FIFTH DIVISION
May 24, 2013

No. 1-10-3160

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, Illinois.
	)	
	)	
	)	No. 07 CR 9627
v.	)	
	)	
JERRY DAY,	)	Honorable
	)	Angela Munari Petrone,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE TAYLOR delivered the judgment of the court.
Presiding Justice McBride and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant forfeited his claim that a visitor's log was admitted without sufficient foundation by stating in court that he had no objections. Further, the prosecutor's remarks on witnesses' credibility did not warrant reversal where they were based on evidence presented at trial. Lastly, the circuit court did not abuse its discretion at sentencing by stating in passing that defendant's actions caused the victim's death or considering evidence that the offense was related to gang activity.

¶ 2 Following a jury trial, defendant Jerry Day was found guilty of the first degree murder of Darin Riggins, and sentenced to 40 years' imprisonment plus a 25-year add-on prison sentence for the use of a firearm. On appeal, defendant contends that his conviction should be reversed and this cause remanded for a new trial because the trial court improperly allowed the State to introduce into evidence a computer printout without properly establishing a foundation for it, and because the court erred in allowing the prosecution to make inflammatory remarks in which the prosecutor interjected his personal opinion. Alternatively defendant contends that his sentence should be either reduced or vacated and his cause remanded for resentencing because the circuit court considered two improper factors in aggravation when ordering his sentence.

¶ 3 BACKGROUND

¶ 4 The record shows that defendant was charged with first degree murder in connection with an incident which occurred in the evening hours of March 19, 2007, on the west side of Chicago. The State first called Joe Brackenridge, who testified that he and the victim were friends, and were both members of a gang called the Four Corner Hustlers. On the night in question, Brackenridge went to a park located at Division and Pulaski streets, where he saw the victim intoxicated and talking to one Kenyatta McLaurin, who was a member of a rival gang named Double I Vice Lords. Brackenridge further stated that defendant was a member of a different gang called the Mafia, and explained that the Mafia and Double I's were both competing with the Four Corner Hustlers for control over the drug spot at the corner of Division and Pulaski, which, at the time of the murder, was controlled by the victim. According to Brackenridge, the Mafia and the Double I's were affiliated and under the same "umbrella."

¶ 5 Brackenridge further testified that McLaurin took off running when he saw Brackenridge approach them, at which point Brackenridge wanted to leave that area, but the victim told him that he wanted to "pick up his cell phone," so they went to the cell phone store across the alley from the park. After they came out of the store, the victim walked towards the alley between the cell phone store and the park, and was approached by defendant, McLaurin and other members of the Double I's. The rest of the crowd of Double I's jumped on and began beating the victim, while defendant stood there with a gun in his hand. After the others stopped beating the victim, defendant shot him from about 6 or 7 feet away as the victim tried to stand up. After a short pause, defendant shot the victim again multiple times while backing onto Pulaski street, causing cars to stop due to gunfire. According to Brackenridge, the Double I's took over the drug selling spot at Pulaski and Division, but admitted that they did not begin to sell drugs at that spot until a month and a half after the victim's murder.

¶ 6 Raymond Andrus, a social worker who had known the victim for 12 to 15 years, also testified for the State. He stated that on the night in question, he was at the park at Division and Pulaski playing basketball with the victim and other members of the community. At about 9 pm, McLaurin and one Antonio Woods approached the group and began arguing with a member of the Four Corner Hustlers named Frank Nitty. The argument escalated and led to McLaurin walking away saying that Nitty could talk to McLaurin's gun when he got back.

¶ 7 Andrus stated that once McLaurin and Woods left, the victim went to the phone store across the street with Andrus and the others that remained, but Andrus soon left for a liquor store and then sat in his car, which was parked on Pulaski near Division. While in his car, Andrus saw

McLaurin and Woods coming down the street, accompanied by several others. McLaurin gave some kind of signal to a car across the street indicating that "everything is all good," at which moment the victim exited the phone store. After briefly speaking to the victim, McLaurin began hitting him. The victim fell to the ground, and Andrus heard shots coming from the alley in front of him by the phone store. When Andrus looked in that direction, he saw defendant quickly firing 8 to 10 shots with an automatic weapon as he backed up and ran across the street right past Andrus, who was able to recognize defendant, who he had known for over 20 years.

¶ 8 The State also called McLaurin, who testified that he is, in fact, a member of the Double I gang, but denied that his gang was battling for the control of the drug spot at Pulaski and Division and that the Double I's gained control of that spot after the victim's murder. He further stated that on the night of the murder, he was at the park at Division and Pulaski, where he also saw defendant and Woods. McLaurin testified that he argued and physically fought with the victim, but left while the victim was still standing. He came back when the victim called out to him, and broke up a fight between the victim and Woods. McLaurin left again, and as he walked away from the victim and towards Augusta street to pick up his car, he heard two shots and started running, but stated that he did not see defendant "right there."

¶ 9 Woods, another member of the Double I's, testified for the State that he knew defendant, but did not know to which gang he belonged. Woods knew that the victim was a member of the Four Corner Hustlers, but did not know who ran the drug spot at Pulaski and Division. On the night of the murder, Woods was in that area with McLaurin, but testified that he did not see who shot the victim. According to Woods, he and the victim began to argue, and when it evolved into

a physical altercation, McLaurin joined the fight to help Woods. When the fight ended, Woods heard two shots being fired and ran towards Augusta. He denied having seen defendant there with a gun that night. Woods further stated that he and McLaurin were the only Double I's there at that time, and that there were other Four Corner Hustlers in the alley, including Brackenridge, who was carrying a gun.

¶ 10 Woods acknowledged in a written statement to the police in which he identified defendant as the shooter, but stated that the police officers had threatened to charge him with attempted murder if he did not make that identification. He further testified that the police worked with him for at least eight hours rehearsing the statement to the Assistant State's Attorney (ASA), in which he would identify defendant as the one who shot the victim. Woods acknowledged, however, that he admitted in his signed statement that no threats or promises had been made to induce him to make that statement, but he claimed that he was afraid that the police would frame him. He further admitted to testifying before a grand jury that it was defendant that shot the victim, and that he never told the ASA, either at the police station or at the grand jury, that the police had threatened him.

¶ 11 Moreover, ASA Jason Kopec, who took Woods' signed written statement, testified that Woods never told him that he was threatened. Similarly, Detective Senner, who interviewed Woods, testified that neither he, nor anyone in his presence, ever told Woods what to say in his statement, or ever threatened to charge Woods with attempted murder. Woods' written statement and his grand jury testimony, both of which identified defendant as the shooter, were admitted as substantive evidence.

¶ 12 Kevin Siler, another witness to the shooting and friend of the victim, testified at trial that he was present when the victim was shot and that he saw the person who shot him, but could not recall who that was or what the shooter looked like. Siler also could not remember whether there was a turf war over the drug selling spot at Division and Pulaski, and could not recall what he had told the police, the ASA, or the Grand Jury about the night of the murder. However, detective Kevin Bor testified that when he showed Siler a photo array, Siler identified defendant as the shooter. Furthermore, Siler's handwritten statement and Grand Jury testimony were admitted as substantive evidence once ASA Aaron Bond testified to taking Siler's statement and ASA John Carrol testified to presenting Siler to the Grand Jury.

¶ 13 In both his written statement and Grand Jury testimony, Siler stated that in March of 2007, the Double I's and the Mafia were engaged in a turf war with the Four Corner Hustlers. On the night of the murder, Siler was at the park at Division and Pulaski, where he saw the victim talking to McLaurin, Woods and one Melvin Davis. Siler saw a van pull up and McLaurin told one of the four men who exited the van that the victim had called him a derogatory name. Once the van drove off, Woods and the victim began fighting, and the victim fell to the ground. Siler heard a gunshot, which hit the victim, and when he turned towards the direction from which he heard the shot, Siler saw defendant pointing a gun at the victim. According to Siler's written statement and Grand Jury testimony, defendant fired 8 to 9 more shots, and Siler was able to see defendant's face because the street was illuminated and defendant fired the shots from 10 to 15 feet away from Siler. He stated that defendant shot the victim with a 9 millimeter semi-automatic weapon, and was the only person on the scene carrying a gun.

¶ 14 After the State's case-in-chief, defense counsel called Dominique Armstead, who testified that it was McLaurin, not defendant, who shot the victim. Armstead stated that he, like the victim, was a member of the Four Corner Hustlers, and had been selling drugs for the victim since he was 16 years old. He further testified that he was at Division and Pulaski when the victim was shot, but defendant was not "out there." According to Armstead, the victim and McLaurin had an argument, which led to McLaurin and his friends jumping on the victim. As the fight began to break up, Armstead saw McLaurin pull out a gun and fire shots, at which point Armstead ran away. While Armstead did not initially see whether McLaurin actually shot the victim, he came back to the scene and found that the victim had been shot.

¶ 15 Armstead further testified that while he had seen defendant in the neighborhood, he did not really know defendant and did not know his name prior to speaking to defense counsel. He acknowledged that he told defendant's attorney that defendant was not there when the victim was killed, despite not knowing defendant's name and not being shown a picture of him. When asked how he knew who the attorney was referring to, Armstead stated that he did not know. Armstead denied visiting defendant in jail, or identifying himself as defendant's cousin.

¶ 16 In rebuttal, the State called Juan Diaz, the superintendent of the criminal intelligence unit of the Cook County Sheriff's Office, who testified that he oversees security at the Cook County jail. Diaz explained that an individual who comes to visit must first go through a screening process in which he is required to produce some form of picture identification, such as a State ID, and asked for his relationship with the inmate who he seeks to visit. He acknowledged, however, that visitors did not have to sign in. According to Diaz, the jail personnel then records

this information before allowing the individual to visit the inmate, in a log that is kept for each inmate in the regular course of business.

¶ 17 Diaz further attested that a document marked "People's Exhibit 55" was a computer printout of the Cook County jail visitor's log as it pertained to defendant. That log indicated that on May 18, 2007, at 7:21 pm, an individual with the name "Domin Armstead" visited defendant in jail, whose relationship to him was described as "cous," which meant cousin. In fact, the record contains a document titled "Cook County Sheriff's Office Inmate Visitation Schedule," which appears to be the computer printout described by Diaz' testimony. The trial court admitted the visitor's log into evidence after defense counsel stated that he had no objections to it.

¶ 18 The State was then granted leave to present a portion of defendant's videotaped interview, in rebuttal of Armstead's testimony that defendant was not present when the victim was shot. In that interview, defendant initially told Detective Bor that he was at home with his mother when the victim was shot, but then stated that he did not know when the murder occurred. Contrary to his initial statement, defendant then said that he was walking around the park when the victim was killed, and that he ran when he heard the shots.

¶ 19 During closing arguments, the State made the following remarks:

¶ 20 "Let's first talk about Domini[que] Armstead. If not legally contemptible, it's certainly offensive and reprehensible. The shear [sic] gall and audacity to walk in here, take an oath, look you people in the eye, and just flat out, bald-faced lie to you is astounding, it's staggering. *** "Dominique Armstead wouldn't know the truth if it slid along his belly and bit him in the ankle."

¶ 21 The State further remarked, with regard to defendant's videotaped interview:

¶ 22 "I'm not a poker player, but I know a little bit about it, but if you ever happen to be playing poker with Jerry Day (indicating), watch for him to put his hand on his chin and on the back of his head cuz [sic] that's his tell. In the video that's how you can tell he's lying."

¶ 23 The jury found defendant guilty of first-degree murder, and specifically found that defendant personally discharged the firearm that proximately caused the victim's death. Defendant filed a motion for a new trial, which was denied.

¶ 24 At defendant's sentencing hearing, the trial court initially stated:

¶ 25 "I'm looking at the statutory factors in aggravation and mitigation. In aggravation... did the defendant's conduct cause or threaten serious harm to others. Yes it did. It resulted in the death of one human being and threatened serious harm to many more who were out on the street."

¶ 26 The court then noted that defendant had a criminal history, although not extensive, that the offense was related to activities of an organized gang, that defendant did not express regret, and that pre-sentencing investigation showed that defendant had shot the victim on a prior occasion. In mitigation, the court considered the effect that defendant's incarceration would have on his family and that he was seasonally employed during parts of his life. The trial court then sentenced defendant to a mid-range sentence of 40 years' imprisonment, as well as a firearm add-on sentence of 25 years.

¶ 27 Defendant filed a motion to reconsider his sentence, which was denied. In doing so, the trial court rejected defendant's argument that the court had improperly considered matters that are implicit in the offense.

¶ 28 ANALYSIS

¶ 29 On appeal from that judgment, defendant first contends that his conviction should be reversed and his cause remanded for a new trial because the trial court improperly admitted into evidence the computer printout of the Cook County jail visitor's log. Defendant maintains that the State failed to establish a sufficient foundation for the introduction of the exhibit. Since that visitor's log attacked the credibility of Armstead, the crucial defense witness, by indicating that he is related to defendant, defendant now argues that he was denied a fair trial due to the improper admission of that document.

¶ 30 Defendant acknowledges that he failed to preserve this alleged error for review because he did not object in court or raise this issue in his post trial motion, but argues that this question should nevertheless be addressed under the plain error doctrine. *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007). The State responds that plain error is not applicable to this case because defendant did not merely forfeit that issue by failing to object to the introduction of the visitor's log at the trial court, but essentially stipulated to the admission of that document by stating in court that he had no objection to it. Defendant replies that he did not affirmatively stipulate to the sufficiency of the foundation for the admission of the visitor's log, but merely failed to raise a timely objection.

¶ 31 The plain error doctrine allows a reviewing court to consider unpreserved error where the evidence is so closely balanced that the error alone may have caused the scales of justice to tip against defendant, or where a clear error occurred that is so serious that it affected the fairness of the trial and challenged the integrity of the judicial process. *Piatkowski*, 225 Ill. 2d at 564-565.

However, plain error analysis applies only to procedural default, not affirmative acquiescence. *People v. Bowens*, 407 Ill. App. 3d 1094, 1101 (2011) (internal citations omitted). Further, our supreme court has repeatedly held that when a defendant procures, invites or acquiesces to the admission of evidence, even if the evidence is improper, he cannot contest the admission on appeal. *People v. Bush*, 214 Ill. 2d 318, 332 (2005); *People v. Caffey*, 205 Ill. 2d 52, 114 (2001). In fact, this court has noted that "an objection requirement is especially important in cases of an improper foundation because errors in laying a foundation are easily cured." *People v. Rigsby*, 383 Ill. App. 3d 818, 823 (2008), citing *People v. DeLuna*, 334 Ill. App. 3d 1, 21 (2001).

¶ 32 Here, as noted above, when the State moved to introduce the visitor's log into evidence, defense counsel stated "[n]o objection." Even if he did not specifically stipulate to the sufficiency of the foundation for the log, he nevertheless acquiesced to the admission of that document such that he can no longer contest it. See *Caffey*, 205 Ill. 2d at 114-15 (where defendant did not stipulate to the introduction of the challenged evidence, our supreme court found that he sufficiently "acquiesced" to the evidence when he stated that he had "no objection" to the State's request to introduce it).

¶ 33 Defendant next contends that his conviction should nevertheless be reversed because the prosecutor made inflammatory closing remarks about Armstead and defendant's lack of credibility. According to defendant, the prosecutor improperly implied that the jury should disregard Armstead's testimony that McLaurin was the shooter based on his personal opinion that Armstead was a habitual liar, and did so in a manner meant to inflame the jury against Armstead. Defendant further maintains that the prosecutor improperly expressed his personal opinion about

defendant's credibility in the videotaped interrogation by stating that he could tell when defendant was lying based on his physical movements.

¶ 34 While defendant acknowledges that he failed to preserve those arguments for review, he again insists that we should nevertheless address them as a plain error. *Piatkowski*, 225 Ill. 2d at 564. Before conducting plain error review, we must first determine whether any error occurred at all. *People v. Ingram*, 1-07-2229, slip op. at 14 (May 17, 2010). In doing so, we note that due to an apparent conflict between Illinois supreme court cases, such as *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007); and *People v. Blue*, 189 Ill. 2d 99, 128 (2000), it is unclear what the proper standard of review is when determining the propriety of a prosecutor's remarks. See, *e.g.*, *People v. Hayes*, 409 Ill. App. 3d 612, 624 (2011) (recognizing the conflict and noting that while *Wheeler* applies a *de novo* standard, *Blue* and others apply abuse of discretion). However, as in *Hayes*, 409 Ill. App. 3d at 624, we need not determine the standard of review because our conclusion would be the same under either a *de novo* or abuse of discretion standard.

¶ 35 Prosecutors are afforded a wide latitude in closing argument, and " 'will result in reversible error only when they engender 'substantial prejudice' against the defendant to the extent that it is impossible to determine whether the verdict of the jury was caused by the comments or the evidence.' " *People v. Kirchner*, 194 Ill. 2d 502, 549 (2000), quoting *People v. Macri*, 185 Ill. 2d 1, 62 (1998). Challenged remarks must be viewed within the context of the closing argument in its entirety. *Id*. In fact, our supreme court has held that a prosecutor's remarks do not warrant reversal if the State's evidence of guilt was " 'substantial,' " rather than closely balanced. *People v. Smith*, 152 Ill. 2d 229, 268 (1992), quoting *People v. Henderson*,

142 Ill. 2d 258, 322-26 (1990).

¶ 36 Here, there was strong evidence of defendant's guilt. Both Brackenridge and Andrus, who were present at the scene, testified to seeing defendant shoot the victim. Further, while Woods and Siler denied seeing who shot the victim, they admitted to identifying defendant as the shooter to the police. Although McLaurin did not identify the shooter, his account of the event that led up to the shooting was consistent with the accounts of all the other witnesses who, at one point, identified defendant as the person who fired the weapon that killed the victim. On the other hand, the only witness who testified that it was McLaurin who shot the victim and that defendant was not present, was impeached with evidence that, contrary to his testimony, showed that he not only knew defendant, but was his cousin and visited him in jail. Further, defendant himself contradicted Armstead's testimony in his videotaped interview by first stating that he was at home at the time of the shooting and then changing his statement to say that he was near the shooting. Since the evidence against defendant was substantial and not closely balanced, the prosecutor's remarks do not warrant reversal.

¶ 37 In fact, regardless of the amount of evidence against defendant, the prosecutor's remarks were not improper. A prosecutor may comment on the evidence presented and draw any "legitimate inferences" from such evidence. *People v. Smith*, 177 Ill. 2d 53, 80 (1997). While it is it prejudicial error for a prosecutor to express his personal beliefs or opinions (*People v. Lee*, 229 Ill. App. 3d 254, 260 (1992)), the State may challenge the credibility of a defendant or that of his theory of defense during closing argument if there is evidence to support that challenge (*Kirchner*, 194 Ill. 2d at 549). See, e.g., *People v. Gray*, 406 Ill. App. 3d 466, 475 (2010)

(prosecutor properly commented on the State's witness' credibility by noting that he is no longer a drug dealer and has taken a job as a soldier, where it was supported by evidence).

¶ 38 Defendant in this case challenges the prosecutor's remarks that Armstead had the "gall and audacity" to lie under oath, "tried to circumvent everything our system is about," and "wouldn't know the truth if it slid along his belly and bit him in the ankle." As discussed above however, the record shows that Armstead's testimony was impeached in various ways. The visitor's log showed that, contrary to his statement that he did not know defendant, he was defendant's cousin. Further, while Armstead claimed that he did not know defendant's name, he admitted to telling defense counsel that defendant was not present at the shooting, even though he was not shown any pictures of defendant. Thus, there was ample evidence to support the State's challenge of Armstead's credibility and support the inference that he lied.

¶ 39 Similarly, while defendant challenges the prosecutor's comment that he could tell from the video when defendant was lying because he put his hand on his chin and on the back of his head, there was also evidence that impeached defendant's testimony in that interview. As noted above, while defendant first claimed that he was at home at the time of the shooting, he quickly retracted his statement and claimed that he was near enough to hear it. In fact, the demeanor of a witness is a proper subject for closing argument when supported by the evidence (*People v. Morgan*, 259 Ill. 2d 770, 784 (2001)), even if the testimony in question is a videotaped interview (See, e.g., *People v. Theis*, 2011 IL App (2nd) 91080, ¶56, 59).

¶ 40 Defendant's reliance on *People v. Lee*, 229 Ill. App. 3d 254 (1997); and *People v. Davis*, 287 Ill. App. 3d 46 (1997), for the proposition that the prosecutor improperly expressed his

personal opinion on the witnesses' credibility, is misplaced. Unlike this case, the prosecutor in *Lee*, 229 Ill. App. 3d at 260, vouched for the credibility of a police officer, explicitly stating that he was honest in the prosecutor's "humble opinion," where no evidence bolstering the officer's veracity was introduced. Similarly, it appears that the prosecutor in *Davis*, 287 Ill. App. 3d at 57, based his statement that the defense witnesses were liars on the integrity of the State's Attorney's Office, rather than evidence.

¶ 41 In any event, any possible prejudice from the prosecutor's remarks have been cured by the trial court's instructions to the jury. As this court has recognized with respect to counsel's potentially prejudicial remarks, trial courts " 'may cure such errors by giving proper jury instructions on the law, informing the jury that counsel's arguments are not evidence and to be disregarded if not supported by the evidence at trial.' " *People v. Gonzalez*, 388 Ill. App. 3d 566, 598 (2008), quoting *People v. Tijerina*, 381 Ill. App. 3d 1024, 1032-33 (2008), citing *People v. Simms*, 192 Ill. 2d 348, 396 (2000).

¶ 42 The court in this case told the jury that they should use their own recollection of the evidence when defense counsel objected to the first challenged remark. Further, it instructed the jury after closing arguments, *inter alia*, that:

> ¶ 43 "It is your duty to determine the facts and to determine them only from the evidence in this case. ***
>
> ¶ 44 "Only you are the judges of the believability of the witnesses and of the weight to be given to the testimony of each of them. ***
>
> ¶ 45 "Closing arguments are made by the attorneys to discuss the facts and

> circumstances in the case and should be confined to the evidence and to reasonable inferences to be drawn from the evidence. Neither opening statements nor closing statements are evidence, and any statement or argument made by the attorneys which is not based on the evidence must be disregarded. ***
>
> ¶ 46 "You have before you evidence the defendant made statements relating to the offense charged in the indictment. It is for you to determine whether the defendant made the statements, and, if so, what weight to be given to those statements."

¶ 47 Under these circumstances, we conclude that not only was there no error in the prosecution's closing arguments, but also that any possible error would have been cured by the court's instructions and was not sufficiently prejudicial so as to warrant reversal.

¶ 48 Defendant next contends, alternatively, that he was denied a fair trial by the cumulative effect of: (1) the alleged error in admitting without sufficient foundation the visitor's log which impeached the only defense witness; and (2) the closing remarks by the prosecutor that affected the credibility of defendant and Armstead.

¶ 49 Cumulative error is applicable only in cases where errors that are not individually considered sufficiently grave to entitle defendant to a new trial cumulatively "create a pervasive pattern of unfair prejudice to defendant's case," in which case a new trial may be granted. *People v. Mendez*, 318 Ill. App. 3d 1145, 1154 (2001), citing *People v. Blue*, 189 Ill. 2d 99, 139 (2000). However, since defendant has forfeited the issue of whether the State presented sufficient foundation for the admission of the visitor's log, and we concluded that the prosecutor's remarks were not improper, there can be no cumulative effect. See, e.g., *People v. Favors*, 254 Ill. App.

3d 876, 898 (1993), quoting *People v. Albanese*, 102 Ill. 2d 54, 83 (1984) (" '[T]he whole can be no greater than the sum of its parts.' ").

¶ 50 Lastly, defendant contends that his sentence should be vacated and his cause remanded for a new sentencing hearing because the trial court considered in aggravation two improper factors in determining his sentence. He specifically points to the trial court's reference to the fact that a person was killed, which was inherent in the offense, as well as to the fact that the offense was gang related, which defendant claims was never proved.

¶ 51 Sentencing is discretionary with the circuit court, and will not be disturbed absent an abuse of discretion. *People v. Smith*, 242 Ill. App. 3d 344, 352 (1993). In fact, the circuit court is presumed to have based the sentence on proper legal reasoning and competent evidence, and reviewing courts are reluctant to change a sentence that is within the statutory guidelines. *Id.*, see also *People v. Burdine*, 362 Ill. App. 3d 19, 25 (2005).

¶ 52 We initially note, and the parties do not dispute, that the 40-year sentence for first-degree murder with a 25-year firearm enhancement imposed on defendant was withing the range prescribed by the Uniform Code of Corrections. 730 ILCS 5/5-4.5-20, 5-8-1(1)(d)(iii) (West 2009). Defendant relies on *People v. Heider*, 231 Ill. 2d 1, 21-22 (2008); and *People v. Saldivar*, 113 Ill. 2d 256, 272 (1986), for the proposition that the circuit court improperly considered the death of the victim, a factor which is inherent in the crime of murder.

¶ 53 While the circuit court is prohibited from considering in aggravation a factor inherent in the offense (*Saldivar*, 113 Ill. 2d at 271), a sentence based on such a factor can be affirmed if the reviewing court can determine, from the record, that the circuit court's reliance on that factor was

insignificant (*People v. Beals*, 162 Ill. 2d 497, 508; *Smith*, 242 Ill. App. 3d at 352). Thus, remandment is not required where it is clear from the record that the reference to the otherwise improper factor was merely a passing comment and that the circuit court relied on other aggravating factors to determine defendant's sentence. See, e.g., *Beals*, 162 Ill. 2d at 508-09 (court's statement that defendant's conduct caused the loss of a human life, in sentencing him for murder, did not warrant resentencing because the court never stated that it actually considered it in aggravation, and the record showed that it relied on numerous other factors to determine defendant's sentence, such as the victim's age and the need to deter defendant.)

¶ 54 As noted above, the circuit court in this case stated that not only did defendant's conduct cause the victim's death, but it also threatened serious harm to others in the vicinity. The court then considered defendant's criminal history, that the offense was gang related, that defendant did not show regret and that he had shot the victim on a prior occasion. In mitigation, the court noted defendant's family ties and previous employment. Furthermore, when defendant argued, on a post trial motion that the court had improperly consider the victim's death as an aggravating factor, the trial court stated: "I only considered the matters I just related, other matters as well, which I stated at the time of the sentencing, and those were not matters implicit in the offense." Thus, the record indicates that the court did not consider the victim's death in aggravation at all, but such reference was made in passing when the court noted that he threatened harm to others, a a conclusion supported by the circuit court's own statement on the post trial hearing.

¶ 55 With respect to defendant's argument that the court improperly considered that the offense was gang related, we are similarly unpersuaded. While defendant maintains that there

was insufficient evidence from which the circuit court could infer that gang competition over drug sales was a motive for the victim's murder, the record indicates that there was ample evidence presented at trial from which the court could make such inference. As explained above, both Brackenridge, in his trial testimony, and Siler, in his statement to the ASA, stated that the Mafia and Double I's were in a turf war with the Four Corner Hustlers over the selling spot at Division and Pulaski. Further, Brackenridge and Woods attested that the victim was a member of the Four Corner Hustlers, and according to Brackenridge, the victim controlled that spot and defendant was a member of the Mafia. Thus, we conclude that the circuit court did not err in considering that the victim's murder was related to the activities of an organized gang in determining defendant's sentence. See, e.g., *People v. Banks*, 260 Ill. App. 3d 464, 474 (1994) (where the record showed that defendant was a gang member, it was not improper for the circuit court to consider such evidence when determining his sentence, as it indicated a rationale for his actions). Accordingly, the circuit court did not abuse its discretion in imposing a 40-year sentence with a 25-year firearm enhancement.

¶ 56 In light of the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 57 Affirmed.