2018 IL App (1st) 152046-U

No. 1-15-2046

Order filed February 6, 2018

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 CR 11249
	)	
FREDERICK SMITH,	)	Honorable
	)	Lawrence E. Flood,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Neville and Justice Mason concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for possession of a stolen motor vehicle is affirmed over his contentions that the State improperly shifted the burden of proof during its rebuttal closing arguments and that his 10-year sentence was punishment for rejecting the court's plea agreement.

¶ 2 Following a jury trial, defendant Frederick Smith was convicted of possession of a stolen motor vehicle (625 ILCS 5/4-103(a)(1) (West 2014)) and sentenced, based on his criminal history, as a Class X offender to 10 years' imprisonment. On appeal, defendant contends that the

State improperly shifted the burden of proof when it made certain remarks during its rebuttal closing arguments. He also contends that his sentence is excessive. We affirm.

¶ 3 Defendant was arrested on June 18, 2014, and charged with one count of possession of a stolen motor vehicle, which alleged that he possessed a 2000, white Chrysler 300, belonging to Rainbow Auto Mart, without being entitled to the possession of the vehicle, and knowing the vehicle to have been stolen or converted (625 ILCS 5/4-103(a)(1) (West 2014)).

¶ 4 On December 2, 2014, defendant requested a Rule 402 conference. At the conference, the trial court offered to sentence defendant to six years' imprisonment in exchange for a guilty plea. Defendant initially indicated that he would accept the court's offer. On January 15, 2015, however, he informed the court that he wished to proceed to trial. The court admonished defendant that the offered sentence would be "off the table" once he rejected it and that everything would "go back to square zero." On April 15, 2015, defendant invoked his right to a jury trial.

¶ 5 Prior to jury selection, the court reminded defendant of the outcome of the Rule 402 conference. The court advised defendant that, due to his background, he would be sentenced as a Class X offender and that its offer of six years' imprisonment was the minimum sentence allowable under that range. Defendant acknowledged that he understood the Class X range was a term of 6 to 30 years' imprisonment. The court explained that its offer was in exchange for defendant's guilty plea, and that, if he were to be found guilty after proceeding to trial, he could not "come back and say, Judge, I want that six years." Instead, the court noted that it could sentence defendant to any term within the statutorily prescribed range. Defendant stated that he understood and that he wished to proceed to trial.

¶ 6 At trial, Eduardo Fuentes testified that he owned and operated the Rainbow Auto Mart, which is a used car dealership, located at 5639 South Western Avenue. He stated that, on June 11, 2014, the Rainbow Auto Mart had a 2000 white Chrysler 300 in its lot. According to Fuentes, neither he, nor any of his employees, gave anyone permission to take that vehicle for a test drive on the day in question. He further stated that no one was given permission to keep the car for seven days from that date. Fuentes received no phone calls at the Rainbow Auto Mart regarding that car between June 11, 2014 and June 18, 2014.

¶ 7 On cross-examination, Fuentes acknowledged that, on June 11, 2014, he was not at the dealership until 5 p.m. because he was at a car auction. He stated that at approximately 2 p.m., he received a call from an employee reporting that someone had left with the Chrysler and not returned. Fuentes did not call the police at that time. According to Fuentes, the car was parked on the "first line" of the lot, which was approximately 50 feet from where the dealership's offices are located. Fuentes stated that he did not have any photographs of the vehicle depicting what it looked like on June 11, 2014, nor did he have any records indicating the vehicle's mileage on that date. Fuentes, accompanied by Christian Gallegos, went to the police station to report the car stolen at 9 p.m. that night. Fuentes did not recall if the police had him sign a complaint.

¶ 8 On redirect-examination, Fuentes stated that he did not call the police right away because he was waiting to see if the car was returned. Fuentes testified that the dealership closes at 7 p.m. and that he waited a few hours after it closed before going to the police.

¶ 9 On recross-examination, Fuentes stated that he waited to call the police because he did not like to "think bad about people" and he hoped that the car would be returned.

¶ 10 Christian Gallegos testified that, on June 11, 2014, he was working at the Rainbow Auto Mart. About 11:30 a.m., defendant entered the dealership and inquired about a white Chrysler 300. At the time, the car did not have any license plates attached to it and it had tape on the driver's side mirror. Defendant asked Gallegos to turn the vehicle on so that he could inspect it. Gallegos started the car and lifted its hood so that defendant could view the engine. Defendant then asked Gallegos if he could test-drive the vehicle. Gallegos asked defendant for identification and he provided an Illinois state ID card. Gallegos took defendant's ID and went to the office to make a photocopy. As he returned, he saw defendant drive off the lot with the car. Gallegos stated that he did not give defendant permission to drive the car because he had not yet returned defendant's ID to him. Gallegos did not go to the police until a couple of hours after the dealership closed at 7 p.m. because he was waiting for defendant to return with the car. He stated that defendant was aware of the dealership's hours of operation because he had given him a business card, which included that information. Gallegos filed a police report at 9 p.m. Gallegos did not see or hear from defendant for the next week.

¶ 11 On June 18, 2014, Gallegos received a phone call from his father stating that he had seen the missing car on the side of the Dan Ryan expressway near Garfield Boulevard. Gallegos drove to that location and saw the car parked adjacent to a building, which was located next to a gas station. He saw that the car had tape residue on the driver's side mirror and that license plates had been added. Gallegos called the police and, while he waited for them to arrive, he saw defendant "peek out" of a window in the building adjacent to the car. Defendant exited the building, entered the car, and drove to a nearby gas station. Gallegos saw defendant exit the car and go inside of the gas station. While he was inside, a uniformed police officer arrived in a

marked car. Gallegos flagged the officer down and told him that he was the individual who called the police. When defendant exited the station, Gallegos and the police officer approached defendant. Defendant threw the keys "away from the vehicle" and fled. The officer pursued and was able to detain defendant. Gallegos observed that changes had been made to the car, including: a rear license plate, a steering wheel cover, a bald eagle where the front license plate would be, and new windshield wiper blades. Gallegos's father, who was on the scene, went to the dealership to retrieve defendant's ID. When his father returned, he gave the ID to the arresting officer.

¶ 12 On cross-examination, Gallegos testified that his father also worked at the dealership. Gallegos was inside of the office when he saw defendant enter the dealership. Defendant did not look at any other cars on the lot. Gallegos acknowledged that his father initially approached defendant to discuss the car, and, after a 30 second discussion, he joined them. Both Gallegos and his father spoke with defendant while he was at the dealership. Gallegos did not immediately tell his father that defendant had driven off because he thought that defendant might return the car. Gallegos's father told Fuentes at approximately 7 p.m. that the car was stolen.

¶ 13 Chicago police officer O'Brien testified that, on June 18, 2014, he was on patrol when he received a call that a stolen car had been located. When he arrived in the area, he was approached by Gallegos, who directed him to a nearby gas station. Gallegos pointed out the car and defendant. O'Brien approached defendant, who fled upon seeing the officer. O'Brien saw defendant throw the car keys. As he ran, O'Brien pulled out his service revolver and told defendant he needed to question him. Defendant continued to run and O'Brien pursued. Eventually, he caught up with defendant and, after a brief struggle, was able to place him into

custody. O'Brien recovered the keys defendant had thrown near the car. He ran the license plate on the car and discovered that it belonged to a Pontiac owned by defendant. O'Brien searched the car and discovered another license plate, with the same numbers, in the trunk. At the scene, Gallegos's father gave O'Brien an ID belonging to defendant. O'Brien then transported defendant to the 9th District police station.

¶ 14 On cross-examination, O'Brien testified that the original call sent him to an address on Wells Street and, when he searched that area, he was alerted that the car had moved to a gas station. O'Brien acknowledged that, as he was patrolling the area, defendant flagged him down and they spoke briefly. O'Brien stated that, at that time, he did not know that defendant was the individual who had stolen the car. As O'Brien entered the gas station, Gallegos pulled alongside of him and told him that he was the individual who called the police. O'Brien observed defendant walking in circles around the gas station. Gallegos identified defendant as the person who stole the car. O'Brien stated that, at first, defendant walked towards him before he fled. O'Brien did not have the car impounded, nor did he take any pictures of the car. Gallegos told O'Brien at the scene that the windshield wipers on the car were different than when it was taken from the dealership. O'Brien testified that, when it was recovered, it had white wipers.

¶ 15 The parties stipulated that the value of the car was in excess of $300. The State rested.

¶ 16 Defendant testified that, on June 11, 2014, he was looking at cars for sale with his friend Brian. When he saw a white Chrysler 300 that he liked at the Rainbow Auto Mart, he had his friend drop him off. Defendant approached the car and a salesman from the dealership walked over to meet him. Defendant stated that the salesman who met with him was not Gallegos. Defendant asked the salesman how the car ran and he retrieved the keys to start the car for

defendant. Defendant remarked that the tires were low and the salesman filled them with air. According to defendant, the car initially would not start and the salesman had to use cables to jump start it. The salesman agreed that defendant could test-drive the car and defendant gave the salesman his ID. The salesman told defendant he would make a copy of the ID and return it to him. While the salesman was making the copy, the car again stopped running. The salesman returned and told defendant that it was "just the battery or something." After starting the car again for defendant, the salesman moved some parked cars that were blocking the Chrysler's exit. The salesman then told defendant that he could test-drive the car. Defendant testified that he never received his ID back from the salesman, nor did defendant speak with anyone else from the dealership while he was there. He estimated that the entire exchange lasted 20 minutes.

¶ 17 Defendant test-drove the car halfway down the block before it again stopped running. A man from the dealership came over and jumped the car for defendant. When the car started up, defendant drove it towards the expressway. As he traveled down Garfield Boulevard to the expressway, the car "clonked out again." Defendant stated that he was "furious" and decided to leave the car there believing that "someone will come get it ***." He called a friend to pick him up and left the car on the side of the road.

¶ 18 Some time later, defendant noticed that the car was still where he had left it. He remembered that the dealership had his ID and feared that he might be "locked up" for abandoning the car. He returned to the car with a gas can and, guessing that lack of gas might have caused the earlier problems, partially filled the car up. He also put the license plates from his car onto the Chrysler. The car started and he drove it to a gas station to fill the remainder of the tank. At the gas station, defendant saw O'Brien pull up in a marked police car and he

approached him in an effort to get the car returned to the dealership. As he went to speak with O'Brien, however, defendant remembered that the car now had his plates on it. He began to stutter and turned around to remove his license plate from the car. At this time, two "Mexican guys" showed up, pointed at defendant, and told O'Brien that he was the person who had stolen their car. Defendant walked away and O'Brien pulled out his service weapon. O'Brien told defendant to "freeze." Defendant was then tackled by an "off-duty police officer." O'Brien handcuffed defendant and placed him in his squad car. Defendant stated that his intentions were to return the car to the area around the Rainbow Auto Mart.

¶ 19 On cross-examination, defendant testified that the man he spoke with at the dealership knew that he intended to test-drive the car on the expressway. Defendant stated that he left the key in the car's ignition when he abandoned it on the side of the road. The key was still in the ignition when he returned to the car "about a week" later. Defendant remembered that he left his ID at the dealership 30 minutes after he left the car on the side of the road. He did not call the dealership because he did not know the number. Defendant denied that he made any changes to the car other than putting the license plate from his Pontiac onto the Chrysler. Defendant stated that he intended to tell O'Brien that the Chrysler had been sitting in the gas station for a while, which defendant acknowledged would have been a lie. Defendant told the plain-clothes officer who tackled him that this was all a misunderstanding and the officer told him to inform O'Brien of that fact. Defendant stated that he tried to tell O'Brien this, but he did not want to listen to him.

¶ 20 During closing arguments, defense counsel highlighted that defendant's testimony was that he spoke exclusively with Gallegos's father, who gave him permission to test-drive the car,

and questioned why the State did not call the father to the stand. Counsel argued that "the people with the proof beyond a reasonable doubt didn't call [Gallegos's father]. There is no reason why we would want to call him. He obviously is apparently a witness for the State. But he never gets called. And you don't know what he could say. You don't know what he did say."

¶ 21 In rebuttal, the State responded to counsel's remarks with the following: "[C]ounsel talked about [Gallegos's father]. Where was [Gallegos's father]? Why didn't we hear from him? Defense counsel has subpoena power as well. Defense counsel could have subpoenaed [him] and testified. He didn't."

¶ 22 At the close of arguments, the jury found defendant guilty of possession of a stolen motor vehicle. The court denied defendant's motion for a new trial and proceeded to sentencing.

¶ 23 At sentencing, the court heard arguments in aggravation and mitigation. In aggravation, the State informed the court that defendant had eight prior felony convictions, four of which were for possession of a stolen motor vehicle. The State explained that, based on his prior convictions, he is a mandatory Class X offender and recommended a term of 20 years' imprisonment.

¶ 24 In mitigation, defense counsel argued that defendant's crime was non-violent. Counsel noted that the only harm done in this case was that the dealership went without a car on its lot for a week. Counsel further argued that the car was not damaged, but rather slightly improved when it was returned to the dealership, and asked the court to sentence defendant to the minimum term. In allocution, defendant asked the court to be lenient.

¶ 25 In announcing its decision, the court stated that it had read the presentence investigation (PSI) report, considered the factors in aggravation and mitigation, and defendant's allocution.

The court disagreed with counsel's contention that no one was injured by defendant's conduct. The court noted that, while defendant's crime was non-violent, he deprived a business owner of the potential profits from the sale of the car for a week. The court also noted that this offense continued a course of conduct for defendant, given his four previous convictions for possession of a stolen motor vehicle. The court then sentenced defendant to 10 years' imprisonment. The court denied defendant's motion to reduce his sentence. He timely appealed.

¶ 26 On appeal, defendant first contends that the State shifted the burden of proof when the prosecutor stated during rebuttal closing arguments that defendant could have subpoenaed Gallegos's father if he wanted his testimony. Defendant argues that this comment violated his due process right to a fair trial and requests this court to remand the case for a new trial.

¶ 27 In setting forth this argument, defendant acknowledges that he has forfeited his burden shifting argument on appeal by failing to raise the issue in the trial court and in his posttrial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (explaining that both a trial objection and a written posttrial motion raising the issues are required in order to preserve the issue for review on appeal). He argues, however, that we should review the issue because (1) the State's alleged error satisfies the first prong of the plain-error doctrine; and (2) his counsel was ineffective for failing to raise the issue.

¶ 28 Under the plain error doctrine, a reviewing court may consider unpreserved error when "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of

the closeness of the evidence." See Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967); *People v. Sargent*, 239 Ill. 2d 166, 189 (2010). However, before considering whether the plain-error exception to the rule of forfeiture applies, a reviewing court conducting plain-error analysis must first determine whether an error occurred, as "without reversible error, there can be no plain error." *People v. McGee*, 398 Ill. App. 3d 789, 794 (2010). Here, we find no error.

¶ 29 Due process requires that the State bear the burden of proving beyond a reasonable doubt all of the elements of the charged offense. *People v. Howery*, 178 Ill. 2d 1, 32 (1997). "The defense is under no obligation to produce any evidence, and the prosecution cannot attempt to shift the burden of proof to the defense." *People v. Beasley*, 384 Ill. App. 3d 1039, 1047–48 (2008). Although a prosecutor is afforded wide latitude in closing arguments, (*People v. Berry*, 264 Ill. App. 3d 773, 780 (1994)), it is generally not appropriate for a prosecutor to comment on a defendant's failure to call witnesses who are equally accessible to both parties (*People v. Franklin*, 93 Ill. App. 3d 986, 994 (1981)). However, a prosecutor may respond to comments by defense counsel that clearly invite a response (*People v. Kliner*, 185 Ill.2d 81, 154 (1998)), which includes commenting on a defendant's failure to call certain witnesses (*People v. Smith*, 111 Ill. App. 3d 895, 906 (1982)). When the defense invites comments regarding an absent witness, the comments cannot be relied upon as error on appeal. *People v. Grant*, 232 Ill. App. 3d 93, 106 (1992).

¶ 30 At the outset, the parties contend, and we agree, that the standard of review this court should apply to this issue is unclear. Compare *People v. Vargas*, 409 Ill. App. 3d 790 (2011) (*de novo*), with *People v. Love*, 377 Ill. App. 3d 306 (2007) (abuse of discretion). However, as our decision would be the same under either standard, we need not decide the issue at this time.

¶ 31 Here, after reviewing the record, we conclude that the State's rebuttal remarks were not improper where they were invited by defendant's closing argument and did not shift the burden of proof. The record shows that, during closing arguments, defense counsel noted that defendant's testimony was that he dealt exclusively with Gallegos's father, who gave him permission to test-drive the car, and questioned why the State did not call him as a witness. Counsel stated: "[The State] with the proof beyond a reasonable doubt didn't call [Gallegos's father]. There is no reason why we would want to call him. He obviously is apparently a witness for the State. But he never gets called. And you don't know what he could say. You don't know what he did say." In rebuttal, the prosecutor responded to that remark with the following: "[C]ounsel talked about [Gallegos's father]. Where was [Gallegos's father]? Why didn't we hear from him? Defense counsel has subpoena power as well. Defense counsel could have subpoenaed [him] and testified. He didn't." By noting that defendant also had the ability to subpoena Gallegos's father, the State was merely responding to comments made during defendant's closing argument regarding the absent witness.

¶ 32 As such, because defendant invited the comments by the State, and he had the ability to call Gallegos's father as a witness, he cannot now complain that he was prejudiced by such comments. See *People v. Jennings*, 142 Ill. App. 3d 1014, 1024 ("In light of the fact that defendant himself insinuated during closing argument that the State was hiding evidence by not calling the doctors to testify and that defendant could have called these expert witnesses but did not choose to do so, we must conclude that the complained remarks were clearly invited and as a result cannot be deemed improper."). Accordingly, there was no error and, thus, defendant has forfeited review of this argument.

¶ 33 In reaching our conclusion, we are not persuaded by defendant's argument that this case is analogous to *People v. Beasley*, 384 Ill. App, 3d 1039, 1048 (2008). In *Beasley*, the defendant was charged with possession of cocaine after police searched his parent's home and found cocaine, a box of baking soda, and a list of names with dollar amounts next to them. *Beasley*, 384 Ill. App. at 1041-42. In his closing arguments, defense counsel noted that the State did not have the baking soda box or the list checked for fingerprints. In rebuttal, the prosecutor responded to that argument by stating that the defense could also have sent the evidence in for testing. The prosecutor went on to argue, "If *** it's unconscionable on the part of [the State,] it's just as unconscionable on the part of the defense. So, if you want something tested, you can get it tested. You can't sit back and say, 'Well, nobody tested it; therefore, the evidence fails.' " *Id.* at 1043-44. This court found that remark to be reversible error, noting that defendants have the ability, but not the burden, when it comes to submitting evidence for testing. *Id.* at 1048. This court concluded: "A defendant's failure to submit evidence for analysis cannot be considered 'unconscionable.' " *Id.*

¶ 34 Here, unlike in *Beasley*, the State never implied that defendant had the burden of calling Gallegos's father to testify, nor did it suggest that defendant's failure to do so was "unconscionable." *People v. Kelley*, 2015 IL App (1st) 132782, ¶ 66 ("By describing the defendant's failure to submit evidence as "unconscionable," the State implied that the defendant had a burden of proof."). Rather, as mentioned, the State was appropriately responding to defendant's argument about the evidence. The State, therefore, did not commit reversible error.

¶ 35 Having found that there was no error, we necessarily reject defendant's accompanying claim that his counsel was ineffective for failing to raise the issue of the State's alleged improper

shifting of the burden of proof. As mentioned, defendant has not shown that the State improperly shifted the burden of proof in its rebuttal argument. Accordingly, defendant cannot succeed on his ineffective assistance of counsel claim because he cannot show that he was prejudiced by counsel's failure to object to the State's alleged shifting of the burden of proof. See *Strickland*, 466 U.S. 668, 687 (1984) (holding that a defendant must show, both, that counsel's performance was deficient and that the deficient performance prejudiced the defendant).

¶ 36 Defendant next contends that the trial court assessed a "trial tax" when it sentenced him to 10 years' imprisonment after having initially offered him a six-year sentence in exchange for a guilty plea. Defendant further argues that the court's sentence is excessive because it ignored his rehabilitative potential and relied on his criminal history that is more than a decade old. He asks that we either reduce his sentence or remand for resentencing.

¶ 37 As an initial matter, we note that defendant has failed to preserve this issue for appeal by not raising the issue in the trial court. See *Enoch*, 122 Ill. 2d 176, 186 (1988) (explaining that both a trial objection and a written posttrial motion raising the issues are required in order to preserve the issue for review on appeal). The State, however, does not argue that defendant has forfeited this issue and, therefore, has waived its forfeiture argument. See *People v. Bridgeforth*, 2017 IL App (1st) 143637, ¶ 46 ("The rules of waiver also apply to the State, and where, as here, the State fails to argue that defendant has forfeited the issue, it has waived the forfeiture."); *People v. Reed*, 2016 IL App (1st) 140498, ¶ 13 ("By failing to timely argue that a defendant has forfeited an issue, the State waives the issue of forfeiture."). As such, we will review the issue.

¶ 38 The Illinois Constitution requires that a trial court impose a sentence that reflects both the seriousness of the offense and the objective of restoring the defendant to useful citizenship. Ill.

Const. 1970, art. I, § 11; *People v. McWilliams*, 2015 IL App (1st) 130913, ¶ 27. In reaching this balance, a trial court must consider a number of aggravating and mitigating factors, including the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. *People v. Alexander*, 239 Ill. 2d 205, 213 (2010). Absent some indication to the contrary, other than the sentence itself, we presume the trial court properly considered all relevant mitigating factors presented. *People v. Sauseda*, 2016 IL App (1st) 140134, ¶ 19.

¶ 39 Ultimately, the trial court is in the superior position to weigh the appropriate factors and so its sentencing decision is entitled to great deference. *Id.* Where that sentence falls within the statutory range, it is presumed proper and will not be disturbed on review absent an abuse of discretion. *Alexander*, 239 Ill. 2d at 212-13. An abuse of discretion exists where the sentence imposed is at great variance with the spirit and purpose of the law, or is manifestly disproportionate to the nature of the offense. *Alexander*, 239 Ill. 2d at 212.

¶ 40 Here, we find that defendant's sentence was not excessive and that the trial court did not abuse its discretion when it imposed the 10-year term. Defendant was sentenced, based on his criminal history, as a Class X offender, which has a sentencing range of 6 to 30 years' imprisonment. 730 ILCS 5/5-4.5-25(a) (West 2014). Accordingly, the 10-year sentence imposed by the trial court falls well within the permissible statutory range and, thus, we presume it proper. *People v. Wilson*, 2016 IL App (1st) 141063, ¶ 12; *People v. Knox*, 2014 IL App (1st) 120349, ¶ 46.

¶ 41 Defendant does not dispute that his sentence is within the applicable sentencing range and is therefore presumed proper. Rather, he argues that his sentence was an excessive "trial tax" imposed by the trial court for rejecting its plea agreement and going to trial. Specifically, he

points out that he was offered a six-year term in exchange for his guilty plea, which he rejected in favor of a jury trial, only to be sentenced to a 10-year term after being found guilty. Defendant contends that the trial court foreshadowed its intention to sentence him to a longer term when, prior to trial, it told him that if he went to trial the deal was "off the table" and "you don't come back and say, Judge, I want that six years. I have a range of sentence that I can sentence you to." This exchange, defendant insists, reveals the court's intention to punish him for electing to go to trial. We disagree.

¶ 42 It is well established that a trial court may not penalize a defendant for choosing to exercise his right to stand trial. *People v. Ward*, 113 Ill. 2d 516, 526 (1986). However, "the mere fact that the defendant was given a greater sentence than that offered during the plea bargaining does not, in and of itself, support an inference that the greater sentence was imposed as a punishment for demanding trial." *People v. Carroll*, 49 Ill. App. 3d 387, 396 (1977) (citing *People v. Perry*, 47 Ill. 2d 402, 408 (1971). Rather, there must be a "clear showing" in the record that the harsher sentence was a result of a trial demand. *Id.* at 349. A clear showing occurs when a trial court makes explicit remarks concerning the harsher sentence (*id.* (citing *People v. Moriarty*, 25 Ill. 2d 565, 567 (1962)); *People v. Young*, 20 Ill. App. 3d 891, 893 (1974)), or where the actual sentence is "outrageously higher" than the one offered during plea negotiations (*Carroll,* 260 Ill. App. 3d at 349 (citing *People v. Dennis,* 28 Ill. App. 3d 74, 78 (1975)). In making this determination, we must consider the entire record rather than focusing on a few words or statements of the trial court. W*ard*, 113 Ill. 2d at 526–27.

¶ 43 Here, after reviewing the entire record we find that defendant's sentence was not the product of a trial tax. The record shows that defendant has an extensive criminal background,

which mandated that he be sentenced to a Class X term. His criminal background included eight felony convictions, four of which were for possession of a stolen motor vehicle, the exact crime he was convicted of in this case. As the court noted, this was a continued course of conduct for defendant, and that fact alone is enough to warrant his 10-year sentence. See *People v. Evangelista*, 393 Ill. App. 3d 395, 399 (2009) ("defendant's criminal history alone would appear to warrant sentences substantially above the minimum."); *People v. Cook*, 279 Ill. App. 3d 718, 727–28 (1995) (affirming defendant's 15-year sentence for possession of a stolen motor vehicle where the trial court "found that defendant's habitual criminal activity" dictated such a sentence). Given defendant's criminal history, the trial court's offer, which was for the minimum term allowable, is best viewed as an acceptable "concession" afforded to defendant in exchange for his guilty plea. *People v. Moss*, 205 Ill. 2d 139, 171 (2001) ("A court may grant dispositional concessions to defendants who enter a guilty plea when the public's interest in the effective administration of justice would thereby be served."); *Ward*, 113 Ill. 2d at 526 ("Although it may be proper in imposing sentence to grant concessions to a defendant who enters a plea of guilty, a court may not penalize a defendant for asserting his right to a trial either by the court or by a jury."). Viewing the record as a whole, we conclude that the court's remarks do not "clearly show" its intention to punish defendant for exercising his right to trial. Consequently, we conclude that the trial court did not abuse its discretion and affirm defendant's 10-year sentence.

¶ 44 Defendant nevertheless argues that the court abused its discretion by sentencing him to a term above the statutory minimum where some of his prior convictions occurred more than 15 years ago. We note that there is no statute of limitations regarding when a prior conviction may no longer be considered by the trial court in aggravation. This aside, defendant ignores the fact

that his most recent conviction, a Class 3 escape, was in 2011. As mentioned above, defendant's continued course of criminal conduct was enough to warrant his 10-year sentence. See *People v. Evangelista*, 393 Ill. App. 3d 395, 399 ("defendant's criminal history alone would appear to warrant sentences substantially above the minimum."); *People v. Cook*, 279 Ill. App. 3d 718, 727–28 (1995) (affirming defendant's 15-year sentence for possession of a stolen motor vehicle where the trial court "found that defendant's habitual criminal activity" dictated such a sentence). Accordingly, the trial court's 10-year sentence was not an abuse of discretion.

¶ 45 For these reasons, we affirm the judgment of the circuit court of Cook County.

¶ 46 Affirmed.