2013 IL App (1st) 111717-U

FOURTH DIVISION
December 26, 2013
Modified on Denial of Rehearing January 16, 2014

No. 1-11-1717

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. 08 CR 1009 (01)
	)	
	)	
LESEAN JACKSON,	)	The Honorable
	)	Maura Slattery Boyle,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Howse and Justice Fitzgerald Smith concurred in the judgment.

ORDER

¶ 1 *Held*: Evidence was sufficient to sustain defendant's conviction for first-degree murder when the State presented two eyewitnesses' testimony supported by corroborative evidence. In addition, the trial court did not deny defendant his constitutional right to confront witnesses because he was given adequate leeway to cross-examine an eyewitness, and there was no plain error in that the evidence was not closely balanced. The trial court did not err in admitting gang membership evidence through a lay witness when it directly related to the defendant's motive for a senseless act. Further, defendant was not prejudiced by trial counsel's defense theory or his failure to impeach an eyewitness's prior inconsistent statement because the evidence was overwhelming. Similarly, the trial court did not commit plain error by failing to question the prospective jurors as to whether they understood and accepted the four principles set forth in

Supreme Court Rule 431 (b). Finally, defendant's sentence was not excessive given the seriousness of the crime, and the court properly considered mitigating factors before it and defendant's gang affiliation. Moreover, in considering aggravation the court did not consider defendant's use of a firearm.

¶ 2 Following a jury trial, defendant Lesean Jackson was found guilty of one count of first-degree murder. Defendant received a sentence of 40 years in prison for his conviction of first-degree murder and an additional 20 years pursuant to the statutory firearm enhancement. 730 ILCS 5/5-8-1(a)(1)(a), (a)(1)(d)(ii) (West 2006). On appeal, defendant asserts that (1) the evidence was insufficient to sustain his conviction; (2) the trial court denied him his constitutional right to confront witnesses when it prohibited him from cross-examining a witness regarding her identification of the shooter; (3) the trial court erred in allowing gang evidence to be admitted through an unqualified witness; (4) defendant was denied the effective assistance of counsel where his defense theory was partly contradicted by the evidence, and counsel failed to impeach a witness with a prior inconsistent statement; (5) the trial court erred by failing to ask the prospective jurors whether they understood and accepted the four principles set forth in Supreme Court Rule 431 (b) (eff. May 1, 2007); and (6) defendant's sentence of 60 years is excessive in light of his criminal background and rehabilitative potential, and the trial court erred when it considered in aggravation defendant's use of a firearm in the commission of the crime causing a "double enhancement," as well as the trial court's personal bias against street gangs. We affirm.

¶ 3 I. BACKGROUND

¶ 4 We recite only those facts and testimony necessary to understand the issues raised on appeal. On October 17, 2007, 10-year-old Arthur Jones (AJ) was shot and killed. As a result,

defendant along with co-defendants Clarence Williams and Steven McCaskill, was charged with first-degree murder. Andrew Bradley, then 14-years-old, was subjected to juvenile delinquency proceedings. Over the course of a six-day jury trial, 15 witnesses testified.[1]

¶ 5 At trial, Johnell Brown testified that he belonged to the Black P Stones street gang (P Stones), which controlled the north side of 55th Street or Garfield Boulevard. The Jet Black Stones (Jets) also occupied the area as a branch of the P Stones (collectively called the "Stones"). The Stones rival street gang, the Gangsters Disciples (GD), controlled the south side of 55th Street. Brown demonstrated and explained the P Stones' hand symbols, as well as their gang colors.

¶ 6 Brown testified that on the day of the incident he sold cigarettes at the corner of 55th Street and Halsted Street around 3:30 p.m. He also testified that he knew defendant, McCaskill and Williams from the neighborhood and all three were members of the Jets. When a fight broke out between the Stones and GD in the Shell service station on the south side of the boulevard, Brown went over to try and "squash" the fight, but eventually got involved when he tried to rescue his friend Jimmy. Brown also saw McCaskill and Williams in the area of the Shell and then saw them leave together heading north. Brown carried Jimmy out of the crowd to a restaurant and then spoke to a GD about not escalating things.

¶ 7 Eventually, Brown went back to his business and crossed over to the east side of Halsted Street, where he had hidden cigarettes and marijuana by the bus stop near the mall. While standing there, Brown saw defendant, Williams and McCaskill walk back though the mall area,

[1]A bench trial was conducted simultaneously for co-defendant Williams.

but Brown could not remember Bradley's whereabouts. Brown also observed a bunch of high school youths hanging out in the grassy area in the middle of the boulevard. He then saw defendant, while standing behind the bus stop, point a semiautomatic gun toward the southwest corner of the intersection. Brown heard Williams tell defendant to wait and saw Williams walk toward the back of the mall. Brown then saw defendant fire four shots into the grassy area of the boulevard. Afterward, Brown took off running toward 54th Street and heard another round of shots.

¶ 8 Necko Sterling testified that she lived on the same block as AJ, who routinely came over for candy. On the day of the incident, she went to the Shell service station, where she observed defendant across the boulevard by the mall and AJ in the grassy area in the middle of the boulevard. Sterling then observed defendant aim and fire his gun toward the crowd in the grassy area and then he ran away. Afterward, AJ was laying in the grass. Sterling gave her name and number to a police officer on the scene, but did not feel safe providing more information in public. Five days later, she identified defendant from a lineup. Although, she had no vision in her left eye, she had 20/20 vision in her right eye.

¶ 9 Tierra Merchant testified that around 4 p.m., she entered the Subway restaurant at the end of the mall and saw Williams talking on his cell phone in the parking lot. When Merchant was leaving five minutes later, she saw Williams fire a pistol in a southwest direction toward the Shell service station. Williams had his face turned away and was not looking in the direction he fired. Merchant then saw Williams flee north through the parking lot.

¶ 10 Teddy Plummer, who claimed injuries and memory problems resulting from being hit in the head in an unrelated incident by a baseball bat, testified that he used to be friends with McCaskill and Bradley from the neighborhood, but denied knowing defendant. Plummer testified that he did not remember (1) if Bradley, McCaskill or defendant were members of the Jets street gang; (2) what happened on the afternoon of the incident; (3) going to the police station with his parents thereafter; (4) signing his statement in which he claimed to have witnessed Bradley put a 9-millimeter handgun in defendant's hoodie pocket; (5) identifying defendant as the shooter; or (6) testifying in front of the grand jury to the factual account in his statement. On the second day that Plummer testified at defendant's trial, Plummer's memory returned. Specifically, he remembered being at 55th Street and Halsted Street after school. He then witnessed Bradley pass a 9-millimeter handgun to McCaskill, who shot AJ. Plummer claimed that he told the grand jury he gave it to defendant, because Plummer felt bad telling on his friend McCaskill. On cross-examination, Plummer claimed to have been afraid in 2007 because of his non-gang affiliation and the Jets' code of silence. He had changed his recitation of the facts at the grand jury hearing to protect himself and McCaskill, a known gang member.

¶ 11 Mark Hitt, an Assistant State's Attorney (ASA), testified that he took Plummer's written statement and asked him to identify photographs of Bradley, McCaskill and defendant, which Plummer did and signed. Plummer never mentioned McCaskill's role in the shooting. In addition, ASA Susan Fleming testified that when presenting Plummer to the grand jury, he never told her that McCaskill pointed the gun or shot into the crowd.

¶ 12 Bradley, who had his charges reduced as part of a plea agreement in a corresponding

juvenile case, testified that he knew defendant, Williams and McCaskill from the neighborhood. On the day of the incident, Bradley ran into McCaskill on Bradley's way to the barber shop. McCaskill had a black semiautomatic gun, handed it to Bradley, and asked him to shoot the gun at the GD. After declining, McCaskill told Bradley to hand the gun to defendant and Bradley complied. He then walked to the barbershop on 54th Street and heard approximately three gun shots fired from the other direction. On cross-examination, he testified that he never went to the home of McCaskill's grandmother's to retrieve the gun or actually saw who shot the gun.

¶ 13 Chicago Police Officer Steve Lipkin testified that he received a radio call about a shooting at 55th Street and Halsted Street. When he reached 54th Street a group of older gentleman pointed toward a gangway and McCaskill ran out of the gangway and collided with Officer Lipkin's vehicle. Officer Lipkin then transported McCaskill to the police station.

¶ 14 Detective Robert Garza testified that he interviewed McCaskill on the night of the incident and received the names of defendant, Bradley, Plummer and Williams. McCaskill also identified photographs of defendant and Williams from a photo array. McCaskill eventually incriminated himself. In addition, Detective Garza interviewed Sterling and witnessed her identify defendant from a lineup as the person who shot AJ.

¶ 15 McCaskill, who pled guilty to first-degree murder in this case, testified that he had known defendant, Williams and Bradley from the neighborhood. On the day of the incident, McCaskill, a member of the Jets, said he was not involved in the fight at the Shell service station, but he did shop in the mall across the street. McCaskill spoke to Bradley before the shooting and went to McCaskill's grandmother's home, but failed to remember if he retrieved a gun from her couch.

He then returned to the mall with Bradley, but denied giving him a gun. In addition, McCaskill observed defendant at the mall, but did not see Bradley give defendant a gun, or see defendant even holding a gun. McCaskill heard shots and ran away. Furthermore, McCaskill did not remember telling Detective Garza any of the allegations in McCaskill's written statement. The State also admitted into evidence the videotape of McCaskill's conversation with Detective Garza, in which McCaskill gave the version of events testified to by Detective Garza. On cross-examination, McCaskill alleged that he said anything he could to get himself out of trouble, but he did not see defendant with the gun. The State rested.

¶ 16 In support of defendant's assertion that Sterling was too far away to clearly identify defendant as the shooter, defendant presented the testimony of public defender investigator Dennis Shaw. He testified that he measured the distance from the traffic or electric box on the southwest corner of Halsted Street and Garfield to the "bus stop area" on the northeast corner of that intersection. The distance was 315 feet and the "line of sight" distance was 238 feet. Defendant also placed exhibits into evidence including four versions of clips from a surveillance video Detective Lutzow obtained from a liquor store on the westside of Halsted Street just north of Garfield Boulevard, in support of the defense theory that the shooter in the video wearing a white tank top was not defendant.

¶ 17 The jury found defendant guilty of first-degree murder and found that defendant personally discharged a firearm during the commission of the offense. After denying defendant's motion for a new trial, the trial court sentenced him to 40 years in prison for his conviction of first-degree murder and an additional 20 years pursuant to the statutory firearm enhancement.

730 ILCS 5/5-8-1(a)(1)(a), (a)(1)(d)(ii) (West 2006). Subsequently, the trial court denied defendant's motion to reconsider his sentence.

¶ 18 II. ANALYSIS

¶ 19 A. SUFFICIENCY OF THE EVIDENCE

¶ 20 On appeal, defendant asserts the evidence was insufficient to sustain his conviction for first-degree murder because it was not supported by credible witness testimony. Where, as here, a defendant challenges the sufficiency of the evidence to sustain his conviction, the question for the reviewing court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime were proven beyond a reasonable doubt. *People v. Smith*, 185 Ill. 2d 532, 541 (1999). A criminal conviction will not be set aside unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). In addition, the trier of fact determines the witnesses' credibility, the weight given to their testimony and draws reasonable inferences from the evidence. *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001). We will not substitute our judgment for that of the trier of fact on these matters. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224-25 (2009). Furthermore, to sustain a conviction for first-degree murder, the State must prove that a defendant killed an individual without lawful justification and in performing the acts which caused the death, he intended to kill or do great bodily harm or knew that his acts created a strong probability of death or great bodily harm to that individual. 720 ILCS 5/9-1(a)(1), (a)(2) (West 2006); *People v. Leach*, 405 Ill. App. 3d 297, 311 (2010).

¶ 21 Defendant contends that both Sterling and Brown were unreliable eyewitnesses and misidentified defendant as the shooter. In evaluating these eyewitness identifications, defendant contends we should consider the following five factors: (1) the witness' opportunity to view defendant at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description; (4) the level of certainty demonstrated by the identification; and (5) the length of time between the crime and the identification. *Neil v. Biggers*, 409 U.S. 188 (1972); *People v. Lewis*, 165 Ill. 2d 305, 3565 (1995).

¶ 22 An application of these factors demonstrates that the jury was entitled to find that Brown and Sterling's identifications were reliable. Both witnesses were at the scene at the time of the incident and had the opportunity to observe defendant commit the crime. Both witnesses also had a high degree of attention in that they were able to recall details of defendant's actions, specifically in his holding of the gun and his location before shots were fired. Neither faltered with their identification before or during trial. Sterling immediately informed a police officer that she witnessed the event, and only identified defendant five days later in a lineup because she feared for her safety. Although defendant contends that Sterling was unreliable based on her visual impairment and the "line of sight" distance between her and the shooter, she had 20/20 vision in her other eye and the trier of fact found her credible. See *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006) (it is the trier of fact's responsibility to determine the appropriate weight to afford each witness's testimony, resolve any conflicts or inconsistencies in the evidence, and draw reasonable inferences from the testimony at trial). In addition, although Brown's testimony regarding Williams' whereabouts was contradicted by Merchant's testimony, Brown's testimony

was not contradicted in regard to defendant's whereabouts. Moreover, the trier of fact was not required to find that the discrepancy in Brown's testimony regarding Williams' whereabouts discredited Brown's entire testimony. In a criminal proceeding, the trier of fact may believe part of one's testimony without believing all of it. See *People v. Borges*, 127 Ill. App. 3d 597, 605 (1984).

¶ 23 Furthermore, Bradley partially corroborated the testimony of Sterling and Brown. Bradley testified that he took possession of a gun from McCaskill and gave it to defendant shortly before the shooting. In addition, the jury's verdict is consistent with a determination that McCaskill and Plummer told the truth when they made their prior statement, but lied at trial. *Cf. People v. Arcos*, 282 Ill. App. 3d 870, 876 (1996) (the trial court erred where it based defendant's first-degree murder conviction on a written statement and grand jury testimony of one eyewitness, who recanted the identification at trial, and there was no substantial corroborative evidence.); *People v. Reyes*, 265 Ill. App. 3d 985, 889-90 (1993) (the trial court erred where the only evidence to contradict defendant's assertion that he did not participate in the group beating was the grand jury testimony of two witnesses, who both recanted at trial, and their grand jury testimony failed to provide detailed accounts). Here, the eyewitness testimony and corroborative evidence were more than sufficient to sustain defendant's conviction and the jury was free to accept or reject as much or as little of the testimony as it pleased. See *People v. Thompson*, 93 Ill. App. 3d 995, 123-24 (1981).

¶ 24 B. CONFRONTATION CLAUSE

¶ 25 Defendant next contends that he was denied his constitutionally-guaranteed right to

confront witnesses when the trial court prohibited him for meaningfully cross-examining Sterling regarding her identification of the shooter. Defendant asserts that defense counsel attempted to question Sterling about whether the shooter was wearing a white tank top and making motions with his hands, as seen in the surveillance video. The trial court sustained the State's objection that the question had been asked and answered. Defendant, argues, however, that Sterling's answer may have identified someone other than defendant as the shooter.

¶ 26 A criminal defendant's right to confrontation under the sixth amendment of the United States Constitution (U.S. Const., amend. VI; see also Ill. Const. 1970, art. I, sec. 8) includes the right to cross-examine witnesses against him. *People v. Kirchner*, 194 Ill. 2d 502, 536 (2000). In that sense, any permissible matter which affects the witness's credibility may be developed on cross-examination. *Id.*; see also *Delaware v. Fensterer*, 474 U.S. 15, 19 (1985). Although any limitation on the right to cross-examine requires scrutiny, a defendant's rights under the confrontation clause are not absolute. *People v. Averhart*, 311 Ill. App. 3d 492, 497 (1999). A court has discretion to impose reasonable limits on cross-examination to curtail possible harassment, prejudice, jury confusion, witness safety, or repetitive and irrelevant questioning, and we review a defendant's claim of a violation of the confrontation clause under the abuse-of-discretion standard. *People v. Tabb*, 374 Ill. App. 3d 680, 689 (2007).

¶ 27 Here, defendant admits that he failed to make an offer of proof regarding Sterling's testimony. Defendant concluded, however, that the purpose and materiality of Sterling's testimony was abundantly clear. Nonetheless, defendant fails to develop a cohesive argument as to how the testimony was obvious as required by Supreme Court Rule 341(h)(7) (eff. Sept. 1,

2006); and this court need not consider this matter further. See *People v. Robinson*, 2013 IL App (2d) 120087, ¶ 15. In any event, it was not apparent from the record that the trial court clearly understood the nature and character of the evidence sought to be introduced. See *People v. Peeples*, 155 Ill. 2d 422, 494-95 (1993). On the contrary, the record suggests that the trial court found the question repetitive.

¶ 28 In the alternative, defendant contends that we may proceed in our review of the matter under the closely balanced prong of the plain error doctrine. See *People v. Herron*, 215 Ill. 2d 167, 175 (2005). We may consider unpreserved error pursuant to the plain error doctrine where the evidence was so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *People v. Walker*, 232 Ill. 2d 113, 124 (2009). The defendant has the burden of persuasion under both prongs of the plain error doctrine, and if he fails to meet his burden, the court must honor the forfeiture. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008). Before applying either prong of the plain error doctrine, we must first determine whether a clear and obvious error occurred. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010).

¶ 29 We find no error here. During defense counsel's cross-examination of Sterling, she testified that she did not remember what the shooter was wearing. Thus, asking her about the blurred figure wearing a white tank top in the video would not have helped defendant's case. In addition, the record demonstrates that counsel had an adequate opportunity to impeach Sterling's identification. The trial court was well within its purview to sustain a conviction and limit

repetitive questioning. See *People v. Martinez*, 335 Ill. App. 3d 844, 856 (2002). Moreover, assuming error occurred the evidence was not closely balanced. The State presented two eyewitnesses' identifications and additional corroborative evidence. In contrast, defense counsel only presented evidence of the "line of sight" distance between Sterling and the shooter and the blurry surveillance video. Thus, we find no plain error.

¶ 30 C. GANG EVIDENCE

¶ 31 Defendant next contends that the trial court erred by allowing gang evidence through an unqualified witness, which we review for an abuse of discretion. *People v. Morales*, 2012 IL App (1st) 101911, ¶ 39. Defendant initially contends that Brown's testimony regarding defendant's gang affiliation was inadmissible because it was not established that he was an expert witness on gangs. While Brown may not have been an expert on gangs, he was not required to be. A lay witness may testify to gang affiliation, if the court determines that its probative value outweighs any unfair prejudice. See *Id*., at ¶ ¶ 41-47 (there was no unfair prejudice where the trial court allowed a lay witness to testify that he knew the defendant from his neighborhood, that the defendant was a member of a gang, and that the gang had a presence in the neighborhood). A police officer's testimony regarding gang activity, however, requires that the officer's testimony must qualify as expert opinion. See *People v. Langford*, 234 Ill. App. 3d 855, 858-59 (1992); see also *People v. Matthews*, 299 Ill. App. 3d 914, 922 (1998). Since Brown was a lay witness, there was no abuse of discretion.

¶ 32 Defendant also asserts that the court erred by allowing in such evidence because it was prejudicial and not relevant to explain the witness' identification of defendant. Evidence of a

defendant's gang membership may be admitted if there is sufficient proof that it is related to the crime charged, and is relevant to an issue in dispute and its probative value is not substantially outweighed by its prejudicial effect. *People v. Campbell*, 2012 IL App (1st) 101249, ¶ 21. Generally, gang-related evidence is admissible to show common purpose or design, or to provide a motive for an otherwise inexplicable act. *People v. Smith*, 141 Ill. 2d 40, 58 (1990). It is the function of the trial court to weigh the probative value of the evidence against the risk of unfair prejudice. *Morales*, 2012 IL App (1st) 101911, at ¶ 39.

¶ 33 Here, the gang evidence's probative value outweighed any prejudice. This evidence went to the key issue at trial: who fired the gun. Defendant's gang membership directly related to the crime charged and spoke to defendant's motive for firing a gun and killing a ten-year-old boy. See *People v. Smith*, 141 Ill. 2d at 58; *Cf. People v. Martin Roman*, 2013 IL App (1st) 110882, ¶37 (where the trial court committed reversible error by admitting gang evidence that was irrelevant to the defendant's motive or the witnesses' identifications). Specifically, Brown's testimony established that he knew defendant from the neighborhood, had personal knowledge of his gang affiliation, and that the Stones have a feud with the GD over territory. In addition, defendant objects to the relevancy of Brown's testimony regarding gang colors, handshakes and symbols. The record suggests that the State admitted the evidence to explain to the jury that even though Brown and defendant were in separate gangs, they were in actuality affiliates and shared a common rivalry with the GD. See *People v. Cruzado*, 299 Ill. App. 3d 131, 142 (1998) (evidence of gang affiliation, gang history, and gang structure is generally admissible nevertheless, although it may prejudice defendant, if it is relevant to the crime). Thus, the

probative value far outweighed any prejudice to defendant. Accordingly, this commonality explained how Brown knew the rivalry. Further, even if admitting evidence of gang colors and symbols was error, it was harmless. The trial court had already properly admitted gang evidence to show motive, and as such, the admittance of gang customs to establish defendant's rivalry was merely cumulative. See *People v. Denson*, 2013 IL App (2d) 110652, ¶ 24. (error is harmless where the improperly admitted evidence is merely cumulative or duplicates properly admitted evidence).

¶ 34 D. INEFFECTIVE ASSISTANCE OF COUNSEL

¶ 35 Defendant further asserts that trial counsel was ineffective because his defense theory was patently contradicted by the evidence. Specifically, defendant contends that counsel was ineffective for arguing that the video showed an individual other than defendant in a white tank top firing a gun when the video actually showed an individual in a white tank top waiving empty hands. To show that counsel was ineffective, a defendant must demonstrate both that counsel's performance was deficient and that, as a result, the defendant was prejudiced. *People v. Bailey*, 232 Ill. 2d 285, 289 (2009) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). The failure to satisfy either prong precludes finding that counsel was ineffective. *People v. Colon*, 225 Ill. 2d 125, 135 (2007). Thus, the reviewing court is not required to consider whether trial counsel's performance was deficient before examining whether the defendant was prejudiced. *People v. Perry*, 224 Ill. 2d 312, 342 (2007). To show prejudice, a defendant must demonstrate a reasonable probability exists that but for counsel's error, the result of proceedings would have been different. *People v. Harris*, 389 Ill. App. 3d 107, 132 (2009).

¶ 36 First, defendant's contention on appeal that the individual in the white tank top could not have been the shooter because he waved empty hands around was not clearly supported by the record. Defendant overestimates the quality of the video and it is unclear as to the actions and identity of said individual. Accordingly, counsel's theory was not contradicted, and thus, his performance was not deficient. Moreover, as stated, defendant was convicted in large part based on the testimony of two eyewitnesses who testified that they actually saw defendant fire the gun. There is no reason to believe that but for counsel's error and trial strategy the result of proceedings would have been different. See *People v. Patterson*, 217 Ill. 2d 407 (2005).

¶ 37 Defendant further contends that defense counsel failed to impeach Brown with a prior inconsistent statement. Defendant's contention would be more accurately characterized as a claim that counsel failed to impeach Brown with a motive for giving a false statement at trial. Even assuming that the jury were to completely disregard Brown's testimony as being incredible, Sterling's eyewitness testimony was never impeached and there was strong circumstantial evidence, such as Bradley's testimony. Based on the verdict, the jury found Sterling and Bradley credible, and therefore, the result of the proceedings would not have been different. Defendant can show no prejudice.

¶ 38 E. SUPREME COURT RULE 431(B)

¶ 39 Defendant further contends that the court failed to question the jurors during *voir dire* as to whether they understood the principles stated in Supreme Court Rule 431(b) (eff. May 1, 2007), which codified our supreme court's ruling in *People v. Zehr*, 103 Ill. 2d 472 (1984).

Defendant apparently acknowledged, however, that he failed to preserve this issue. Notwithstanding this forfeiture, defendant asks us to review the issue under the closely balanced prong of the plain error doctrine. See *People v. Martin*, 2012 IL App (1st) 093506, ¶ 71. As stated, the evidence in this case was not closely balanced and defendant has identified no evidence that the error resulted in a partial jury. See *People v. Stuckey*, 2011 IL App (1st) 092535, ¶ 31. Accordingly, defendant cannot show plain error.

¶ 40 F. SENTENCING

¶ 41 Finally, defendant challenges his sentence. Specifically, defendant asserts his 60-year prison term is excessive, due to his youth and rehabilitative potential. The trial court has great discretion to fashion an appropriate sentence within the statutory limits. *People v. Cooper*, 283 Ill. App. 3d 86, 95 (1996). Absent an abuse of discretion, a sentencing decision shall not be altered upon review. *People v. Hernandez*, 319 Ill. App. 3d 520, 526 (2001). In addition, a trial judge is in the best position to determine the appropriate sentence, for such judge can consider firsthand "[a] defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age." *Id*. Furthermore, where mitigation evidence is before the court, it is presumed the court considered that evidence absent some contrary indication other than the sentence imposed. *People v. Smith*, 214 Ill. App. 3d 327, 339 (1991). Nevertheless, all penalties for criminal offenses must be determined by balancing the seriousness of the offense with the objective of restoring the offender to useful citizenship. Ill. Const. Art. I, § 11.

¶ 42 Here, although defendant argues that the trial court failed to take into account any

mitigating factors in sentencing, such as his age, limited criminal record, and familial support, it is presumed that the court considered all mitigating evidence before it and defendant has presented no evidence to rebut this presumption. See *Smith*, 214 Ill. App. 3d at 339. In addition, the record suggests that the trial court considered the seriousness of the crime in sentencing defendant, specifically, defendant's senseless murder of a ten-year-old boy in broad daylight. See *People v. Cox*, 377 Ill. App. 3d 690, 709 (2007) (where the court noted that the seriousness of the crime is considered the most important consideration in fashioning an appropriate sentence). The record does not suggest an abuse of discretion.

¶ 43 Furthermore, defendant argues that the trial court erred when it considered in aggravation defendant's use of a firearm in the commission of the crime, which was inherent as a mandatory sentencing enhancement. 730 ILCS 5/5-8-1(a)(1)(d)(ii) (West 2006). It is well established that 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, 11-13 (2004). Also, mandatory sentencing enhancements cannot be used as a basis for imposing a harsher sentence. *People v. Walker*, 392 Ill. App. 3d 277, 300 (2009). Such dual use of a single factor is often referred to as a "double enhancement." *Id*. at 12. The reasoning behind this prohibition is that it is assumed that the legislature, in determining the appropriate range of punishment for a criminal offense, necessarily accounted for the inherent factors of the offense. *People v. Gonzalez*, 151 Ill. 2d 79, 84 (1992). Thus, to use one of those same factors that make up the offense as the basis for imposing a harsher penalty than might otherwise be imposed constitutes a double use of a single factor. *Id*. The double-enhancement rule is one of statutory

construction and therefore the standard of review is *de novo*. *Phelps*, 211 Ill. 2d at 12.

¶ 44 Here, the record does not support defendant's assertion that in considering aggravation the trial court considered the discharging of a firearm in and of itself. Specifically, the court said, "when the court has heard the testimony of that gun being raised and pointed in the direction of individuals . . . the real miracle is that there weren't more people killed that day." In addition, the court stressed that the incident occurred in "broad daylight" and noted that, "this little boy that thought that he could be out on a fall day and be out in an area was sadly mistaken." Accordingly, the court's comments show that it focused on the location and circumstances of defendant's conduct, *i.e.*, violence on a public street in a crowd of innocent people. *Cf. Walker*, 392 Ill. App. 3d at 301-02 (2009) (where the trial court erred when it considered in aggravation the defendant's discharging of a firearm in and of itself during the commission of the crime, while the defendant was in a barbershop that was empty except for his accomplice and the victim).

¶ 45 Further, we reject defendant's contention that the trial court improperly relied on its subjective feelings regarding gang violence in sentencing defendant. Again, the record suggests that the trial court considered the seriousness of the offense in terms of all the innocent lives that were placed in harms way by defendant's gang activity, not its own personal bias. *Cf. People v. Henry*, 254 Ill. App. 3d 899, 905 (1993) (where the court clearly informed the defendant that it personally considered the crime “disgusting” and “that's why you are given this amount of time”). In addition, factors related to organized gang activity are proper in considering sentencing and evidence at trial supported defendant's gang affiliation. See 730 ILCS 5/5-5-

3.2(a)(15) (West 2006). Accordingly, we find no abuse of discretion.

¶ 46 III. CONCLUSION

¶ 47 Based on the foregoing, we affirm the judgment of the circuit court.

¶ 48 Affirmed.