unlike in *Ramey*, *id.* at 544, where the court held that the jury could have found the defendant eligible for the death penalty if it determined that he accidentally caused the victim's death under the challenged jury instruction, in this case the jury could not have determined that defendant was subject to the sentencing enhancement for having "personally discharged a firearm" if it determined that he accidentally shot Gooch because it then could not have first found him guilty of first degree murder.

III. Sentencing

Defendant further contends that the trial court erred by considering the improper factor of his prior arrests in determining his sentence. Where the sentence imposed by the trial court falls within the statutory range permissible for the offense of which the defendant is convicted, a reviewing court may disturb that sentence only if the trial court has abused its discretion. *People v. Jones*, 168 Ill. 2d 367, 373-74 (1995).

Defendant does not dispute that his sentence of 50 years' imprisonment falls within the permissible statutory range for the crime of first degree murder, but instead asserts that the trial court improperly relied on his prior arrests in determining his sentence. The State first responds

that defendant has waived this issue by failing to include it in his motion to reconsider sentence. A defendant generally waives a claim of a sentencing error by failing to raise that issue in a postsentencing motion. *People v. McDade*, 345 Ill. App. 3d 912, 914 (2004).

Defendant maintains, however, that this court should review this issue under the plain-error doctrine because the error is alleged to have been a result of judicial conduct. In doing so, defendant cites to *People v. Zapata*, 347 Ill. App. 3d 956, 963-64 (2004), in which this court stated that "the waiver rule is less rigidly applied when the basis for the objection is the trial judge's conduct" and cited to our supreme court's holding in *People v. Nevitt*, 135 Ill. 2d 423, 455 (1990), in which it cited to its previous holding in *People v. Sprinkle*, 27 Ill. 2d 398, 400-01 (1963), in support of that proposition. Our supreme court has recently commented on the *Sprinkle* doctrine in *People v. Thompson*, 238 Ill. 2d 598, 612 (2010), and clarified that "[t]he failure to preserve an error will be excused under the *Sprinkle* doctrine only in extraordinary circumstances, *** such as when a judge makes inappropriate remarks to a jury or relies on social commentary instead of evidence in imposing a death sentence." In this case, there is no indication that the trial court would have ignored a challenge by defendant to its alleged reliance on his prior arrests in determining his sentence, and we therefore determine that there is no compelling reason to relax the forfeiture rule on the basis of the *Sprinkle* doctrine. *Id.*

The plain-error rule bypasses normal forfeiture principles and permits reviewing courts to consider unpreserved error in certain circumstances. *People v. Averett*, 237 Ill. 2d 1, 18 (2010). A reviewing court may consider unpreserved error under the plain-error doctrine when 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 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. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). The first step in conducting plain-error review is to determine whether error occurred at all. *People v. Walker*, 232 Ill. 2d 113, 124-25 (2009).

While a court may consider evidence of criminal conduct unrelated to the offense of which a defendant has been convicted during sentencing, bare arrests and pending charges may not be considered as factors in aggravation. *People v. Johnson*, 347 Ill. App. 3d 570, 575 (2004). A sentence based on improper factors may be affirmed where the record establishes that the weight placed on an improperly considered aggravating factor was so insignificant that it did not result in an increase to the defendant's sentence. *People v. Whitney*, 297 Ill. App. 3d 965, 971 (1998).

The record shows that during the sentencing hearing, the State argued in aggravation that defendant had 25 prior arrests and six prior felony convictions and that the murder of Gooch was senseless. The State also summarized the facts of each of defendant's six prior felony convictions and noted that he was on parole when he robbed and murdered Gooch. In handing down its sentence, the court stated that it had the opportunity to sit through the trial and sentencing hearing and consider all the statutory factors in aggravation and mitigation and that the murder of Gooch was "incredibly senseless" and "incredibly stupid."

Thus, there is no indication in the record that the court relied on defendant's prior arrests in determining his sentence. Although defendant maintains that his 50-year sentence is not

justified by his prior felony convictions, it is the province of the trial court to balance factors in aggravation and mitigation and make a reasoned decision as to the appropriate punishment (*People v. Streit*, 142 Ill. 2d 13, 21 (1991)), and it is not our prerogative to reweigh these factors and independently decide that the sentence is excessive (*People v. Alexander*, 239 Ill. 2d 205, 214 (2010)). The evidence presented at the sentencing hearing showed that defendant had six prior felony convictions and was on parole when he robbed and murdered Gooch, and the evidence presented at trial convinced the court that "this was an incredibly senseless crime." We therefore determine that the trial court did not rely on an improper factor in sentencing defendant and that the court did not abuse its discretion by sentencing him to 50 years' imprisonment for the murder of Gooch. As such, there is no error by the trial court to rise to the level of plain error to excuse defendant's procedural default of this issue in this case.

CONCLUSION

Accordingly, we affirm the judgment of the circuit court of Cook County.

Affirmed.