SIXTH DIVISION
April 27, 2018

No. 1-16-0054
2018 IL App (1st) 160054-U

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. 15 CR 10998
	)	
CHIQUEL RICHARDSON,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Justices Cunningham and Delort concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant was proven guilty of the offense of armed habitual criminal beyond a reasonable doubt; defendant forfeited the issue of whether the State proved beyond a reasonable doubt that he had been convicted two or more times of a qualifying offense; the armed habitual criminal statute is not facially unconstitutional; and the trial court did not err in relying on defendant's prior convictions during sentencing.

¶ 2 Following a bench trial, defendant Chiquel Richardson was found guilty of the offense of armed habitual criminal, and sentenced to nine years in the Illinois Department of Corrections. On appeal, defendant claims that the State did not prove him guilty beyond a reasonable doubt where (1) the sole eyewitness' testimony was not credible because she had a motive to lie, and (2) defendant had not been convicted two or more times of a qualifying offense. Defendant also contends that the armed habitual criminal statute (720 ILCS 5/24-1.7 (West 2014)), is facially

unconstitutional. Finally, defendant claims that the trial court erred when sentencing defendant because it relied on his two prior convictions for robbery and armed robbery which were inherent in the offense of armed habitual criminal. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 Defendant was arrested on July 1, 2015, and charged with one count of being an armed habitual criminal, four counts of unlawful use of a weapon by a felon, and four counts of aggravated unlawful use of a weapon. At a bench trial, Jaquita Foots testified that on the date in question, just after 7 p.m., she and her sister, Sharica Foots, were on the sidewalk near 7925 South Maryland in Chicago. Jaquita testified that Sharica got into an argument with defendant, who they knew from around the neighborhood, about the killing of Jaquita's and Sharica's mother. Jaquita testified that defendant then walked away, but came back about two minutes later and pointed a gun at them, stating that he had nothing to do with their mother's death. Jaquita testified that the gun was black but she did not know what kind of gun it was.

¶ 5 Jaquita testified that after defendant pointed the gun at them, she attempted to record the argument on her cell phone. She stated that during the argument, defendant threw the gun over a fence and into a yard, but that is not shown on the video. Rather, the video, which was played for the trial court, showed defendant in a grey hooded sweatshirt, walking away while Jacquita stated, "you just upped, period." Jaquita testified that right as the video cut out, a police car pulled up with two officers inside. Jaquita showed the officers where defendant had tossed the gun, and the officers recovered it.

¶ 6 On cross-examination, Jaquita testified that she believed defendant was somehow involved in her mother's death, but he has never been convicted of that crime. Jaquita testified

that during the video, the gun was in defendant's pocket. Jaquita testified that in the video she said to defendant, "you just upped, period," which meant he "pulled a gun" in her face.

¶ 7 Officer Albert Rangle then testified that on the night in question, he was working with his partner when they were flagged down by two women. Officer Rangle testified that the women directed him to the front yard of a building, behind a gate, where Officer Rangle recovered a 9-millimeter blue steel handgun. The handgun was loaded with seven rounds. Officer Rangle testified that the women directed him to defendant, who was about 20 feet away, and he then placed defendant into custody.

¶ 8 On cross-examination, Officer Rangle testified that he never saw defendant with a gun, that defendant did not attempt to flee when Officer Rangle detained him, and that the gun was never tested for fingerprints or DNA evidence.

¶ 9 At the close of evidence, the State sought to admit verified copies of conviction under 08 CR 19354 01, for armed robbery, and 08 CR 17303 02, for robbery.

¶ 10 The trial court noted that there was "definitely some animus" between the Foots family and defendant. The trial court stated that Jaquita's testimony was corroborated because the gun was recovered exactly where the witness said it would be. The trial court further explained, "I don't think [Jaquita]'s got the wherewithal to craftily make up some story on the double quick just to frame somebody ***." Rather, the trial court found that defendant "pointed a gun at her and told her basically to mind her own business, tossed the gun away as she started taping him. The police came, found the gun where it's supposed to be. Finding of guilty."

¶ 11 During sentencing, the State noted that defendant had a prior "Class 3 manufacture/delivery of a look alike," that he received four years' imprisonment for in 2012, a Class 2 robbery from 2008, that he received three years' imprisonment for, and the armed

robbery from 2008 that he received seven years' imprisonment for. When sentencing defendant, the trial court stated, "[h]e was on probation as a juvenile for robbery. A year after that, he was in the penitentiary for robbery as an adult, then armed robbery, although the robbery and the armed robbery were served concurrently. He was selling look alike drugs, got some other small matters, misdemeanor matters, then this case." The trial court then stated, "The sentence will be nine years in the penitentiary." Defendant now timely appeals.

¶ 12 ANALYSIS

¶ 13 On appeal, defendant contends that: (1) the State failed to prove him guilty of being an armed habitual criminal beyond a reasonable doubt where the only eyewitness had a motive to lie; (2) the State failed to prove him guilty of being an armed habitual criminal beyond a reasonable doubt where the State failed to prove that defendant had been convicted two or more times of a qualifying offense; (3) the armed habitual criminal statute is facially unconstitutional; and (4) the trial court erred in relying on defendant's prior convictions for robbery and armed robbery in imposing his sentence, where these convictions were inherent in the offense of armed habitual criminal.

¶ 14 Sufficiency of the Evidence

¶ 15 In order to prove the offense of armed habitual criminal, the State must prove beyond a reasonable doubt that defendant possessed a firearm after having been convicted two or more times of any combination of the following offenses:

> "(1) a forcible felony as defined in Section 2-8 of this Code;
>
> (2) unlawful use of a weapon by a felon; aggravated unlawful use of a weapon; aggravated discharge of a firearm; vehicular hijacking; aggravated vehicular hijacking; aggravated battery of a child as described in Section 14-4.3 or

subdivision (b)(1) of Section 12-3.05; intimidation; aggravated battery with a firearm as described in Section 12-4.2 or subdivision (e)(1), (e)(2), (e)(3), or (e)(4) of Section 12-3.05; 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." 720 ILCS 5/24-1.7 (West 2014).

¶ 16 Defendant contends that the only evidence presented that he possessed a firearm was by Jaquita, who had a motive to testify falsely because she believed defendant was involved in her mother's death. In reviewing a challenge to the sufficiency of the evidence, we must determine whether after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Jackson*, 232 Ill. 2d 246, 280 (2009). This standard of review does not allow us to substitute our own judgment for that of the fact finder on questions involving the weight of the evidence or the credibility of the witnesses. *Id*. at 280-81. In weighing the evidence, the trier of fact is not required to disregard inferences which flow normally from the evidence before it, nor need it search out all possible explanations consistent with innocence and raise them to the level of reasonable doubt. *Id*. at 281. "The testimony of a single witness is sufficient to convict if positive and credible." *People v. Smith*, 185 Ill. 2d 532, 545 (1999).

¶ 17 Here, reviewing the evidence in a light most favorable to the prosecution, we find that a rational trier of fact could have found that defendant possessed the gun in question. Jaquita testified that following an argument, defendant returned with a gun and pointed it in her face. She testified that she saw him throw the gun over a fence and into a nearby yard. Jaquita testified that police officers arrived less than a minute later and she told them what happened. Officer

Rangle testified that Jaquita and her sister flagged him down and that he recovered a gun in the spot that Jaquita told him defendant had tossed a gun. As the trial court noted, Jaquita's testimony regarding where the gun was located was corroborated by Officer Rangle's testimony.

¶ 18 Defendant contends, however, that Jaquita's testimony is not credible because she had a motive to testify falsely. The trial court was made aware of this potential motive to testify falsely, noting that there was animosity between the Foots family and defendant. However, the trial court found that despite this animosity, Jaquita did not have the "wherewithal to craftily make up some story on the double quick just to frame somebody ***." It is the trial court's responsibility to determine the credibility of the witnesses and the weight to be given to their testimony. *Jackson*, 232 Ill. 2d at 281; see also *People v. Patterson*, 2014 IL 115102, ¶ 43 ("Due to inherent limitations in reviewing a cold transcript, we must give the trial court's credibility findings considerable deference.") As the State notes in its brief on appeal, to have framed defendant, Jaquita would have had to plant the gun in the neighboring yard, instigate an altercation with defendant, and then hope a police cruiser would happen to come along. In weighing the evidence, the trial court is not required to disregard inferences which flow normally from the evidence before it, nor need it search out all possible explanations consistent with innocence and raise them to the level of reasonable doubt. *Jackson*, 232 Ill. 2d at 281. Accordingly, we find that a rational trier of fact could have found that defendant possessed the gun beyond a reasonable doubt.

¶ 19 Qualifying Offenses

¶ 20 Defendant next contends that he was not proven guilty beyond a reasonable doubt of the offense of armed habitual criminal because the State failed to prove that he had been convicted two or more times of a qualifying offense. The record reveals that defendant was charged with

robbery (08 CR 1720302) on September 18, 2008. On October 21, 2008, while he was in custody on the robbery charge, defendant was charged with armed robbery (08 CR 1935401). Defendant pled guilty to both offenses, and was sentenced on the same day to concurrent terms on the two offenses. Defendant contends that because he pled guilty to both the armed robbery offense and the robbery offense on the same day, he was not convicted "two or more times," but rather only convicted once.

¶ 21 As an initial matter, defendant has forfeited this claim. It is well settled that to preserve a claim of error both an objection at trial and a written posttrial motion raising the issue are required. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Here, defendant made no objection before trial, at trial, or in a post trial motion, regarding the two qualifying offenses of armed robbery and robbery.

¶ 22 Consequently, we may review this claim of error only if defendant has established plain error. *People v. Hillier*, 237 Ill. 2d 539, 545-46 (2010). Under Illinois' plain error doctrine, a reviewing court may consider a trial court error not properly preserved for review when the evidence in a criminal case is closely balanced or where the error is so fundamental 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. *Enoch*, 122 Ill. 2d at 186. Under both prongs of the plain error doctrine, the defendant has the burden of persuasion. *Hillier*, 237 Ill. 2d at 545. If the defendant fails to meet his burden, the procedural default will be honored. *Id*. "A defendant who fails to argue for plain-error review obviously cannot meet his burden of persuasion." *Id*. Here, defendant did not argue for plain error review in either his opening brief or his reply brief, and thus has failed to meet his burden of establishing plain error. See *People v. Clark*, 2014 IL App (1st) 130222, ¶ 24. Accordingly, this issue is forfeited.

¶ 23 However, "forfeiture is a limitation on the parties and not the reviewing court, and we may overlook forfeiture where necessary to obtain a just result." *People v. Holmes*, 2016 IL App (1st) 132357, ¶ 65. In this case, we briefly address defendant's contentions regarding the language of the armed habitual criminal statute. Defendant maintains that in order to be convicted "a total of 2 or more times" of a qualifying offense, the convictions would have to occur on separate dates.

¶ 24 In construing a statute, our primary objective is to give effect to the intention of the legislature. *People v. Blair*, 215 Ill. 2d 427, 442 (2005). In doing so, we must first look to the plain language of the statue. *Id*. We will not depart from the plain language of the statute by reading into it exceptions, limitations, or conditions that conflict with the express legislative intent. *Id*. at 443.

¶ 25 The plain language of the armed habitual criminal statute criminalizes being in possession of a firearm after having been convicted "a total of 2 or more times" of a qualifying offense. Here, defendant was convicted two times – once for armed robbery, and once for robbery. Defendant was given two different sentences for these two convictions – three years' imprisonment for robbery, and seven years' imprisonment for armed robbery. The fact that the convictions were handed down on the same day, and that the sentences were to run concurrently, does not negate the fact that defendant was convicted a total of two times of a qualifying offense.

¶ 26 Defendant's reliance on the general recidivism provisions does not convince us otherwise. The general recidivism provisions, which delineate when a defendant is adjudged and sentenced as a habitual criminal, state in pertinent part:

> "(4) This Section does not apply unless each of the following requirements are satisfied:

***

(C) The third offense was committed after conviction of the second offense.

(D) The second offense was committed after conviction of the first offense." 730 ILCS 5/5-4.5-95 (West 2012).

¶ 27 This language does not appear in the plain language of the armed habitual criminal statute, and we will not depart from the plain language of the statute by reading into it these conditions. See *Blair*, 215 Ill. 2d at 443. We therefore find that the State proved beyond a reasonable doubt that defendant possessed a firearm after having been convicted a total of two times of a qualifying offense.

¶ 28 Constitutionality of Statute

¶ 29 Defendant's next argument is that the armed habitual criminal statute, which criminalizes the lawful and unlawful possession of firearms by certain felons, is facially unconstitutional because all Illinois citizens, including felons, are eligible to legally possess firearms. Defendant contends that because the statute criminalizes the possession of a firearm regardless of whether a person has a firearm owner's identification (FOID) card, the statute violates the tenets of due process by potentially criminalizing innocent conduct.

¶ 30 The State responds that defendant's constitutional challenge is without merit because this court has recently rejected that exact argument in *People v. Brown*, 2017 IL App (1st) 150146. We agree with the State.

¶ 31 The constitutionality of a statute is an issue of law that is subject to *de novo* review. *People v. Patterson*, 2014 IL 115102, ¶ 90. Because statutes carry a "strong presumption" of constitutionality, it is the burden of the party challenging the constitutionality of a given statute to "clearly establish" that the statute violates constitutional protections. *People v. Sharpe*, 216 Ill.

2d 481, 487 (2005). A reviewing court has a duty to uphold a statute's constitutionality whenever it is reasonably possible to do so. *Patterson*, 2014 IL 115102, ¶ 90. All doubts must be construed in favor of a statute's validity and constitutionality. *Id*. Courts have recognized that succeeding on a facial challenge, rather than on an "as applied" challenge to a statute's constitutionality, is "extremely difficult, requiring a showing that the statute would be invalid under *any* imaginable set of circumstances. The invalidity of the statute in one particular set of circumstances is insufficient to prove its facial invalidity." (Emphasis in original). *In re M.T.*, 221 Ill. 2d 517, 536-37 (2006). That is, "[s]o long as a there exists a situation in which a statute could be validly applied, a facial challenge must fail." *Hill v. Cowan*, 202 Ill. 2d 151, 157 (2002). In *Brown*, this court noted that where, "as here, the statute does not implicate a 'fundamental constitutional right,' the statute will be reviewed using the 'highly deferential rational basis test.' " 2017 IL App (1st) 150146, ¶ 26 (quoting *People v. Madrigal*, 241 Ill. 2d 463, 466 (2011)). Under that test, a statute will be upheld "so long as it bears a rational relationship to a legitimate legislative purpose and is neither arbitrary nor unreasonable." *People v. Hollins*, 2012 IL 112754, ¶ 15.

¶ 32 Keeping these standards in mind, this court in *Brown* analyzed the armed habitual criminal statute, which provides, in pertinent part, that a person commits the offense of armed habitual criminal if he possesses any firearm after having been twice previously convicted of certain specified serious offenses, including two forcible felonies. 720 ILCS 5/24-1.7(a)(1) (West 2014). This court noted that this provision was enacted "to protect the public from the threat of violence that arises when recidivist violent offenders possess firearms." *Brown*, 2017 IL App (1st) 150146, ¶ 27. In order to effectuate this goal, the statute imposes harsher penalties on all felons who have twice previously been convicted of serious offenses and who are subsequently

found to be in possession of a firearm. 720 ILCS 5/24-1.7(b) (West 2014) (classifying the offense of armed habitual criminal as a Class X felony).

¶ 33 In accordance with section 10(c) of the FOID Act, an applicant may appeal the revocation of his FOID card or the denial of a FOID card and be granted relief if the applicant establishes that: (1) "[he] has not been convicted of a forcible felony within 20 years of the application for a [FOID card], or at least 20 years have passed since the end of any period of imprisonment imposed in relation to that conviction; (2) the circumstances regarding a criminal conviction, where applicable, the applicant's criminal history, and his reputation are such that the applicant will not be likely to act in a manner dangerous to public safety; (3) granting relief would not be contrary to the public interest; and (4) granting relief would not be contrary to federal law." 430 ILCS 65/10(c)(1)-(4) (West 2014). Because a twice-convicted felon could theoretically obtain a FOID card, defendant argues that the possession of a firearm by a twice-convicted felon is not, by itself, a crime, and that the armed habitual criminal statute is therefore unconstitutional because it criminalizes innocent conduct.

¶ 34 This court, however, has previously rejected this same constitutional challenge to the armed habitual criminal statute. See *Brown*, 2017 IL App (1st) 150146, *People v. Fulton*, 2016 IL App (1st) 141765, *People v. Johnson*, 2015 IL App (1st) 133663. Specifically, we found that the invalidity of a statute in one particular set of circumstances is insufficient to prove that a statute is facially unconstitutional, and that the potential invalidity of the armed habitual criminal statue in one very unlikely set of circumstances does not render the statute unconstitutional. *Johnson*, 2015 IL App (1st) 133663, ¶ 27. We found that the statute did not overreach or criminalize wholly innocent conduct because a twice-convicted felon's possession of a firearm is not "wholly innocent" and is, in fact, exactly wat the legislature was seeking to prevent in

passing the armed habitual criminal statute. *Id*. The statute's criminalization of a twice-convicted felon's possession of a weapon is, therefore, rationally related to the purpose of protecting the public from the threat of violence that arises when repeat offenders possess firearms. *Id*.

¶ 35 Defendant acknowledges our prior decisions but urges this court not to follow them. We decline this invitation to deviate from our previous rulings, and continue to reaffirm the constitutionality of the armed habitual criminal statute.

¶ 36 Sentence

¶ 37 Defendant's final contention on appeal is that the trial court relied on improper sentencing factors. Specifically, defendant alleges that the trial court improperly relied on defendant's prior convictions for robbery and armed robbery in imposing his sentence, where those convictions were inherent in the offense of armed habitual criminal.

¶ 38 We accord great deference to a trial court's sentence and will not reverse it absent an abuse of discretion. *People v. Butler*, 2013 IL App (1st) 120923, ¶ 30. In general, "we will not disturb sentences that fall within the statutory guidelines unless they are 'greatly disproportionate' to the nature of the offenses of which the defendant has been convicted." *People v. Bailey*, 409 Ill. App. 3d 574, 591 (2011) (quoting *People v. Johnson*, 347 Ill. App. 3d 570, 574 (2004)). Here, the trial court sentenced defendant to nine years' imprisonment, which is within the statutory range and just three years above the minimum term. 720 ILCS 5/24-1.7(d) (West 2014) (armed habitual criminal is a Class X felony); 730 ILCS 5/5-4.5-25(a) (West 2014) (Class X sentencing range is 6 to 30 years' imprisonment). Because his sentence is within the applicable range, we presume it is proper. *People v. Burton*, 2015 IL App (1st) 131600, ¶ 36. The burden is therefore on defendant to establish that the alleged improper sentencing considerations led to a greater sentence. See *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 49.

¶ 39 In determining the propriety of a sentence, we must consider the record as a whole and not focus on a few words or statements made by the trial court. *People v. Walker*, 2012 IL App (1st) 083655, ¶ 30. Where the trial court mentions an improper factor, but gives insignificant weight to that factor which does not result in a greater sentence, the case need not be remanded for resentencing. *Walker*, 2012 IL App (1st) 083655, ¶ 30. Whether the trial court considered an improper factor at sentencing is reviewed *de novo*. *Bowen*, 2015 IL App (1st) 132046, ¶ 49.

¶ 40 In imposing defendant's sentence, the trial court stated:

> "The facts as were described at trial. The gun was displayed but not used. Unfortunately, even though [defendant] did have the benefit of a dad that seemed [to] care about him, he's got aunts that care about him and are supporting him, he's led something of a criminal life.
>
> He was on probation as a juvenile for robbery. A year after that, he was in the penitentiary for robbery as an adult, then armed robbery, although the robbery and the armed robbery were served concurrently. He was selling look alike drugs, got some other small matters, misdemeanor matters, then this case."

¶ 41 The trial court is generally prohibited from considering a factor implicit in the offense as an aggravating factor at sentencing. *People v. Phelps*, 211 Ill. 2d 1, 11 (2004). In other words, one factor cannot be used as both an element of the offense, and as a basis for imposing a sentence that is harsher than what might otherwise have been imposed. *Id.* at 11-12. The court, however, may consider the nature of the offense when imposing a sentence, including the circumstances and extent of each element as committed. *People v. Robinson*, 391 Ill. App. 3d 822, 842 (2009).

¶ 42 Here, we find that when read in context, the trial court did not improperly rely on a factor implicit in the offense when sentencing defendant. Rather, the court's comment was a reference to defendant's criminal history, and the nature of the offense of armed habitual criminal. Defendant cannot meet his burden of proof that the trial court's reference to the robbery and armed robbery led to a greater sentence. *Bowen*, 2015 IL App (1st) 132046, ¶ 49.

¶ 43 CONCLUSION

¶ 44 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 45 Affirmed.