2016 IL App (1st) 143633-U

THIRD DIVISION
September 7, 2016

No. 1-14-3633

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. 12 CR 2331
	)	
VERNON WALKER,	)	The Honorable
	)	William J. Hooks,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court. Justices Lavin and Pucinski concurred in the judgment.

ORDER

HELD: Trial court did not err in denying defendant's motion to quash arrest and suppress evidence where there was sufficient probable cause for his warrantless arrest based on evidence recovered from the execution of a search warrant the day before; the evidence presented at trial was sufficient to support all of defendant's convictions beyond a reasonable doubt; and the trial court did not improperly consider any predicate felonies or defendant's silence as aggravating factors when sentencing him and his sentences, which were on the low end of the applicable statutory ranges, were not excessive. However, defendant's conviction for unlawful use of a weapon by a felon violates the one-act, one-crime rule and it, and its accompanying sentence, must be vacated.

¶ 1 Following a bench trial, defendant Vernon Walker (defendant) was convicted of armed habitual criminal, possession of a controlled substance with intent to deliver, possession of a controlled substance and unlawful use of a weapon by a felon (UUWF). He was sentenced to 10 years' imprisonment on each count, to run concurrently. He appeals, contending that the trial court erred in denying his motion to quash arrest and suppress evidence, that the evidence presented at trial was insufficient to support each of his convictions, that the trial court erred at sentencing in considering predicate felony convictions and his silence as aggravating factors, that his sentence was excessive, and that his UUWF conviction violates the one-act, one-crime rule. He asks that we reverse his convictions outright, or that we vacate them and remand his cause for further proceedings. Alternatively, he asks that we reduce his sentence, or that we vacate his sentence and remand his cause for resentencing with instructions prohibiting the consideration of improper sentencing factors. For the following reasons, we affirm but vacate defendant's UUWF conviction and accompanying sentence.

¶ 2 BACKGROUND

¶ 3 Defendant's convictions stem from the execution of a search warrant that took place on January 4, 2012 at a second-floor apartment located at 5701 South Throop Street in Chicago.

¶ 4 Before trial, defendant filed a motion to quash arrest and suppress evidence, arguing that his warrantless arrest and subsequent interrogation were not supported by independent probable cause. At a pretrial hearing on this motion, officer Gary Olsen testified that he had received information from his confidential informant, with whom he had been working for six years, that this informant purchased cocaine from defendant every day for the last three months. On January

3, 2012, officer Olsen and his partners drove with the informant past 5701 South Throop. While officer Olsen did not see defendant nor any evidence of drug sales there at that time, the informant positively identified the second floor rear door that leads into the second floor apartment of that building as the location where the informant had been purchasing the cocaine from defendant. Officer Olsen then returned to the police station, where he investigated defendant's criminal background. In so doing, officer Olsen discovered that defendant, who was 32 years old at that time, had some 28 prior arrests and, while defendant never gave 5701 South Throop as his address during these arrests, he had provided a variety of different addresses as his residence, all of them "very close to the residence located at 5701 South Throop Street." Based on this information, officer Olsen made an application for a search warrant. In this, he outlined the confidential informant's identification of defendant (via a photographic array) and of the second floor apartment at 5701 South Throop, the three months' worth of cocaine purchases the confidential informant had made from defendant, and the final incident leading to the application, to wit: that, on January 3, 2012, the confidential informant met defendant on the second floor rear staircase of 5701 South Throop, that defendant invited him inside the second floor apartment, that once inside the confidential informant gave defendant $40, and that defendant entered "a bedroom in the middle of the apartment," returned moments later, and gave the confidential informant four zip-lock bags that contained a white, rock-like substance believed to be cocaine. Officer Olsen brought the application for a search warrant before a judge, who signed it on January 3, 2012.

¶ 5 Officer Stephen Inseley also testified at this pretrial hearing. He stated that, after

obtaining a photograph of defendant from a police database, he accompanied other officers in executing the search warrant the following day, January 4, 2012. When officers entered the second floor apartment at 5701 South Throop, no one was home. Officer Inseley noted that this was a three-bedroom apartment; specifically, he was in charge of searching the rear bedroom adjacent to the kitchen. There, in a night stand drawer, he found seven personal documents, each bearing defendant's name. These included two traffic citations issued to defendant, his original birth certificate, his social security card, an opened personal letter addressed to him, a remittance slip issued to him and his insurance identification card. The traffic citations, personal letter and insurance card contained an address, listed as 8419 South Paulina Street, Chicago; none of the documents listed the South Throop address. In addition to the documents, officer Inseley found several items of adult male clothing in the bedroom, including designer jeans, a stack of men's dress shirts, underwear and socks. Officer Inseley recovered a semiautomatic handgun in the bedroom closet wrapped in an adult-sized male sweatshirt. He also recovered, on top of the night stand, two large sandwich bags and nine blue tinted zip-lock bags containing a white powder and white chunk substances, which he suspected to be cocaine. And, he recovered rolled up bills in the amount of $293 on the floor beneath the bedroom window.

¶ 6 Officer Inseley further testified that, after executing the search warrant and recovering these items, another officer discovered, via the police computer system, that defendant had a criminal court date the following day. Therefore, on January 5, 2012, officer Inseley and his partners went to the criminal courthouse with a photograph of defendant. After identifying defendant from the photograph, officer Inseley approached him as defendant exited a courtroom

and asked him his name. Defendant identified himself, whereupon officer Inseley placed defendant in custody.

¶ 7 Following this testimony, and after considering written memoranda submitted by the parties as requested, the trial court denied defendant's motion to quash and suppress, concluding that police "had probable cause to arrest" him. The court noted that officers executed a valid search warrant and, in so doing, "recovered various items bearing defendant's name" which amounted to "proof of residency." This, combined with the "narcotics, currency and firearms" also recovered by police and in consideration of the "information furnished by the" confidential informant, gave officers "probable cause to believe that *** defendant had recently committed" the offenses charged. The court specifically noted that "the proof of residency" established that "defendant had knowledge and control over the narcotics and firearms that were discovered in the premises."

¶ 8 Having found that the search warrant was properly issued and executed, the trial court next addressed whether the officers properly conducted the warrantless arrest of defendant. The court concluded that defendant's warrantless arrest was properly effectuated, based on the information obtained from the confidential informant, the items recovered during the execution of the search warrant, and the fact that the officers made the arrest in public "close in time to the recovery of the evidence" and "following the execution of the search warrant, upon which *** defendant was the direct target." Accordingly, the court ultimately held that "[b]ased on the totality of the circumstance[s], *** the officers had probable cause to make a warrantless arrest of *** defendant."

¶ 9 Defendant's cause then proceeded to trial. Officer Inseley testified in much the same manner as he did at the pretrial hearing. On January 4, 2012, he and other officers entered the second-floor apartment at 5701 South Throop to execute a search warrant, of which defendant was the target. The apartment contained three bedrooms, and no one was home at that time. Officer Inseley was in charge of searching the rear bedroom off the kitchen, which contained only a bed, a night stand and a closet. Upon entering the bedroom, he saw in plain sight on the night stand two clear sandwich bags each containing a white powder substance and a white rock-like substance, which he suspected to be crack cocaine. Also on the night stand were nine small blue tinted zip-lock bags containing this suspect crack cocaine. Upon continuing his search, officer Inseley found on the bedroom floor under the window a large bundle of cash, totaling $293. Finally, officer Inseley searched the closet, where he found a handgun wrapped in a white hooded men's sweatshirt. Officer Inseley's partner discovered additional cash and seven documents with defendant's name and some containing an address of 8419 South Paulina Street on them in the bedroom, and a police scanner and numerous zip-lock bags were recovered elsewhere in the apartment.

¶ 10 Officer Inseley further testified that, on the following day, and with a photograph of defendant, he and other officers went to the criminal courthouse building. When he saw defendant exiting a courtroom, officer Inseley asked him his name. After defendant identified himself, officer Inseley placed him in custody and he was transported to the police station. Once there, officer Inseley mirandized defendant who waived his rights and had a conversation with police. Officer Inseley recounted that defendant first asked the officers "how much sh*t did you

get out of my crib?," to which officer Inseley asked him "which crib would [he] be talking about?" Defendant replied "5701 South Throop," and then told officer Inseley that "the work was his, [but] that the heater was not," which officer Inseley, based on his 15-plus years of experience as a police officer, knew defendant to mean that the suspect narcotics, or "work," were his but the gun, or "heater," was not. At this point in the conversation, officer Inseley warned defendant that the gun was being sent to the state crime lab for fingerprint testing and, after a few moments, defendant admitted to him that the gun was also his and that he wanted to cooperate with police. On cross-examination, officer Inseley affirmed that, while he did not take any notes during his conversation with defendant, he memorialized it in a written narrative supplemental report attached to his police report which he prepared and signed soon after the conversation took place. He also admitted that defendant was not asked to write out his statement, nor to review nor sign anything with respect to his statement.

¶ 11 Officer Jerod Nowak testified that he too was at the second-floor apartment at 5701 South Throop to assist in executing the search warrant and was assigned to search the rear bedroom with officer Inseley. Officer Nowak opened the night stand drawer and recovered $940 in cash and seven documents bearing defendant's name. Officer Nowak identified these as defendant's birth certificate, his social security card, an envelop with his name on it, a payment slip bearing his name, his insurance card and two traffic citations with his name on them. On cross-examination, officer Nowak noted that, while all of the documents bore defendant's name, none of them contained the address of 5701 South Throop; only three of the documents the personal envelop and the two traffic citations contained an address, and this was listed as South Paulina.

¶ 12 At the close of the State's case-in-chief, stipulations were presented. These included that the contents of the 11 items (the 2 sandwich bags and the 9 blue-tinted zip-lock bags) recovered from the night stand tested positive for cocaine in the amount of 124.9 grams. The parties also stipulated to the presentation of two certified copies of conviction for defendant to support the charge of armed habitual criminal. The trial court received these certified copies of conviction, specifically stating that they were "[f]or the limited purpose of the armed habitual criminal statute." It then asked each party if there was any objection to this limited admission and, after both responded in the negative, the trial court again stated for the record that defendant's prior convictions "will be allowed for the narrow purpose of an element of the offense charged and not taken into account for [any] other purpose whatsoever."

¶ 13 Defendant testified on his own behalf. He denied telling the officers at the police station that the drugs or the gun found in the apartment were his, and denied that he offered to be cooperative with them in their investigation. He testified that, at the time of the search warrant's execution, he lived at 8419 South Paulina, had been living there for the previous ten years, and was sharing that residence with his mother, father and younger brother. Defendant further explained that, one day after work, he had gone to renew his driver's license and had a folder containing the documentation police recovered at the apartment in order to do so. After renewing his license, he then went to 5701 South Throop where his male cousin lived with two females to watch a game, and he put the folder in a kitchen drawer while there. Defendant denied ever living at the South Throop address, having keys to the apartment or knowing that the drugs and gun were there. On cross-examination, defendant could not explain how his

documents went from the kitchen drawer to the night stand drawer in the bedroom, and stated the last time he was at the apartment was two or three weeks before the date of the search warrant's execution.

¶ 14 Defendant's mother, Jacquelyn Washington, also testified. She stated that she lives at 8419 South Paulina and defendant has lived with her at that address for the last 20 years. She admitted that, although defendant has always lived with her at this address and maintains this as his residence, he sometimes spends the night elsewhere and does not come home. She further testified that she does not know anyone who lives at 5701 South Throop and affirmed that no family members, either from her side or her husband's, live there.

¶ 15 Following the close of evidence, the trial court found defendant guilty on all four counts. In its colloquy, the court noted some deficiencies in the police investigation, but specifically found officer Inseley to be "credible" and that he provided "sufficient" evidence "concerning main points that [he] testified to[p]articularly taken into light when we get to [o]fficer Nowak's testimony," which it also determined to be credible. The court noted at length defendant's personal documentation recovered in the bedroom, concluding that, in its view, this is what "started to sink defendant's ship." The court commented that it did not "disbelieve" defendant's recount that he needed to renew his driver's license, but it did not believe defendant would leave behind "two valuable documents," namely, his original birth certificate and social security card, at a residence that he said he visited two to three weeks earlier without going back to retrieve them. Based on this, the court stated it did not find defendant's testimony to be credible and, instead, found it to be "an incredible story."

¶ 16 In concluding its colloquy, the court addressed the counts against defendant and the evidence presented with respect to each. The court noted that the State had met its evidentiary burden of proof as to armed habitual criminal; that "the totality of the circumstances" supported a finding of guilt for possession with intent to deliver, citing the "amount of drugs alone" as well as the police scanner, the gun and the "[s]tack of money;" that he was in possession of a controlled substance; and that the State had submitted his previous convictions for "the limited purpose" of proving UUWF. The court made clear that it believed defendant "lived there," that he "used that facility" for selling drugs, and, ultimately, that the evidence presented "removed reasonable doubt in this case to the extreme."

¶ 17 Defendant's cause then proceeded to sentencing. In aggravation, the State noted for the trial court the sentencing ranges for defendant's instant convictions, as well as the fact that he had three prior felony convictions from 1997, 2000 and 2001 for manufacture and delivery of cannabis and a controlled substance. In mitigation, defendant pointed out his employment history, that his prior convictions were old and he had received probation and boot camp for them, and that there was no evidence in this cause that he was distributing the narcotics. Defendant also noted the minimums regarding the applicable sentencing ranges, and the fact that he was convicted of having "just above the minimum amount" of narcotics involved in his possession of a controlled substance with intent to deliver conviction (*i.e.*, a 100-400 gram threshold with a minimum sentence of 9 years served at 75%). Acknowledging this, the court asked the State "to talk to somebody on the supervisory side" to ensure that the sentence on this count would not be "excessive," and continued the hearing for a later date so it could "look at this

once again."

¶ 18 When the court reconvened, the State noted for the court that it would stand on the evidence and statutory minimums regarding sentencing. The court again took the matter under advisement and postponed sentencing.

¶ 19 When the court reconvened, defendant reiterated his contentions in mitigation, again citing the low amount of narcotics recovered. While discussing his view that he deserved a "break" in sentencing, the trial court responded by stating that "judges give probation or they give sentences within the lower range *** with the hope" that defendants learn from theirs mistakes, but that "the problem" with defendant here is that "he just keeps coming back." Further, the court commented that defendant had:

> "chosen this as a lifestyle. He's chosen this as an occupation. That being the case, he has assumed the risk for what he does in these situations. I mean, if it was an accidental or a one-time situation or a situation that somebody else put him in, the Court would have a little bit more sympathy with respect to the defense side.
>
> On the other side, [the] Court feels that the mandatory sentencing requirements beyond the ten years are too onerous based upon the totality of the circumstances. So it puts me in a position that he does not rate the exact minimum, but there is no public good beyond the ten years ***.
>
> ***
>
> I do see the [S]tate's point that this is not a novice who simply got caught

> up in the web of what was happening. I understand *** defendant is reserving his claim of innocence in this matter. The Court would have maybe looked at a different option in terms of the sentence and gone the exact minimum if *** defendant at this juncture of the litigation would accept responsibility, but I understand why at this particular point in litigation he does not accept responsibility, continues to maintain his innocence, but with that comes the consequences that he received. *** I think once he gets beyond this particular case and serves whatever time he's due to serve with the credit due him, he can come back out and be a protective citizen.
>
> If I imposed a sentence deeper into the Class X special sentencing, enhanced sentencing, I think it would be counter-productive in this case because I would end up with a person getting out who would have absolutely no hope of rehabilitation, no hope of coming back to society and making good his situation. So this is tailored to *** defendant as best it can be based upon the restrictions that the Court has."

The court then sentenced defendant to 10 years for each of his 4 convictions, all to run concurrently.

¶ 20 ANALYSIS

¶ 21 As noted, defendant raises multiple issues for our review, including with respect to his pretrial motion to quash arrest and suppress evidence, the sufficiency of the evidence as to each conviction, and sentencing. We will address each of these.

¶ 22 I. One-Act, One-Crime

¶ 23 Before we turn to more substantive issues, we note that one of defendant's claims centers on the one-act, one-crime rule. Essentially, he asserts that his UUWF conviction (and accompanying sentence) must be vacated because this was a lesser included offense of his armed habitual criminal conviction. The State concedes this issue, noting that defendant's convictions for these two crimes were both based on the same physical act of his possession of the handgun recovered in the apartment. Indeed, the record is clear that those counts of the indictment against defendant detailing these two crimes for which he was charged and later convicted both allege that he unlawfully possessed a firearm, and only one such firearm was ever at issue in this cause the firearm recovered by officer Inseley in the bedroom closet wrapped in the white hooded men's sweatshirt. Accordingly, and upon the State's concession, we need not further review this portion of his claim. Defendant's UUWF conviction and accompanying sentence are hereby vacated. See, *e.g.*, *People v. Bailey*, 396 Ill. App. 3d 459 (2009) (vacating UUWF conviction as it was based on same act as act forming basis of armed habitual criminal offense).

¶ 24 II. Pretrial Motion to Quash and Suppress

¶ 25 Defendant's first substantive contention on appeal is that the trial court erred in denying his motion to quash arrest and suppress evidence. He asserts that police committed an unlawful warrantless arrest of him based upon insufficient probable cause to believe the he was the owner of the contraband recovered from the apartment. He cites principally to the statements made by the confidential informant as contained in the search warrant, claiming that these were uncorroborated since the police never conducted any surveillance of the apartment, the

statements were not material to the issue of probable cause for his arrest, and the State made clear it was not basing probable cause for his arrest on these statements.

¶ 26 As a threshold issue, the State insists that defendant has forfeited his contention "by failing to preserve it in his motion for a new trial as required." See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988); accord *People v. Herron*, 215 Ill. 2d 167, 175 (2005) (both trial objection and written posttrial motion raising issue are required to preserve error for review). The State then provides a record citation in support of this assertion. However, upon our review of the record, the citation the State provides is to a posttrial motion defendant filed entitled "Motion to Reconsider Finding of Guilt of Possession of a Controlled Substance with Intent to Deliver," seemingly, a separate and more specific motion defendant made with respect to that particular conviction. Yet, in the record, immediately before this motion appears, is defendant's "Motion for a New Trial." In the very first paragraph of this, defendant alleges error on the part of the trial court "in denying [his] motion to quash arrest and suppress evidence" and provides details with respect to the same, namely (and identical to what he asserts on appeal), that the execution of the search warrant did not create probable cause for his warrantless arrest. Based on this, we find that defendant did, indeed, preserve this issue in a motion for a new trial as required and, thus, did not waive it for our review.

¶ 27 Following the State's assertion of waiver, defendant then, in his reply brief on appeal, turns around to assert a claim of waiver against the State, namely, that the State, by "consistently and repeatedly" maintaining that its theory of probable cause for arrest was based solely upon the observations of police while inside the apartment, has thereby forfeited its ability to cite either

the judicial issuance of the search warrant itself or the probable cause observations made prior to the search as a sufficient basis for the warrantless arrest. Defendant cites to several passages in the record where the State, at the pretrial hearing, told the trial court it was not relying on the fact that the search warrant was issued in relation to its presentation of sufficient probable cause but, rather, was instead basing its motion, and its probable cause assertions, solely on the evidence recovered from the search.

¶ 28 In reading defendant's assertions and noting his focus on the propriety of the statements made by the confidential informant, it appears that there may be some confusion here on his part. The basis of his motion to quash arrest and suppress evidence was that he was *arrested* without probable cause. In arguing against his motion, the State, indeed, never relied on the circumstance surrounding the issuance of the search warrant itself to prove probable cause, and reminded the trial court that one had nothing to do with the other. Rather, for its assertion that there was sufficient probable cause *to arrest* defendant, the State relied on what the officers found in the apartment pursuant to the search warrant the narcotics on the night stand, the gun in the closet and defendant's documents in the night stand drawer. Thus, the State argued, it was the evidence recovered pursuant to the search warrant that gave police probable cause to arrest defendant, not the issuance of the search warrant itself.

¶ 29 Mistakenly, defendant argues here on appeal that the issuance of the search warrant itself was improper, and that this, in turn, rendered his arrest, and subsequent statements to police, improper. As we have noted, his argument focuses on the validity of the search warrant as based upon the statements made by the confidential informant, asserting, *i.e.*, that these were

uncorroborated because there was no police surveillance to verify them, they were not relevant because the confidential informant never saw defendant handling the narcotics or gun, and the State did not rely on them. But, again, defendant's only pretrial motion at issue here is his motion to quash arrest and suppress evidence not to quash the search warrant or suppress the evidence recovered from that search. That the search warrant which initiated this cause was signed by a magistrate based on the confidential informant's statements to officer Olsen and the other information officer Olsen provided to that magistrate had nothing to do with defendant's subsequent arrest. Rather, his arrest was based on what was recovered from the execution of that search warrant. Defendant, essentially, is now attacking an issue he did not challenge below: the issuance of the search warrant rather than the propriety of his warrantless arrest. Issues not raised before th trial court are generally waived on appeal. See *Enoch*, 122 Ill. 2d at 186; *People v. Flores*, 245 Ill. App. 3d 149, 154 (1993).

¶ 30 Further support for this point comes from the record. During the pretrial hearing on defendant's motion, he presented questions to officers Inseley and Olsen about how they obtained the search warrant. The State objected repeatedly, noting for the court that defendant was improperly "attacking the search warrant," whereas his motion was "attacking the probable cause for his arrest." In response, the trial court specifically asked defendant if he was "attacking the issuance of the search warrant by the [j]udge?", to which defendant responded, "I am not." Based on this, the trial court made clear for the record that it would not evaluate "the legitimacy of that search warrant because both parties have agreed that that's [the purpose of the pretrial motion to quash arrest and suppress evidence] not it." Clearly, then, the issue on appeal has nothing to do

with the validity of the search warrant, as defendant now argues.

¶ 31 However, we reiterate, as we often do, that waiver is a limitation on the parties and not on courts, and we may choose not to apply the waiver doctrine but, instead, to review an issue presented to us on appeal. See *People v. Hoskins*, 101 Ill. 2d 209, 219 (1984); accord *People v. Clay*, 167 Ill. App. 3d 628, 631 (1988). Reading between the lines of defendant's brief, while somewhat confusing as outlined above, it is remains obvious that he is challenging the trial court's denial of his motion to quash arrest and suppress evidence on the ground that police did not have probable cause for his warrantless arrest obvious enough that the State presented a lengthy response to such an assertion in its responsive brief on appeal. Because of this, and based on judicial economy concerns, we will review defendant's claim.

¶ 32 A warrantless arrest is valid if police have probable cause to arrest. See *People v. Sims*, 192 Ill. 2d 592, 614 (2000); accord *People v. Wetherbe*, 122 Ill. App. 3d 654, 657 (1984) (while warrant is generally required for arrest, a warrantless arrest is proper if probable cause exists). Probable cause to arrest exists when the facts known to the officer at the time of the arrest are sufficient to lead a reasonably cautious person to believe a crime has occurred and that the person to be arrested committed the crime. See *People v. Wear*, 229 Ill. 2d 545, 563-64 (2008); see also *People v. Chapman*, 194 Ill. 2d 186, 215-16 (2000); *People v. Williams*, 305 Ill. App. 3d 517, 523 (1999). Whether probable cause existed is not a legal or technical determination, but one of practicality and common sense which analyzes the totality of the circumstances at the time of arrest. See *Sims*, 192 Ill. 2d at 615; *People v. Robinson*, 299 Ill. App. 3d 426, 431 (1998); see also *People v. Love*, 199 Ill. 2d 269, 279 (2002) (totality of circumstances is central focus for

determination of existence of probable cause). Though more than mere suspicion is required to justify a warrantless arrest, evidence beyond a reasonable doubt or sufficient to sustain a conviction is not. See *Sims*, 192 Ill. 2d at 615; see *Chapman*, 194 Ill. 2d at 218 (determination of probable cause rests only on probability of criminal activity); accord *People v. Lee*, 214 Ill. 2d 476, 485 (2005). The defendant has the ultimate burden of showing a lack of probable cause. See *Williams*, 305 Ill. App. 3d at 523.

¶ 33 We further note that in reviewing a trial court's decision on a motion to suppress based, as here, on a claim of lack of probable cause, we are presented with a mixed question of law and fact. See *People v. Novakowski*, 368 Ill. App. 3d 637, 640 (2006). Therefore, we apply a two-part standard of review. See *People v. Grant*, 2013 IL 112734, ¶ 12. That is, while we accord great deference to the trial court's factual findings and credibility determinations and will reverse those only if they are against the manifest weight of the evidence, we review *de novo* the trial court's ultimate determination of whether the evidence should have been suppressed. See *Grant*, 2013 IL 112734, ¶ 12; accord *People v. Pitman*, 211 Ill. 2d 502, 512 (2004)*; Novakowski*, 368 Ill. App. 3d at 640.

¶ 34 Essentially, then, we are called in this cause to conduct a review of the totality of the circumstances to determine whether probable cause existed after police executed the search warrant of the second-floor apartment at 5701 South Throop, which the record establishes was the sole basis for defendant's warrantless arrest in public at the criminal courthouse the following day. Upon our analysis of the facts at hand, we find, just as the trial court did, that the totality of them, as known to police at the time of defendant's arrest, clearly supported a finding of probable

cause.

¶ 35 With the valid search warrant that officer Olsen had obtained, and along with the confidential informant's drive-by identification, police specifically targeted the second-floor apartment at 5701 South Throop and defendant. In preparation of its execution, as officer Olsen testified, he investigated defendant's criminal background, whereupon he discovered that defendant, who was 32 years old at that time, had some 28 prior arrests, many of which involved narcotics. Officer Olsen also discovered that, while defendant never gave 5701 South Throop as his address during these arrests, he had provided a variety of different addresses as his residence, with all of them being "very close to the residence located at 5701 South Throop Street." With this information, and armed with a photograph of defendant, police then executed the search warrant. When they arrived, no one was home. Officer Inseley testified that he and his partner were in charge of searching the rear bedroom. As he testified, he found, in plain view, two sandwich bags and nine smaller blue-tinted zip-lock bags of cocaine on the night stand. Inside the night stand drawer, his partner recovered a series of personal legal documents, seven in all, each bearing defendant's name. These included his original birth certificate, his social security card, an opened personal letter addressed to him, a payment remittance slip issued to him, his insurance identification card and two traffic citations issued to him just two weeks before the search warrant was executed. Again, all of these documents had defendant's name on them; however, none of them had the 5701 South Throop address, and of those that did contain an address (the traffic citations, personal letter and insurance card), the address listed was 8419 South Paulina. In addition to defendant's documents, officer Inseley testified that the bedroom

contained several items of adult male clothing, including designer jeans, a stack of men's dress shirts, underwear and socks. In the closet, officer Inseley recovered a gun wrapped in an adult male's white sweatshirt. He further testified that he recovered rolled up bills in the amount of $293 on the floor beneath the bedroom window. Following the search, police discovered defendant had a criminal court date the following day. With this information and all the evidence recovered, officer Inseley went to the courthouse, identified defendant from a photograph he had with him, waited until he exited a courtroom and approached and asked him his name. After defendant identified himself, officer Inseley placed him in custody.

¶ 36 In considering all this, the trial court concluded that police had probable cause to arrest defendant because they "recovered various items bearing defendant's name" in the bedroom which, it found, amounted to "proof of residency." Based on the totality of the circumstances, we agree. As discussed in more detail below, the documents recovered two of which were dated only several days before the search warrant's execution established that defendant had knowledge of the narcotics and gun recovered in the bedroom and that he had control over this contraband. In addition, police discovered that defendant had been arrested 28 times, mostly for narcotics offenses. Although he never gave the 5701 South Throop address as his residence for these, he did give multiple different addresses, all of which were "very close" in proximity to the target address. See, *e.g.*, *People v. Tisler*, 103 Ill. 2d 226, 237 (1984) (police officer's factual knowledge, based on prior law enforcement experience, is relevant to probable cause determination). Defendant's documents were recovered in the same night stand upon which narcotics were found. Moreover, the bedroom contained only male clothing, and the gun was

recovered wrapped in a men's hooded sweatshirt in the closet. And, there was a large amount of cash under the bedroom window. All this the recovery of some seven vital personal documents all bearing defendant's name, and his repeated criminal background of providing multiple nearby addresses as his residence upon arrest, combined with the narcotics, gun and large amount of cash currency also recovered there, pursuant to a search warrant that targeted both this specific apartment and this specific defendant, and the fact that police arrested defendant in public the very next day after the recovery of this evidence clearly amounted to sufficient probable cause to arrest defendant.

¶ 37 Defendant's arguments to the contrary are meritless. As we have discussed, these focus solely on the statements provided to police by the confidential informant, which defendant insists were uncorroborated and immaterial to a determination of probable cause here. Defendant is actually correct; the confidential informant's statements to police are irrelevant here precisely because, as, again, we discussed earlier, they did not form the basis for his arrest. Rather, the basis for his arrest was the evidence recovered from the execution of the search warrant, namely, all his personal documents in the night stand, the narcotics on top of the night stand, the gun in the closet, and the money under window all indicative to police that this was defendant's bedroom. That, according to defendant, there was no police surveillance to verify the confidential informant's statements and identifications or that the confidential informant never saw defendant handling these narcotics or gun is irrelevant. Such information goes only to a challenge of the validity of the search warrant, which was never challenged below. The crux of the probable cause determination here is what was recovered as a result of the search and, what

was recovered, we believe, was more than ample evidence to provide police with probable cause to arrest defendant for the crimes charged.

¶ 38 Accordingly, we hold that, based on the record before us, and when considering the totality of the circumstances presented, there was sufficient probable cause for defendant's warrantless arrest and, thus, we find no error on the part of the trial court in denying defendant's motion to quash arrest and suppress evidence.

¶ 39 III. Sufficiency of the Evidence

¶ 40 Defendant next presents a series of challenges against the sufficiency of the evidence with respect to each of his convictions of possession of a controlled substance, possession of a controlled substance with intent to deliver, and armed habitual criminal.[1] He argues that the evidence presented to support each of these was not enough to sustain his convictions and, thus, his convictions must all be reversed. We disagree.

¶ 41 When a criminal defendant challenges the sufficiency of the evidence used to convict him, the standard of review is whether, when viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See *People v. Smith*, 185 Ill. 2d 532, 542 (1999); *People v. Hunley*, 313 Ill. App. 3d 16, 20 (2000). Courts of appeal will not retry the defendant. See *People v. Digirolamo*, 179 Ill. 2d 24, 43 (1997). Instead, the trial court, as the trier of fact in a bench trial, hears and sees the witnesses and, thus, has the responsibility to adjudge their credibility, resolve any

[1]Having already determined that defendant's conviction for UUWF must be vacated, we need not address the assertions he makes in the context of a sufficiency of the evidence challenge with respect to that conviction.

inconsistencies, determine the weight to afford their testimony and draw reasonable inferences from all the evidence presented. See *People v. Steidl*, 142 Ill. 2d 204, 226 (1991); *Hunley*, 313 Ill. App. 3d at 21. Ultimately, a conviction will not be overturned unless the evidence is so improbable or unsatisfactory as to create a reasonable doubt of guilt. See *People v. Brown*, 185 Ill. 2d 229, 247 (1998).

¶ 42 We begin with defendant's conviction for possession of a controlled substance. In order to convict someone for this crime, the State must prove that he knew of the presence of the narcotics and that they were in his immediate and exclusive control. See *People v. Woods*, 214 Ill. 2d 455, 466 (2005). Possession may be established through evidence of either actual or, as applicable herein, constructive possession. See *People v. McLaurin*, 331 Ill. App. 3d 498, 502 (2002). Constructive possession exists without any actual physical dominion over the controlled substance and, instead, where there is an intent and capacity to exercise control or dominion over them. See *People v. Frieberg*, 147 Ill. 2d 326, 361 (1992); *People v. Blue*, 343 Ill. App. 3d 927, 939. Evidence of constructive possession is " 'often entirely circumstantial.' " *People v. McCarter*, 339 Ill. App. 3d 876, 879 (2003), quoting *McLaurin*, 331 Ill. App. 3d at 502. For example, control over the location where the narcotics are found gives rise to the inference that the defendant knew they were there and possessed them. See *McCarter*, 339 Ill. App. 3da t 879; accord *Blue*, 343 Ill. App. 3d at 939. Habitation in or rental of the premises by the defendant is sufficient evidence to prove the requisite control. See *Blue*, 343 Ill. App. 3d at 939, citing *People v. Cunningham*, 309 Ill. App. 3d 824, 828 (1999). Proof of residency is also relevant to show the defendant lived on the premises and therefore controlled them and, in turn, the narcotics

recovered therein. See *Blue*, 343 Ill. App. 3d at 939, citing *People v. Lawton*, 253 Ill. App. 3d 144, 147 (1993).

¶ 43 In addition, while simple proximity to narcotics, alone, is not enough to sustain a conviction for possession (see *People v. Adams*, 242 Ill. App. 3d 830, 833 (1993)), where there is other circumstantial evidence that is sufficiently probative, proof of proximity combined with inferred knowledge of the presence of the narcotics will support a conviction for constructive possession. Moreover, constructive possession does not wholly necessitate that the defendant control the location where the narcotics are found, and a defendant's lack of control will not preclude a finding of guilt if the circumstantial evidence presented otherwise supports an inference that he intended to control the narcotics inside. See *People v. Minniweather*, 301 Ill. App. 3d 574, 578 (1998), citing *People v. Adams*, 161 Ill. 2d 333, 345 (1994). "The sufficiency of proof of the accused's control of the place where the narcotics were found is not eroded because the place previously had been under the control of another who could have placed the narcotics there." *Cunningham*, 309 Ill. App. 3d at 828; see *People v. Scott*, 152 Ill. App. 3d 868, 871 (1987) (mere access by others to the area where narcotics found does not defeat charge of constructive possession). Critically, the determination of whether the defendant had the requisite knowledge and possession lies directly with the trial court in a bench trial, and we may not disturb its finding on this "unless the evidence is so palpably contrary to the verdict or so unreasonable, improbable or unsatisfactory so as to create a reasonable doubt as to guilt." *Scott*, 152 Ill. App. 3d at 871.

¶ 44 We find no reason to disturb the trial court's finding here, as it is clear that defendant

occupied and controlled the bedroom in the second-floor apartment at 5701 South Throop where police officers recovered the narcotics at issue. Officers Inseley and Nowak wholly corroborated each other when they each testified at trial that, while assigned to search the rear bedroom at that location, they saw, in plain view on top of the night stand, two sandwich bags and nine blue zip-lock bags of suspect cocaine. Then, upon opening the night stand drawer, they recovered some seven documents, all bearing defendant's name. While these did not directly match defendant with the South Throop address, the documents did include critical pieces of personal identification, including his original birth certificate, his social security card and his insurance identification card, along with a personal letter, a payment receipt and two traffic citations that had just been issued to him only several days before the execution of the search warrant. The trial court found that this discovery is what "started to sink defendant's ship." That is, while it did not disbelieve his recount that he had needed these documents to renew his driver's license a few weeks earlier, it could not believe that defendant would have left these "valuable documents" behind at a residence at which he did not live or over which he did not have control for that long without going back to retrieve them. The trial court specifically found that, whereas defendant's testimony made for "an incredible story," officers Inseley and Nowak were wholly "credible."

¶ 45 In addition to this testimony regarding the recovery of the narcotics and documents was the testimony officer Inseley provided regarding defendant's statements to police once in custody. After defendant was taken to the station and mirandized, he began a discussion with police by asking at the outset, "how much sh*t did you get out of my crib?" When officer Inseley asked him which "crib" he was talking about, defendant confirmed the location where the

narcotics were found by replying "5701 South Throop." He then admitted that the narcotics, or "work," were his but the gun, or "heater," was not. And, immediately after officer Inseley told him that the gun was going to be processed for fingerprints, defendant further admitted that gun was also his.

¶ 46 Citing a multitude of case law, defendant insists that the mere recovery of some personal documents and a lack of evidence demonstrating his presence and access to the second-floor apartment at 5701 South Throop, along with no other documentation specifically tying him to that address, cannot sustain his conviction for possession here. However, defendant attempts to isolate each of these factors. When combining the evidence presented and taking all of it into consideration, the elements of knowledge and control are clear. It is true that defendant and his mother testified he did not live at that address but, rather, on South Paulina at the family home. But, his mother admitted that defendant did not sleep there every night, and she contradicted his testimony that his "cousin" lived at South Throop where he left his documents upon a visit there to watch a game with him by affirming that no relative of either side of the family lived at that address. Moreover, and as the trial court found, it was certainly not inconceivable that this 32-year-old defendant maintained two residences his familial home on South Paulina and his personal abode at South Throop. The court commented that, in its view, defendant may live at the former but he also lived, and kept his narcotics out of respect for his mother, at the latter, which he used as a "facility." Based on the evidence presented, this is not an unreasonable assumption.

¶ 47 In sum, the State was required to prove beyond a reasonable doubt that defendant had

knowledge of the narcotics in the second-floor rear bedroom of 5701 South Throop and that he exercised control over them. The seven vital, personal pieces of documentation recovered in the night stand right under the narcotics, along with defendant's statements to police, his incredible testimony at trial and his mother's confirmation that he did not always come "home" to 8419 South Paulina every night solidify that the State met its burden here with respect to constructive possession.

¶ 48 Defendant's next claims that the evidence presented with respect to his conviction for possession of a controlled substance with intent to deliver was insufficient to prove his guilt of this crime beyond a reasonable doubt. Identical to the crime of possession of a controlled substance, the State is required to prove beyond a reasonable doubt that the defendant knew of the presence of the controlled substance and that it was in his immediate control or possession; as an added element, the State must additionally prove beyond a reasonable doubt that the defendant intended to deliver the controlled substance. See *People v. Robinson*, 167 Ill. 2d 397, 407 (1995); accord *People v. Contreras*, 327 Ill. App. 3d 405, 408 (2002). Just as with constructive possession, the intent to deliver is most often proved by circumstantial evidence. See *Robinson*, 167 Ill. 2d at 407. Factors relevant to this inquiry may include: whether the quantity of drugs possessed is too large to reasonably be view as being for personal consumption; the high degree of drug purity; the possession of any weapons; possession and amount of cash; possession of police scanners, beepers or cellular telephones; possession of drug paraphernalia commonly associated with narcotics transactions; and the manner in which the controlled substance is packaged. See *Robinson*, 167 Ill. 2d at 408; see also *People v. Bush*, 214 Ill. 2d 318, 328 (2005)

(this list is not exhaustive; other factors present in a cause may be equally probative of intent to deliver).

¶ 49 With respect to the first factor of quantity, on which defendant focuses the majority of his argument here, a reasonable inference of intent to deliver can arise when the amount of narcotics recovered is too large to be viewed as being for personal consumption. See *Robinson*, 167 Ill. 2d at 408. Therefore, the quantity of the controlled substance, alone, can be sufficient to prove this element of the crime beyond a reasonable doubt. See *Robinson*, 167 Ill. 2d at 410. And, the State need not present expert testimony that as to whether the amount of narcotics recovered was too large for personal consumption in order to prove intent. See *Contreras*, 327 Ill. App. 3d at 409. Rather, as the quantity recovered decreases, the need for additional circumstantial evidence of intent to deliver to support a conviction increases. See *Robinson*, 167 Ill. 2d at 413. Therefore, "[t]his court has held that when a defendant possesses narcotics within the range of personal use, 'the minimum evidence a reviewing court needs to affirm a conviction is that the drugs were packaged for sale, and at least one additional factor tending to show intent to deliver.' " *People v. Ellison*, 2013 IL App (1st) 101261, ¶ 16, quoting *People v. Blakney*, 375 Ill. App. 3d 554, 558 (2007).

¶ 50 In the instant cause, the parties stipulated that the police recovered 124.9 grams of cocaine from the rear bedroom of the second-floor apartment at 5701 South Throop. The trial court, as the finder of fact, could have reasonably concluded that this amount of cocaine was too large for personal consumption and, thus, that it established defendant's intent to deliver this controlled substance. See *Contreras*, 327 Ill. App. 3d at 409. In fact, the trial court here arrived

at this exact conclusion, as it stated in its colloquy at the close of trial that the "amount of drugs alone" in this cause was sufficient to establish defendant's intent to deliver. As such, no other evidence was required. See *Robinson*, 167 Ill. 2d at 410. However, the State did, indeed, present several additional factors to further support defendant's intent to deliver beyond a reasonable doubt. These included defendant's possession of the gun, which was recovered by police in the bedroom's closet; officer Inseley's recovery of a large bundle of cash totaling $293 from the bedroom floor and officer Nowak's recovery of $940 in cash in the night stand drawer; the discovery of a police scanner in the apartment; and the fact that the narcotics recovered were packaged in two sandwich bags and nine smaller blue-tinted zip-lock bags. As the trial court's colloquy shows, it closely considered these added factors and found that "the totality of the circumstances" supported a finding of guilt for possession with intent to deliver.

¶ 51 Based on these facts, and contrary to defendant's assertions, the trial court could have reasonably found that 124.9 grams of cocaine was not for personal use and that this amount established defendant's intent to deliver. Therefore, the State sufficiently proved the element of intent with respect to the charge of possession of a controlled substance with intent to deliver beyond a reasonable doubt.

¶ 52 Defendant's last claim with respect to sufficiency of the evidence is that the State did not prove him guilty of armed habitual criminal beyond a reasonable doubt. In order to be convicted for this crime, the State must show that the defendant possessed a firearm and has at least twice before been convicted "of any combination of the following offenses: (1) a forcible felony***; (2) unlawful use of a weapon by a felon; aggravated unlawful use of a weapon; aggravated

discharge of a firearm ***; or (3) any violation of the Illinois Controlled Substances Act or the Cannabis Control Act that is punishable as a Class 3 felony or higher." See 720 ILCS 5/24-1.7(a) (West 2012). As the State points out, two certified copies of defendant's prior convictions for manufacture and delivery of a controlled substance were entered into evidence at trial for the purpose of supporting the charge against defendant of armed habitual criminal. These prior convictions were entered into evidence via stipulation, without objection by defendant and accepted by the trial court for this purpose. And, defendant does not dispute their validity in general nor as a basis to support this charge against him. Therefore, having met, without argument, this element of armed habitual criminal, we need only examine whether the State established defendant possessed a firearm. Based on the record before us, it did.

¶ 53 Many of the legal principles just outlined with respect to possession of a controlled substance apply in the same manner to possession of a firearm. That is, it may be actual, or, as in the instant cause, constructive, thereby requiring a showing that the defendant had knowledge of the presence of the firearm and had immediate and exclusive control over the area where it was found. See *People v. Ross*, 2015 IL App (1st) 120089, ¶ 35, citing *McCarter*, 339 Ill. App. 3d at 879. Both of these factors, knowledge and possession, may be proven by circumstantial evidence. See *People v. Bailey*, 333 Ill. App. 3d 888, 891 (2002); accord *People v. Smith*, 2015 IL App (1st) 132176, ¶ 26, citing *People v. Besz*, 345 Ill. App. 3d 50, 59 (2003) ("constructive possession is typically proved entirely through circumstantial evidence"). The State may prove knowledge by providing evidence regarding the defendant's acts, statements or conduct which may create the inference that he knew of the firearm's presence. See *Smith*, 2015 IL App (1st)

132176, ¶ 26. The State may prove control by providing evidence regarding the defendant's intent and capability to maintain control and dominion over the firearm, even if he did not have personal present dominion over it. See *Smith*, 2015 IL App (1st) 132176, ¶ 26, citing *People v. Spencer*, 2012 IL App (1st) 102094, ¶ 17. For example, the defendant's control over the location where the firearm is found creates an inference of his possession, even if others also have access to that area. See *McCarter*, 339 Ill. App. 3d at 879; *People v. Ingram*, 389 Ill. App. 3d 897, 901 (2009). Ultimately, the trial court, as the trier of fact in a bench trial, is entitled to rely on reasonable inferences regarding knowledge and possession, and these are factual questions for the direct purview of the trial court; again, we will not overturn its determination with respect to these unless the evidence is so unbelievable, improbable or palpably contrary to the verdict that it creates a reasonable doubt of defendant's guilt. See *People v. Ross*, 407 Ill. App. 3d 931, 935 (2014), citing *People v. Smith*, 191 Ill. 2d 408, 413 (2000); see also *Smith*, 2015 IL App (1st) 132176, ¶ 25.

¶ 54 Here, the State offered sufficient circumstantial evidence for the trial court to properly conclude that defendant had constructive possession of the gun recovered in this cause. First, defendant was the specified target of the search warrant, which further specified the second-floor apartment at 5701 South Throop. Next, officers Inseley and Nowak, both of whom the trial court explicitly stated were credible, testified that, when they entered the rear bedroom of that apartment, its contents included only a bed, night stand and closet. Defendant's documents their import and value which we have already discussed at length herein were recovered from the top drawer of the night stand in that room; this, according to the trial court, was sufficient to show

defendant's proof of residency, or control over the bedroom and its contents. Upon recovery of the narcotics in plain sight on the night stand, and two large amounts of cash discovered on the floor under the window and in the night stand drawer, Officers Inseley and Nowak then recovered the gun in the bedroom closet, which was filled exclusively with men's clothing. The gun was hidden, wrapped in a white hooded men's sweatshirt in this closet of the bedroom in which the trial court determined defendant resided, demonstrating he had, and intended to maintain, dominion and control over it. Finally, defendant provided a statement to police detailing that the gun was his. Initially, defendant admitted that the drugs were his, but stated that the "heater" was not. However, after officer Inseley told him that the gun would soon be sent for fingerprint testing, defendant capitulated, affirming that the gun, too, was his. Clearly, defendant knew that the recovered gun was in the closet and that it was his, or he would not have confessed this immediately after this warning after first denying its ownership. Moreover, and significantly, the trial court's determination of defendant' guilt of this crime turned on the credibility of the witnesses who testified at trial. That is, while the trial court found the police officers' testimony credible regarding what they found and defendant's confession, it specifically found defendant's testimony regarding this and his whole recount of what occurred to be incredible.

¶ 55 All this evidence, ample as it was, was more than sufficient to create the reasonable inference that defendant had knowledge of the gun's presence in the bedroom closet and that defendant had the intent and capability to maintain control and dominion over it, thereby supporting his conviction for armed habitual criminal beyond a reasonable doubt.

¶ 56 Considering all the evidence in the light most favorable to the State, a rational trier of fact could have easily found that the State proved all the elements of possession of a controlled substance, possession of a controlled substance with intent to deliver and armed habitual criminal beyond a reasonable doubt. Therefore, we affirm defendant's convictions, as the evidence against him was not so unreasonable, improbable or unsatisfactory so as to create a reasonable doubt of his guilt.

¶ 57 IV. Sentencing

¶ 58 The remaining issues defendant raises on appeal focus on his sentence. Citing several isolated comments made by the trial court during its colloquy at this hearing, he first argues that the court erred in considering his underlying predicate felony convictions as aggravating factors while determining the length of his sentence for the crime of armed habitual criminal. Next, he insists that the trial court erred in considering his silence as an aggravating factor. And, he claims that the trial court erred in imposing an excessive sentence in light of the aggravating and mitigating factors presented. However, based upon our review of his sentencing hearing, we, for the final time, disagree with his contentions.

¶ 59 Before we address each of these claims, we are again presented with the threshold matter of waiver. The State makes a blanket assertion in its brief on appeal that defendant "has forfeited all of his sentencing claims" because he did not raise them at sentencing or in his motion to reconsider sentence while noting that in this posttrial motion, he alleged only that his sentence was excessive. Defendant, meanwhile, insists that he did adequately preserved his claim for his first assertion of double enhancement since he brought it to the court attention during the hearing

on his motion to reconsider sentence; that, even if he did not, his claims for double enhancement and the improper consideration of his silence merit plain error review; and that he clearly preserved his third sentencing claim regarding excessiveness, as it was specified in that motion.

¶ 60 We note for the record that the failure to object during a sentencing hearing and to file a motion to reconsider sentence citing the objections results in the waiver of a claim of sentencing error. See *People v. Hillier*, 237 Ill. 2d 539, 544 (2010); accord *People v. Walsh*, 2016 IL App (2d) 140357, ¶ 16. Yet, sentencing errors that are raised for the first time on appeal are, indeed, reviewable under plain error. See *People v. Ahlers*, 402 Ill. App. 3d 726, 734 (2010); *People v. McCain*, 248 Ill. App. 3d 844, 850 (1993) (challenges to the propriety of a defendant's sentence involve his fundamental right to liberty, thereby meriting plain error review if otherwise waived). However, in this context, the burden is on the defendant to specifically assert that the evidence at his sentencing hearing was closely balanced or that any of the alleged errors deprived him of a fair sentencing hearing. See *Ahlers*, 402 Ill. App. 3d at 734 (to succeed under plain error in sentencing context, the evidence at that hearing must have been closely balanced or the error "was sufficiently grave" that it rendered the hearing fundamentally unfair). And, critically, absent error, there can be no plain error. See *People v. McGee*, 398 Ill. App. 3d 789, 794 (2010), citing *Herron*, 215 Ill. 2d at 187; see also *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Accordingly, even were we to review defendant's sentencing claims despite any technical forfeiture, because, as we discuss in more detail below, we find no error here, there likewise is no plain error. See *People v. Walker*, 232 Ill. 2d 113, 124 (2009) (plain error rule does not apply if a clear and obvious error did not occur).

¶ 61 Turning to the merits of defendant's arguments, we begin by noting several general principles, as the law regarding sentencing is well established. The trial court has broad discretionary powers to determine a defendant's sentence. See *People v. Stacey*, 193 Ill. 2d 203, 209 (2000); *People v. Fern*, 189 Ill. 2d 48, 53 (1999). Its decision merits great deference because the trial judge is in the best position to make a reasoned judgment, weighing factors such as its direct observations of the defendant and his character. See *Fern*, 189 Ill. 2d at 53; see also *People v. Kelley*, 2013 IL App (4th) 110874, ¶ 46, quoting *People v. Price*, 2011 IL App (4th) 100311, ¶ 36 (trial court's sentence must be based on particular circumstances of each case, including the defendant's credibility, age, demeanor, moral character, mentality, social environment and habits). A reviewing court must not substitute its judgment with respect to sentencing for that of the trial court merely because it would have weighed factors differently or desires to invoke clemency. See *Fern*, 189 Ill. 2d at 53 (reviewing court "must proceed with great caution" in deciding whether to modify sentence); *People v. Hayes*, 159 Ill. App. 3d 1048, 1052 (1987); accord *People v. Coleman*, 166 Ill. 2d 247, 258 (1995) (trial court's decision with respect to sentencing "is entitled to great deference"). Nor is a reviewing court to focus on a few words or comments from the sentencing court but, rather, must consider the record as a whole and the sentencing court's decision within that context. See *People v. Andrews*, 2013 IL App (1st) 121623, ¶ 15. Ultimately, a sentence imposed by the trial court will not be altered absent an abuse of discretion. See *Stacey*, 193 Ill. 2d at 209-10; accord *Kelley*, 2013 IL App (4th) 110874, ¶ 46, quoting *Price*, 2011 IL App (4th) 100311, ¶ 36.

¶ 62 In challenging his sentence, defendant first asserts that the trial court improperly

considered his underlying predicate felony convictions to be an aggravating factor, as some of these had already been admitted into evidence with respect to his underlying offense of armed habitual criminal.[2] He cites to "several articulated findings" which he insists "tended to indicate an improper reliance, at least in part" upon his predicate felonies. These include the following statements made by the trial court:

> "The defendant, the problem that *** defendant has is that he has chosen to have he's chosen this as a lifestyle. He's chosen this as an occupation. That being the case, he has assumed the risk for what he does in these situations. I mean, if it was an accidental or a one-time situation or a situation that somebody else put him in, the Court would have a little bit more sympathy with respect to the defense side.
>
> ***
>
> I do have some concerns for cases similar to this where defendants may not quite have had the same background as *** defendant. I do see the [S]tate's point that this is not a novice who simply got caught up in the web of what was happening."

¶ 63 While it is true that a factor inherent in an offense should not also be used as an aggravating factor at sentencing, the proper penalty in a cause must be based on the particular

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[2]We note for the record, as do the parties, that, while we, as a reviewing court, examine the propriety of a sentence pursuant to an abuse of discretion, as just outlined, the consideration of whether the trial court improperly subjected a defendant to double enhancement is an issue that we are to review *de novo*. See *People v. Chaney*, 379 Ill. App. 3d 524, 527 (2008).

circumstance of each case, including the nature and extent of each element of the offense as committed by the defendant. See *Andrews*, 2013 IL App (1st) 121623, ¶ 15. Therefore, a sentencing court "is not required to refrain from any mention of the factors which constitute elements of an offense, and the mere reference to the existence of such a factor is not reversible error." *Andrews*, 2013 IL App (1st) 121623, ¶ 15; see also *People v. Thomas*, 171 Ill. 2d 207, 226-27 (1996) (while sentencing court must not consider element inherent in offense as aggravating factor, this rule does apply rigidly to restrict that court's fundamental function of sentencing a defendant according to relevant factors). In other words, not every double enhancement error, if one were committed by the trial court, would required remand for resentencing. See *People v. Shanklin*, 2014 IL App (1st) 120084, ¶ 91. Rather, where the record shows that the trial court's reference to a potential double-enhancement aggravating factor was so insignificant that it did not lead to a greater sentence, remand is not required. See *Shanklin*, 2014 IL App (1st) 120084, ¶ 91. And again, critically, we, as the reviewing court, are not to focus on a few words or sentences of the sentencing court but, rather, should consider the record as a whole. See *Andrews*, 2013 IL App (1st) 121623, ¶ 15.

¶ 64 The sentencing court in the instant cause did not reconsider the defendant's predicate felonies which were the basis of his armed habitual criminal conviction as an aggravating factor when it sentenced him. Instead, it is clear from various portions of the record that the court's intent was always, from the very beginning, to segregate these two concepts. For example, the record reveals that at trial, when evidence of defendant's prior convictions was initially submitted into evidence via stipulation to support the charge of armed habitual criminal, the trial

court received this while specifically stating that the certified copies of defendant's convictions were "[f]or the limited purpose of the armed habitual criminal statute." It then asked each party if there was any objection to this limited admission and, after both responded in the negative, the trial court again stated for the record that defendant's prior convictions "will be allowed for the narrow purpose of an element of the offense charged and not taken into account for [any] other purpose whatsoever." Notably, then, the court solidified at the immediate introduction of defendant's prior criminal convictions that these would be considered only in satisfaction of his instant armed habitual criminal charge and not for any other purpose.

¶ 65 In addition, we note that the statements to which defendant cites, when read in the context of the court's sentencing colloquy as a whole, further support our conclusion. Nowhere did the court state it was considering defendant's prior convictions as an aggravating factor in rendering its sentence. Rather, during the sentencing hearing, the court did nothing more than comment on the nature and circumstances of the crimes involved, as well as the length and duration of defendant's criminal history in general 28 arrests by the age of 32, mainly for narcotics violations, which he faced once again here. This, the court had the right to do. Precisely as it noted, and regardless of the specific convictions used to support his armed habitual criminal conviction, defendant's background makes it undeniable that he has chosen narcotics and their sale as his "lifestyle" and, as the court noted, the instant situation could not be said to have been a one-time scenario involving a novice. Also, the court's comments which defendant isolates came in reference not to any enhancements or aggravating factors, *per se*, but instead directly to the court's review of his presentence investigation report and in response to his claim that no

evidence had been presented at trial that he had engaged in narcotics distribution. These were not double enhancement factors; rather, they were general factors with respect to the crimes at hand that the trial court could not, nor should not, ignore.

¶ 66 Even if the trial court's comments could be said to have resulted in a double enhancement error by considering his prior felony convictions supporting his armed habitual criminal conviction as aggravating factors in sentencing, with they did not, we would further note, as we did earlier, that this, alone, would not require automatic remand for resentencing. See *Shanklin*, 2014 IL App (1st) 120084, ¶ 91. Instead, it must be shown that the trial court's use of a double-enhancement aggravating factor was so significant that it lead to a greater sentence in order for this to be merited. See *Shanklin*, 2014 IL App (1st) 120084, ¶ 91. That situation is not at all present here. Defendant was sentenced to 10 years' imprisonment for his armed habitual criminal conviction only 4 years more than the minimum and some 20 years less than the maximum for this Class X felony. See 720 ILCS 5/24-1.7(b), 730 ILCS 5/5-8-1(a)(3) (West 2012). Moreover, and as we discuss in further detail below, the entirety of the trial court's colloquy at defendant's sentencing hearing clearly demonstrates that the court weighed and balanced all relevant factors and did not give any greater weight to those particular convictions which formed the basis of his armed habitual criminal conviction than to any others or that it imposed a harsher sentence than it otherwise would have because of them, in light of all the factors it considered. Essentially, any reference the trial court made to these specific convictions was so insignificant that it did not lead to a greater sentence. See, *e.g.*, *Shanklin*, 2014 IL App (1st) 120084, ¶ 91. Therefore, and contrary to defendant's first assertion with respect to

sentencing, we find no double enhancement error on the part of the trial court.

¶ 67 Defendant's next challenge to his sentence is his claim that the trial court improperly considered his silence at sentencing as an aggravating factor. He cites the following comments from the trial court's colloquy:

> "I understand *** defendant is reserving his claim of innocence in this matter. The Court would have maybe looked at a different option in terms of the sentence and gone the exact minimum if *** defendant at this juncture of the litigation would accept responsibility, but I understand why at this particular point in litigation he does not accept responsibility, continues to maintain his innocence, but with that comes the consequences that he received."

Based on this, defendant maintains that the court improperly considered the assertion of his constitutional right against self-incrimination in rendering its sentence, drawing a negative inference from his decision to remain silent and not offer any testimony on his behalf during this portion of the proceedings against him.

¶ 68 Indeed, it is impermissible to draw a negative inference in a criminal case from a defendant's failure to testify or to speak during the allocution phase of the proceedings against him. See *People v. Pace*, 2015 IL App (1st) 110415, ¶ 99, citing *Mitchell v. United States*, 526 U.S. 314, 327-28 (1999). However, this privilege against self-incrimination, within the context of sentencing, is violated when a defendant's silence is used as evidence that he lacks remorse, or when the court considers this lack of remorse as an aggravating factor when imposing its sentence. See *Pace*, 2015 IL App (1st) 110415, ¶ 100.

¶ 69 Defendant's assertion here and his citation to a few short isolated sentences presents a classic case of mischaracterization of the trial court's colloquy. Simply put, upon our review of all that the trial court said before rendering its decision, it clearly did not consider, or punish defendant for, his silence at his sentencing hearing. This is evident from the very comments defendant himself cites. Within these, the court repeatedly stated that it understood why defendant chose not to speak at the hearing and to instead maintain his innocence "at this particular point in litigation." After all, defendant's entire defense from the origin of his cause was that he was innocent that the narcotics and gun recovered were not his, that he did not live in that second-floor apartment on South Throop, and most importantly, that he had no knowledge of the contraband in that bedroom. This was defendant's theory throughout his cause, from start to finish. The court expressed that it understood this and, thus, that it could not expect him to abandon his defense now at sentencing.

¶ 70 Further support for our conclusion is evidenced by the comments the court made immediately before and after those isolated by defendant. That is, the cited comments came in the middle of the court's discussion of both sides of the principle sentencing argument which presents itself in every case the examination of aggravating and mitigating factors. Immediately before the cited comments, the court noted the State's argument that defendant was not new to this situation and merited a maximum sentence; as the record verified, he was not a "novice" when it came to narcotics convictions. Yet, the court then examined "the other side" of the situation, noting that a lengthy sentence was "too onerous" based on the facts of the instant cause. The court acknowledged its understanding that defendant was reserving his claim of innocence

and continued by stating that, after he got "beyond this particular case and serves whatever time he's due," "he can come back out and be a protective citizen." It spent a considerable amount of time discussing its belief that a long sentence "would be counter-productive in this case" because such punishment for this particular defendant would render him with "absolutely no hope of rehabilitation, no hope of coming back to society and making good his situation." Thus, it stated the sentence would be "tailored to *** defendant as best it can."

¶ 71 Although the comments cited by defendant indicate that the court mentioned defendant's decision to remain silent, the remainder of its colloquy and its context demonstrates that it did not rely on this as a factor in aggravation. The court did not hold it against defendant, did not enumerate it in specifically addressing any of the aggravating factors it considered, and did not rely upon it as evidence of lack of remorse or, in fact, of any other indication that would have been relevant to the ultimate sentence it rendered. Rather, and pursuant to our reading of the colloquy as a whole, the court clearly respected defendant's decision, acknowledged that it was in line with his theory of defense, and fashioned a sentence honoring its belief that he had a good chance of returning to society as a productive, capable and functioning citizen. Therefore, we find no substance to defendant's inference from a few comments in its otherwise lengthy and detailed colloquy that the trial court somehow held his silence against him or considered this an aggravating factor in any way.

¶ 72 Defendant's last challenge to his sentence is his claim that it is excessive or, as he states, that it is "longer than appropriate based upon the aggravating and mitigating factors that were available for consideration" during his sentencing hearing. In addition to citing his rehabilitative

potential and the lack of seriousness of the instant crimes, he also argues that the minimum quantity of narcotics recovered, the passage of time since his last felonies, and the fact that he has never served more than 120 days in a prison boot camp program for his past crimes all demonstrate that he should have received the lowest minimum sentences for his convictions here.

¶ 73 In determining an appropriate sentence for a defendant, the sentencing court must weigh both aggravating and mitigating factors. See 730 ILCS 5/5-5-3.1, 3.2 (West 2008). When such factors have been presented to the court, it is presumed that they have been considered, absent some contrary indication. See *People v. Sutherland*, 317 Ill. App. 3d 1117, 1131 (2000); see also *People v. Cord*, 239 Ill. App. 3d 960, 969 (1993) (when mitigating factors have been presented, it is presumed court considered them in fashioning sentence and burden rests with the defendant to prove that court failed to do so). The sentencing court is not required to recite or assign a value to each factor in mitigation or aggravation that forms part of the record. See *People v. Daniel*, 2014 IL App (1st) 121171, ¶ 14; *People v. Hindson*, 301 Ill. App. 3d 466, 476 (1998). And, "[t]he weight that the trial judge accords each factor in aggravation and mitigation, and the resulting balance that is struck among them, depends on the circumstances of the case." *Sutherland*, 317 Ill. App. 3d at 1131. For example, while it is true that a sentencing court is to keep in mind the "objective of restoring the offender to useful citizenship" (Ill. Const. 1097, art. 1, § 11), it is not required to give that more weight than the seriousness of the crime, protection of the public and punishment. See *People v. Harris*, 294 Ill. App. 3d 561, 569 (1998). Nor is it required to do this with a defendant's rehabilitative potential (see *People v. Wilburn*, 263 Ill. App. 3d 170, 185 (1994)), the nonviolent nature of his prior offenses (see *People v. Hill*, 408 Ill. App.

3d 23, 29-30 (2011)), or the fact that he received sentences for prior convictions that were comparatively lenient (see *Kelley*, 2013 IL App (4th) 110874, ¶¶ 45-47)). Ultimately, a sentence within the prescribed statutory range is presumed to be appropriate and will not be deemed excessive unless the defendant affirmatively shows that his sentence varies greatly from the purpose and spirit of the law or is manifestly disproportionate to the nature of the offense. See *Fern*, 189 Ill. 2d at 54; accord *Stacey*, 193 Ill. 2d at 210.

¶ 74 The trial court's colloquy in the instant cause clearly demonstrates that the sentence it rendered was thoroughly contemplated, appropriate, fair and based on a balance of all the aggravating and mitigating factors presented at defendant's sentencing hearing. At the outset, the court commented that it reviewed defendant's presentence investigation report. It then heard about aggravating factors from the State, which included the applicable sentencing ranges for his instant convictions, and mitigating factors from defendant, which included his employment history, the length of time since his last conviction, that he was convicted herein of only a minimum amount of narcotics, that he had received light sentences in the past, and that there had been no evidence of distribution presented at trial. At this point, the trial court called a recess, asking the State "to talk to somebody on the supervisory side." Clearly, the court was taking serious consideration of the mitigating factors, expressing that it wanted to ensure that defendant's sentence would not be "excessive." The court stated it would continue the hearing for a later date so it could "look at this once again." When the court reconvened and the State declared it would stand on the statutory sentencing minimums, the court postponed sentencing a second time and took the matter under advisement.

¶ 75 When the court reconvened, it allowed defendant to once again present his arguments in mitigation and heard his request for a "break" in sentencing. Then, the court balanced these factors with those in aggravation. It noted that "the problem" with defendant was that "he just keeps coming back" into the criminal system despite the "sentences within the lower range" he had received in the past. In the court's view, defendant had chosen narcotics "as a lifestyle" and "occupation," and he had not learned from his past mistakes. At the same time, however, the court was quick to note that sentences for his convictions here beyond "ten years" would be "too onerous based on the totality of the circumstances." Accordingly, the court commented that, based on all that had been presented, defendant did not "rate the exact minimum, but there is no public good beyond the ten years ***."

¶ 76 Following these comments, the court continued with and intense discussion of defendant's rehabilitative potential. It noted that it sincerely believed that "once [defendant] gets beyond this particular case and serves whatever time he's due to serve ***, he can come back out and be a protective citizen." It further reasoned that sentencing him "deeper into" the sentencing ranges he faced would be "counter-productive" because it would leave him with "no hope of rehabilitation, no hope of coming back to society and making good his situation." Thus, the court stated its finding would be "tailored to *** defendant as best it can be" and sentenced him to 10 years for each of his convictions, to run concurrently.

¶ 77 From all this, we find no excessiveness or disproportionality. A variety of factors were presented to and discussed by the trial court in fashioning its sentence for defendant. Undeniably, these included those he now points to appeal, including the minimum amount of

narcotics involved, the age of his prior felonies, and the minimum sentences he received in the past. While the court acknowledged these and spent a good portion of its colloquy discussing defendant's rehabilitative potential, which it found to be good, it also found weighty the fact that despite all this, defendant has not yet seemed to learn his lesson. The court's attempt at balancing these competing interests is obvious in the record and, that its decision was not one favorable to defendant, alone, cannot support the conclusion that the sentences it rendered were excessive. Indisputably, they were all well within the appropriate sentencing ranges for each of his instant convictions; in fact, from our view, they were actually all on the lower end of these ranges. See 720 ILCS 5/24-1.7(b), 570/402(a)(1)(B), 570/401(a)(2)(B) (West 2012) (sentencing range for armed habitual criminal is 6-30 years; for possession of a controlled substance with intent is 9-40 years, and for possession is 4-15 years). Moreover, the fact remains that police discovered sufficient proof of defendant's residency at the second-floor apartment on South Throop and, with his admission to officer Inseley that the drugs and gun found in the bedroom there were his, defendant clearly exercised possession and control of these sufficiently enough to support the findings of his guilt in this cause.

¶ 78 Therefore, and again based on all this, we reject defendant's arguments regarding the court's alleged failure to consider his rehabilitative potential and other mitigating factors and its imposition of an inappropriately lengthy sentence and find, instead, that his sentence, which was properly within the applicable sentencing range for the crimes charged, was, contrary to his

contention, not excessive in light of the circumstances presented.[3]

¶ 79 CONCLUSION

¶ 80 Accordingly, for all the foregoing reasons, we affirm the judgment of the trial court, vacating only defendant's conviction and accompanying sentence for UUWF in light of the one-act, one-crime rule.

¶ 81 Affirmed in part, vacated in part.

[3]We note for the record that, in his reply brief, defendant raises for the first time another, and additional, contention regarding his sentence, namely, that remand is required because it is unclear from the record whether the trial court improperly considered his "vacatable" conviction for UUWF as an aggravating factor in sentencing him for his other convictions here. However, points not raised in a brief are waive and cannot be argued for the first time in a reply brief, pursuant to Illinois Supreme Court Rule 431(h)(7) (S. Ct. R. 341(h)(7)). Accordingly, we will not, and cannot, address this at this time. See *People v. Thomas*, 116 Ill. 2d 290, 303-04 (1987).