SIXTH DIVISION
February 19, 2016

No. 1-13-1081

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 10913
	)	
KENDALL McDOWELL,	)	Honorable
	)	Michele M. Simmons,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice ROCHFORD and Justice HOFFMAN concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's claims that the trial court misunderstood the applicable combined sentencing range and mistakenly believed that he was on bond for a pending drug case at the time he committed murder are forfeited and do not constitute plain error. Moreover, trial counsel was not ineffective for failing to preserve these issues for review. However, because the State concedes that the trial court imposed an unauthorized firearm enhancement, we reduce the enhancement from 25 to 20 years.

¶ 2 Following a jury trial, defendant Kendall McDowell was convicted of first degree murder. The trial court sentenced him to 27 years for first degree murder and imposed a 25-year firearm enhancement, for a total of 52 years in prison. On appeal, defendant contends that he

must receive a new sentencing hearing because the trial court misunderstood the applicable combined sentencing range, imposed an unauthorized firearm enhancement, and mistakenly believed that he was on bond for a pending drug case at the time of the murder. For the reasons that follow, we affirm defendant's conviction and reduce the imposed firearm enhancement from 25 to 20 years.

¶ 3 Defendant's conviction arose from the February 4, 2006, shooting death of Troy Pickett. Defendant and codefendant, Andrew Anderson, were each charged with eight counts of first-degree murder. Defendant and codefendant were tried at simultaneous trials before different juries. Codefendant is not a party to this appeal.

¶ 4 At trial, Justenn Tyra testified that sometime after 6 p.m. on the date in question, he was walking to his grandmother's house in Robbins when he saw a car slide off the road and hit a tree. Tyra then saw a flash of light inside the car and saw two men get out of the car and run away. Tyra also ran from the area, but returned a short time later and joined the crowd of people watching police officers process the scene.

¶ 5 Robbins police detective sergeant Deon Kimble testified that about 7 p.m. on the date in question, he responded to a call of a possible homicide. When he arrived at the given location, he observed a car that appeared to have struck a tree. In the driver's seat of the car was the victim, dead, but with his foot still on the gas pedal.

¶ 6 Detective Kimble testified that his investigation of the murder led to two suspects: defendant and codefendant. On April 9, 2006, both men were arrested on loitering charges. Over the next two days, Detective Kimble interviewed them regarding the victim's murder. At trial, the prosecution played portions of video recordings of Detective Kimble's interviews of defendant.

Neither the recordings nor transcripts of the recordings are included in the record on appeal. However, on cross-examination, Detective Kimble testified that defendant told him codefendant said he was going to kill the victim. Detective Kimble also testified that after defendant was shown a video recording of codefendant making a statement that he shot the victim from the back seat of the car, that the car crashed, and that after he had gotten out of the car, he learned that defendant had also shot the victim. Defendant either said, "That's what happened" or "That's the way it happened."

¶ 7 William Evers, an evidence technician with the Cook County Sheriff's Police Department, testified that he and his partners processed the crime scene and inspected the car after it had been towed to a garage. Investigator Evers recovered a spent cartridge casing from the floor of the car's back seat, as well as a loaded gun and a spent, deformed projectile on the floorboard next to the gas pedal.

¶ 8 The parties stipulated that an evidence technician who attended the victim's autopsy would have testified that a bullet and a bullet fragment were recovered from the victim's body.

¶ 9 Marc Pomerance, a forensic scientist with the Illinois State Police and an expert witness in the field of firearm and toolmark identification, testified that neither the bullet nor the spent cartridge case recovered from the car, both of which were .45 caliber, nor the bullet recovered from the victim's body, which was .38 caliber, were fired from the recovered gun. Pomerance also concluded that the two fired bullets he analyzed were not fired from the same firearm. The bullet fragment recovered from the victim's body was unsuitable for analysis.

¶ 10 A medical examiner who reviewed the victim's autopsy testified that the victim suffered three gunshot wounds: one to the right upper neck, one to the right posterior neck, and one to the

back of the neck on the right side. The medical examiner further testified that the victim died as a result of multiple gunshot wounds.

¶ 11 Defendant testified on his own behalf that in 2006, he was 18 years old. The victim, who was older and bigger, would bully him, beat him up, and take things from his pockets. Defendant feared the victim because of his reputation. Specifically, the victim was known in the neighborhood for taking money from people, bullying them, and shooting them.

¶ 12 Defendant testified that on the day in question, he and codefendant, who were both armed, were "standing out selling drugs." Defendant was armed with a "380" and codefendant was carrying a "45." As defendant saw the victim driving up in his car, codefendant stated that he was going to kill the victim. The victim stopped his car and asked "[w]ho had half on some weed." When defendant said he had no money, the victim told him and codefendant to get in the car so they could go get marijuana. Defendant sat in the front passenger seat, while codefendant sat in the back. The victim started to drive. Within a few minutes, defendant heard the "boom" of a gunshot and saw that the victim had been shot in the head. The car crashed into a tree. Codefendant got out of the car and ran, but defendant could not open the front door, so he climbed into the back seat. As he was getting out of the car, he pointed his gun at the victim and shot him. Defendant did not know at the time if the victim was alive, but did state that the victim had a gun in his lap. When asked why he shot the victim, defendant stated, "I -- I was afraid of him, so I was just thinking about all the things that he did to me at that time." Defendant further testified that some time after the shooting, codefendant asked why he had shot the victim, as the victim was already dead.

¶ 13 At the instruction conference, the State proposed several instructions referencing its allegation that during the commission of first degree murder, defendant personally discharged a firearm. Defendant did not object to any of these instructions and the trial court agreed to give them.

¶ 14 In closing, the State informed the jurors, among other things, that if they found defendant guilty of first degree murder, they would then have to decide whether he personally discharged a firearm which proximately caused the victim's death. Defense counsel objected. At sidebar, the trial court noted that during the instruction conference, the State was proceeding with an allegation that defendant personally charged a firearm, but not that he had personally discharged a firearm that proximately caused death. The prosecutor agreed that he had erred. Thereafter, he explained to the jurors that they would be asked to find whether defendant personally discharged a firearm, but not whether he personally discharged a firearm that proximately caused death to another person.

¶ 15 Following closing arguments, the jury was instructed, *inter alia*, on murder and the law of accountability. The jurors also received instructions indicating that the State had alleged that during the commission of first degree murder, defendant personally discharged a firearm; that the State had the burden of proving that allegation; that to sustain the allegation, the State was required to prove that during the commission of first degree murder, defendant personally discharged a firearm; and that they would be provided with alternate verdict forms, one finding that the State had proved the allegation, and one finding that it had not. The jury received four verdict forms total: one finding defendant guilty of first degree murder; one finding him not guilty; one finding that the State had proved the allegation that during the commission of first

degree murder, defendant personally discharged a firearm; and one finding that the State had not proved that allegation.

¶ 16 The jury found defendant guilty of first degree murder. The jury also found that the allegation was proved that during the commission of first degree murder, defendant personally discharged a firearm.

¶ 17 At defendant's sentencing hearing, the State called Cook County Sheriff's police investigator William Delafuente. Investigator Delafuente testified that at around 11 a.m. on March 28, 2006, he and his two partners were on patrol in Chicago Heights when he saw defendant, whom he knew, emerge from an alley, look at the officers' car, and quickly turn away. When Investigator Delafuente called defendant's name, defendant began to run. Investigator Delafuente and one of his partners got out of their car and pursued defendant on foot. When Investigator Delafuente was about 10 feet behind defendant, he saw defendant throw something to the ground and keep running. Investigator Delafuente dropped his flashlight to mark the spot and continued the chase. Shortly thereafter, the third officer cut defendant off with the police car. Defendant stopped running and was taken into custody. Investigator Delafuente and one of his partners went back to the area where defendant dropped the object. As Investigator Delafuente watched, the other officer retrieved the item, which was a small chunky white rock wrapped in a knotted piece of plastic, and gave it to Investigator Delafuente. Investigator Delafuente field tested the item, which tested positive for the presence of cocaine and weighed "something like" 0.4 grams. According to Investigator Delafuente, defendant was eventually charged with possession of a controlled substance (PCS) based on this incident.

¶ 18 The State also presented six victim impact statements prepared by family members of the victim. Defense counsel presented no witnesses, but stated that defendant's grandmother was asking the court to temper the sentence with mercy.

¶ 19 In aggravation, the State highlighted the facts of the case, characterizing the victim's murder as an execution. The prosecutor asserted that defendant had "a history of prior delinquency or criminal activity" and made the following statement:

> "He had a pending PCS in this courtroom when [the murder] went down. It shows the level of respect this defendant has for this system where he is on bond for a possession of controlled substance, and then commits this first degree murder, and you also know now his respect for human life, which is none."

Finally, the prosecutor argued that a sentence should be fashioned to deter others from committing the same crime.

¶ 20 In mitigation, defense counsel argued that defendant had no real felony record. Counsel asserted that the "drug case" brought out by the Sate did not show a disrespect of the law, but instead, showed that the murder came about from a ruse involving drugs and illustrated the despair and hopelessness defendant found himself in. Counsel then argued that defendant would receive a message from any sentence imposed by the court, stating as follows:

> "The minimum for murder is 20 years at 100 percent. That is not a walk in the park. He is a young man. That is over half his life, and that is just the murder sentence of 20 to 60. The statute also goes so far as to say you fired a gun. Those twelve people said you fired a gun. You have to get 25 years. No matter how good you were in jail, don't care how good you were before you got into this mess; you

> have to get 25 years for walking in the door. We are talking about 45 years at 100 percent."

Counsel completed his argument by asking the court to temper the sentence with mercy.

¶ 21 In allocution, defendant apologized to his own family and the victim's family and asked the court to have mercy on him.

¶ 22 Before announcing defendant's sentence, the trial court stated that it had considered the facts of the case, the statutory matters in aggravation and mitigation, and the parties' arguments and statements. The court emphasized that the murder was an "execution," noted that there was a plan to kill the victim, and observed that defendant seemingly shot the victim unnecessarily, as the victim had already been shot twice by codefendant. The trial court stated that it was interesting that defendant was asking for mercy, as he had shown no mercy to the victim. The court then made the following statement:

> "The Court does realize the defendant stands here without any prior convictions. He had a pending drug case before this Court when he committed this offense; however, he did not have any prior criminal convictions. He didn't have any juvenile convictions; however, he stands here charged with the most heinous crime known to man, that of taking someone's life in a violent manner, in a violent manner. It was planned. It was something that the defendant got into the car with [the victim] armed with a loaded firearm, and again [defendant] sits here charged with the offense of first degree murder because, not that he fired the first two shots, but because he made sure [the victim] did not survive this encounter with [him] and [codefendant].

> This Court has considered, as indicated, all of the facts of the case. I have heard all of the arguments. I have read the Victim Impact Statements; I have heard them read to me. I have considered the defendant's statement he just made before this Court. I have thoroughly read the Presentence Investigation Report as well."

¶ 23 The trial court imposed a sentence of 27 years' imprisonment for first degree murder with an additional "25 years for personally discharging a firearm, for a total of 52 years of incarceration in the Illinois Department of Corrections for the offense of first degree murder committed by discharging a firearm."

¶ 24 Defendant thereafter filed a motion to reconsider sentence, arguing that the sentence was excessive. At the hearing on the motion, the State asserted, among other things, that defendant had a "matter that was pending in this courtroom when the murder was [committed]." The trial court denied defendant's motion, noting, in doing so, that the sentencing range was 20 to 60 years, "with an extra 25 to life for personally discharging a firearm."

¶ 25 On appeal, defendant contends that he must receive a new sentencing hearing because the trial court misunderstood the applicable sentencing range, imposed an unauthorized 25-year firearm sentencing enhancement, and incorrectly believed that he was on bond for a pending drug case at the time he committed the charged offense. Defendant argues that the proper sentencing enhancement was 20 years, as the jury found that he personally discharged a firearm, but did not find that the discharge of that firearm proximately caused the victim's death. He further argues that because the court was mistaken about which firearm enhancement applied, it was necessarily also operating under a misapprehension of the appropriate sentencing range.

Finally, defendant argues that the trial court erred when it considered as a factor in aggravation the State's assertion that he was on bond for a PCS charge at the time of the murder, when in fact, he was arrested for PCS after the murder was committed.

¶ 26 As an initial matter, we address defendant's challenge to the 25-year sentencing enhancement. At trial, the jury found that during the commission of first degree murder, defendant personally discharged a firearm. The proper sentencing enhancement for such a finding is 20 years. 730 ILCS 5/5-8-1(a)(1)(d)(ii) (West 2012). However, at sentencing, the parties and the trial court all proceeded as if the proper enhancement was 25 years, and the trial court imposed a 25-year enhancement. Even though defendant failed to preserve this issue for appeal by objecting at trial and including the argument in a posttrial motion, the State concedes that the proper enhancement is 20 years and asserts that we should reduce the imposed sentence enhancement by 5 years. We accept the State's concession and modify defendant's sentence accordingly. See *People v. Lavelle*, 396 Ill. App. 3d 372, 385 (2009); see also *People v. Johnson*, 338 Ill. App. 3d 213, 215 (2003) (where the State concedes that a sentence is unauthorized, it is foreclosed from suggesting that a challenge to that sentence is forfeited).

¶ 27 Defendant's next contention on appeal is that because the trial court was mistaken about the length of the firearm enhancement, it was necessarily also operating under a misapprehension of the appropriate combined sentencing range. Defendant notes that the total combined sentencing range he was actually subject to was 40 to 80 years in prison. 730 ILCS 5/5-4.5-20(a) (West 2012) (20 to 60 years for first degree murder); 730 ILCS 5/5-8-1(a)(1)(d)(ii) (West 2012) (20-year sentence enhancement for personally discharging a firearm). However, he argues that the trial court incorrectly believed the combined range was 45 years to natural life. In support of

this assertion, defendant cites the trial court's statement at the hearing on the motion to reconsider sentence that "The court sentenced the defendant to 25 years. It is a sentencing range of 20 to 60, with an extra -- excuse me, 27 years, with an extra 25 to life for personally discharging a firearm." Defendant asserts that the trial court's misapprehension of the authorized combined sentence mandates a new sentencing hearing because the misunderstanding could have impacted its sentence on both the murder charge and the firearm enhancement.

¶ 28 Defendant acknowledges that trial counsel did not object at sentencing or include the issue in a posttrial motion, but nevertheless argues that this court may review the issue as plain error or "under the framework of ineffective assistance of trial counsel."

¶ 29 We first address defendant's argument regarding plain error. Forfeited claims of sentencing errors may be reviewed for plain error only where the defendant demonstrates either that (1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing. *People v. Polk*, 2014 IL App (1st) 122017, ¶ 15, citing *People v. Hillier*, 237 Ill. 2d 539, 545 (2010).

¶ 30 With regard to the first prong of plain error analysis, we find that the evidence at the sentencing hearing was not closely balanced. In mitigation, defendant was 18, had no criminal convictions or juvenile adjudications, and had been bullied and beaten by the victim in the past. Also, as noted by defendant in his brief, the presentence investigation report indicated that he was not in a gang and had graduated high school despite a learning disability. In contrast, in aggravation, the evidence at trial showed that defendant knew of codefendant's intent to kill the victim, entered the victim's car with codefendant, and then, after codefendant had already shot the victim twice, shot the victim in the back of the neck. Given the brutal facts of the victim's

murder, it is clear that the evidence at sentencing was not closely balanced. *People v. Hall*, 195 Ill. 2d 1, 19 (2000).

¶ 31 Defendant argues that we may review his claim regarding misapprehension of the appropriate sentencing range under the second prong of the plain error doctrine simply "because the right to a fair sentencing hearing is fundamental." We find that this assertion is insufficient to raise second-prong plain error under these facts. *People v. Rathbone*, 345 Ill. App. 3d 305, 311 (2003). Therefore, defendant has forfeited plain error review under the second prong. *People v. Hillier*, 237 Ill. 2d 539, 545-46 (2010).

¶ 32 We similarly reject defendant's argument that trial counsel was ineffective for failing to preserve his claim that the trial court misapprehended the appropriate combined sentencing range. To establish ineffective assistance at sentencing, a defendant must show that (1) his counsel's performance at the sentencing hearing fell below an objective standard of reasonableness; and (2) the deficient performance so prejudiced the defense as to deny the defendant a fair sentencing hearing. *People v. Perez*, 148 Ill. 2d 168, 186 (1992), citing *Strickland v. Washington*, 466 U.S. 668 (1984). If a claim of ineffectiveness may be disposed of on the ground of lack of sufficient prejudice, a reviewing court need not consider whether counsel's representation was constitutionally deficient. *Strickland*, 466 U.S. at 697. To satisfy the prejudice prong of the *Strickland* test, a defendant must demonstrate that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

¶ 33 Here, to establish prejudice, defendant would have to show that, had counsel objected to the mistaken assertion that the applicable firearm enhancement was 25 years, or objected to the

trial court's statement that the sentencing range was "20 to 60 *** with an extra 25 to life," a reasonable probability exists that he would have received a lesser base sentence than the 27 years imposed by the trial court. See *People v. Arbuckle*, 2015 IL App (3d) 121014, ¶ 45. Defendant has not met that burden. At trial, defendant admitted that he shot the victim, and evidence was presented that a bullet matching the caliber of his gun was recovered from the victim's body. For this crime, defendant received a base sentence of 27 years, a term well within the range of 20 to 60 years for first degree murder. 730 ILCS 5/5-4.5-20(a) (West 2012). Defendant has not explained why, if the trial court had realized defendant could only receive an enhancement of 20 years, not 25 years, or realized that the upper limit of his combined sentence was 80 years, not natural life, it would have imposed a shorter base sentence. Accordingly, we find no reasonable probability that had counsel made an objection, the trial court could have been any more lenient in its sentencing. Defendant's ineffectiveness claim fails.

¶ 34 Defendant's final contention on appeal is that the trial court erred when it considered as a factor in aggravation the State's assertion that he was on bond for a PCS charge at the time of the murder, when in fact, he was arrested for PCS after the murder was committed. Defendant argues that because the trial court considered an improper factor at sentencing, and because the record does not positively demonstrate that the improper factor did not affect his sentence, a new sentencing hearing is required. As above, defendant acknowledges that this issue was not preserved for appeal, but asserts that it may be reviewed as plain error or "under the framework of ineffective assistance of trial counsel."

¶ 35 We reject defendant's assertion of plain error. As explained above, the evidence at sentencing was not closely balanced (see *Hall*, 195 Ill. 2d at 19), and defendant has forfeited

plain error review under the second prong because his assertion that "the right to a fair sentencing hearing is fundamental" is insufficient to raise second-prong plain error here (*Hillier*, 237 Ill. 2d at 545-46; *Rathbone*, 345 Ill. App. 3d at 311).

¶ 36 With regard to ineffective assistance of counsel, we find that defendant has not satisfied the prejudice prong of the *Strickland* test; that is, he has not demonstrated a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. In the instant case, to establish prejudice, defendant would have to show that had trial counsel objected to the mistaken assertion that he was on bond when he committed murder, a reasonable probability exists that he would have received a lesser sentence. See *Arbuckle*, 2015 IL App (3d) 121014, ¶ 45. We find that defendant has not met his burden.

¶ 37 At the sentencing hearing, Investigator Delafuente testified that on March 28, 2006 -- almost two months after the victim's murder -- he observed defendant possessing a controlled substance and he and his fellow officers arrested defendant for PCS. While this testimony did not constitute evidence that defendant was on bond when he committed the instant offense (see 730 ILCS 5/5-5-3.2(a)(12) (West 2012)), the testimony did demonstrate that defendant had a history of prior delinquency or criminal activity (see 730 ILCS 5/5-5-3.2(a)(3) (West 2012)). Evidence of other criminal misconduct, including arrests, is admissible at sentencing where it is both relevant and reliable. *People v. Hudson*, 157 Ill. 2d 401, 452 (1993). Here, Investigator Delafuente's testimony was relevant because it related to defendant's criminal history and provided some insight into defendant's character, and was reliable because it was based on his own observation and arrest of defendant. See *id*. at 452-53. Thus, the testimony was admissible

as aggravating evidence at sentencing. *Id*. Given that the evidence of defendant's arrest was admissible, we find no reasonable probability that had counsel made an objection as to the trial court's understanding of the timing of that arrest, the trial court would have imposed a shorter sentence. Accordingly, we reject defendant's claim of ineffective assistance of counsel.

¶ 38 In conclusion, defendant's claims that the trial court misunderstood the applicable combined sentencing range and mistakenly believed that he was on bond for a pending drug case at the time of the murder are forfeited and do not constitute plain error. In addition, trial counsel was not ineffective for failing to preserve the issues for appellate review. However, because the State concedes that the trial court imposed an unauthorized firearm enhancement, we reduce the enhancement from 25 to 20 years. Ill. S. Ct. R. 615(b)(4) (eff. Jan. 1, 1967) (a reviewing court may reduce the punishment imposed by the trial court); *People v. Lavelle*, 396 Ill. App. 3d 372, 386 (2009) (reducing length of sentence enhancement).

¶ 39 For the reasons explained above, we affirm defendant's conviction and modify his sentence by reducing the enhancement from 25 to 20 years.

¶ 40 Affirmed; sentence modified.