

2019 IL App (1st) 171326-U

No. 1-17-1326

Order filed August 8, 2019

Fourth Division

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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. 16 CR 11323
)	
JAMES JOHNSON,)	Honorable
)	James N. Karahalios,
Defendant-Appellant.)	Judge, presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice McBride and Justice Reyes concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's conviction for felony driving while his license was revoked affirmed where the State proved that he was driving outside the parameters of his restricted driving permit, his claim that the trial court shifted the burden of proof to him is forfeited, and his five-year extended-term sentence is not excessive; remanded to the trial court as to the fines and fees issues.

¶ 2 Following a bench trial, defendant James Johnson was convicted of felony driving while his driver's license was suspended or revoked (625 ILCS 5/6-303(a), (d-3) (West 2016)). The

trial court sentenced defendant to an extended term of five years' imprisonment. The court also assessed defendant \$654 in fines, fees and court costs.

¶ 3 On appeal, defendant contends that the State failed to prove him guilty beyond a reasonable doubt because it failed to disprove his affirmative defense that he was driving within the parameters of his restricted driving permit. Defendant further contends that the trial court erroneously shifted the burden of proving his affirmative defense to him when it was the State's burden to rebut his defense beyond a reasonable doubt. Defendant also argues that his five-year prison sentence is excessive because it is unduly harsh and the court failed to give proper consideration to his mitigating evidence. In addition, defendant argues that his fines and fees order must be amended by vacating two fees and applying presentence monetary credit against several fees that are actually fines. We remand this case to the trial court on the fines and fees issues, and affirm defendant's conviction and sentence in all other respects.

¶ 4 The State charged defendant with one count of felony driving while his driver's license was suspended or revoked. The charge specified that the State sought to sentence defendant as a Class 4 offender pursuant to section 6-303(d-3) of the Illinois Vehicle Code (Code) (625 ILCS 5/6-303(d-3) (West 2016)) based on his eight prior convictions for the same offense. In his pretrial motion for extension of discovery, defendant asserted that at the time of his arrest, he possessed a valid restricted driving permit (RDP) and was traveling for work purposes. In his answer to the State's discovery motion, defendant asserted that he may raise the affirmative defense that he possessed an RDP.

¶ 5 At trial, Schaumburg police officer Arein Kalik testified that about 11:10 a.m. on June 4, 2016, she responded to a report of an automobile accident in the parking lot of an Enterprise car

rental agency in a shopping plaza on West Higgins Road. When she arrived at the location, Kalik observed defendant standing near a white Acura waving his arms. Kalik identified defendant in court. Defendant told Kalik that while making a U-turn, he struck a parked vehicle. Defendant also stated that his vehicle was experiencing brake problems, and he was driving to the Meineke auto shop which was west of the Enterprise agency. Kalik observed minor damage to the front bumper of the parked vehicle. Kalik asked defendant for his driver's license and proof of insurance. Defendant handed Kalik his state identification card, proof of insurance, and his RDP. Kalik then spoke with Spencer Filosa, an employee from Enterprise.

¶ 6 After speaking with Filosa, Kalik again spoke with defendant. Kalik specifically asked defendant where he had been prior to the accident. Defendant stated that he met with his girlfriend at a plaza in Schaumburg to confront her about her infidelity. Defendant told Kalik that he dropped off his girlfriend at an address in Hoffman Estates just prior to the accident. Kalik asked defendant about his work and "whether he was working at the time." Defendant initially told Kalik that he was on his way to church. Kalik observed that the RDP permitted defendant to attend a church in Cicero only on Sundays between 12 p.m. and 2 p.m. The accident occurred on a Saturday. Defendant then "changed his story" and stated that he was on his way to a second place of employment in Hanover Park. The RDP did not include an employer's address in Hanover Park. Defendant also told Kalik that he was "having a break with his girlfriend prior to working."

¶ 7 Kalik asked defendant for his employer's phone number. Defendant stated that his mother was his employer. Kalik asked defendant if she could call his mother. Defendant replied that "it wouldn't matter if [you] did any ways." Kalik then placed defendant under arrest. Kalik

testified that she arrested defendant because he was “changing his stories” and did not provide her with an explanation that matched his RDP. She further testified that defendant did not provide any permissible use of his RDP for 11:10 a.m. on June 4.

¶ 8 Kalik transported defendant to the Schaumburg police department. After waiving his *Miranda* rights, defendant stated that he was a “bad driver” and admitted that he hit the parked vehicle. Defendant further stated that he should not have called the police and should have “taken off.” Defendant told Kalik that she was “whacked” and that she should not have conducted an investigation. Kalik understood his comment to mean that she should not have investigated his RDP. Kalik testified that at no time during her investigation did defendant provide her with a valid place of employment that he was either returning from or driving to. Kalik acknowledged that the RDP allowed defendant to attend support groups. However, he did not tell her that he was coming from or going to a valid support group.

¶ 9 On cross-examination, Kalik acknowledged that she did not observe defendant driving, and that he was outside of his vehicle which was parked in a private lot when she arrived at the scene. The parking lots for Enterprise and Meineke were connected. Kalik acknowledged that at the police station, defendant showed her a text message from his mother which directed him to go to a specific address in Hoffman Estates at 1 p.m. “for a leak.” Kalik spoke with defendant’s mother to verify his employment, which was not reflected in her police report. When defense counsel asked Kalik if defendant’s mother verified his employment, the trial court sustained the State’s objection. Counsel explained to the court that she was not asking about what defendant’s mother said specifically, but was asking whether or not she verified his employment. The court replied that the question was objectionable as to form, and as to hearsay because counsel was

attempting “to elicit something from another individual for the purpose of establishing the truth therein.” When counsel’s cross-examination continued, Kalik acknowledged that defendant’s RDP allowed him to drive from 7 a.m. to 7 p.m. Monday through Saturday for work purposes.

¶ 10 On redirect examination, Kalik testified that the text message from defendant’s mother was sent to him at approximately 11:47 a.m., which was a half hour after Kalik first spoke with defendant. Kalik confirmed it was at that time that defendant was informed of a job assignment.

¶ 11 On re-cross-examination, Kalik acknowledged that when she spoke with defendant in the parking lot, he told her that he was working that day. Defendant explained to her that he performed maintenance work at multiple buildings, and that he received messages directing him to the locations or addresses where he needed to go for work. Kalik acknowledged that defendant’s RDP allowed him to drive within 100 miles of the actual physical office location of his employer.

¶ 12 Filosa testified that about 11 a.m. on June 4 he was working inside the Enterprise agency looking out a window when he observed a vehicle strike a parked Ford Focus owned by Enterprise. The vehicle that struck the Ford was driving diagonally, as though it had lost control. Filosa called the police. He went outside and observed damage to the front left bumper of the Ford. Filosa spoke with the driver of the vehicle that struck the Ford, and also observed the police speaking with the driver.

¶ 13 On cross-examination, Filosa testified that the vehicle that struck the Ford was driving slowly but “jolting” as though it was not operating correctly. Filosa only observed that vehicle in the parking lot, he did not observe it driving on the public highway. The Meineke auto shop is next to the Enterprise agency and can be accessed by driving through the Enterprise parking lot.

¶ 14 The State presented defendant's RDP and certified driving abstract, which were admitted into evidence. The RDP was effective from January 21, 2016, to January 21, 2017. The first page of the RDP indicates that its purpose is for "Original Employment Only." The restrictions list defendant's employer as Preferred Properties and Management Company, with an address in St. Charles, Illinois. Defendant was permitted to drive within a 100-mile radius of his employer. The RDP indicates defendant's work hours as 7 a.m. to 7 p.m., Monday through Saturday, and subject to emergency on call as required by the employer, which was subject to law enforcement verification. The RDP provides that defendant was allowed additional travel time outside of the listed work hours to drive to and from his residence and work location, and that he was authorized to drive in conjunction with his employment-related duties within the listed work hours and radius. The second page of defendant's RDP indicates that its purpose is for "Original Support/Recovery." The restrictions list three support programs defendant was permitted to attend. One program met at a church in Cicero on Sundays from noon to 2 p.m. The second program met in Maywood on Tuesdays from 6 p.m. to 8 p.m., and the third program met in Aurora on Wednesdays from 5:30 p.m. to 7:30 p.m. The RDP allowed defendant additional travel time to drive to and from his residence and the meeting locations. Both pages of the RDP indicate that it was "[s]ubject to law enforcement verification upon request." Defendant's driving abstract indicates that he had eight prior convictions for driving on a suspended or revoked driver's license between 2001 and 2013. The abstract also shows that defendant had numerous other convictions for various moving violations, and one conviction for driving under the influence of alcohol. The defense rested without presenting evidence.

¶ 15 The trial court noted that defendant's RDP was revoked on September 12, 2016. The court found, however, that the RDP was in effect on June 4, the date of the offense. The court stated that the only remaining question was whether defendant was validly operating a vehicle pursuant to the restricted privileges in his RDP. The court found that the date, time and distance, Saturday at 11:10 a.m. in Schaumburg, all fell within the RDP. The court noted that defendant initially told Kalik that he had met with his girlfriend, dropped her off in Hoffman Estates, and was returning from that errand when he discovered a problem with his brakes and drove into the parking lot. The court expressly stated that "[s]uch a use would not fall within the purpose of the driving permit because it has nothing to do with work." The court noted that defendant's second claim was that he was on his way to church. The court found that use also fell outside the parameters of the RDP because driving to church was limited to Sundays, and the offense occurred on a Saturday.

¶ 16 The court noted that defendant thereafter stated that he was working and that his mother was his employer. The court further noted that Kalik called defendant's mother. The court stated:

"And whatever happened during that conversation, the charges were still pursued. So I don't know that there is a favorable inference I could take from that. And, furthermore, the mother is not called to testify.

I mean, the easiest thing, if that's what the defense wanted to establish, was to call the mother to establish that her son worked for her, was working on that day, and was going to go to his next assignment pursuant to this text."

The court pointed out that defendant received the text message directing him to go to a job assignment in Hoffman Estates 30 minutes after he was arrested. The court further noted that

defendant was driving from, not to, Hoffman Estates when he experienced mechanical difficulty. Consequently, the court found that the evidence did not place defendant within the allowable uses set forth in his RDP. The court further stated:

“I don’t see any evidence upon which I could base a not guilty verdict or I could use to establish that there is reasonable doubt. There just isn’t any evidence to that effect. All the evidence is to the contrary; and under the state of the record here and the evidence that was adduced, I don’t have any choice but to find the defendant guilty of felony driving while his driver’s license was suspended or revoked.”

¶ 17 Defendant did not file a posttrial motion. At sentencing, the State pointed out that defendant’s presentence investigation report (PSI) did not include seven of his eight prior convictions for driving on a revoked license, which were reflected in defendant’s driving abstract. The State read the dates of those seven convictions into the record. In aggravation, the State argued that in addition to a prior felony conviction for driving on a revoked license, defendant also had felony convictions for a 1994 burglary, possession of a controlled substance in 2013, and five felony retail thefts from 1999, 2001, 2002, 2006 and 2011. The State noted that the sentencing range was one to six years’ imprisonment. The State argued that based upon defendant’s criminal history, and the number of prior violations for driving while his license was revoked, he should be sentenced to a substantial number of years in prison.

¶ 18 In mitigation, defense counsel argued that defendant had gotten “his driving act together” and had an RDP on the date of the offense. Counsel argued that the underlying basis of defendant’s revoked license was a conviction for driving under the influence of alcohol, which defendant had since addressed. Counsel argued that defendant has been sober since 2006, was a

sponsor for Alcoholics Anonymous (AA), and attended AA meetings three times a week. Counsel further argued that defendant worked 40 or more hours per week, and attended Harper College at night where he was pursuing a business degree. Counsel added that defendant attended church every Sunday and cared for his elderly mother. Counsel pointed out that defendant had already served 70 days in custody. Counsel argued that because defendant's conduct did not harm anyone, and he made substantial efforts to turn his life around, probation would be an appropriate sentence. Defendant did not make a statement in allocution.

¶ 19 The trial court acknowledged that defendant had gotten his affairs in order and obtained an RDP, and that his act of driving outside the parameters of his RDP was not the most offensive conduct. The court found, however, "to be very candid, this gentleman's criminal history is horrendous." The court listed all of defendant's convictions reflected in the PSI, which, in addition to the felonies noted by the State, included disorderly conduct in 1991, a battery in 1993, resisting a peace officer in 1993, attempted burglary in 1994, driving under the influence of alcohol in 1999, theft in 2010, and additional retail thefts in 2005, 2008, and 2009. The court also listed the prison terms defendant had previously served, which included 4 years for the 1994 burglary, 4 years for the 1999 retail theft, 2 years for the 2001 retail theft, 42 months for the 2002 retail theft, 3 years for the 2008 retail theft, 3 years for the 2011 retail theft, and 18 months for a 2014 driving with a revoked license. The court noted that defendant had 23 prior convictions and had been to prison 7 times. The court stated "that's the gravamen of this sentencing issue," and sentenced defendant to five years' imprisonment. The court also assessed defendant \$654 in fines, fees and court costs.

¶ 20 Defendant filed a motion to reconsider his sentence arguing that the trial court failed to give proper consideration to several factors in mitigation. At the hearing on that motion, defense counsel argued that the court should have considered in mitigation that there was no violence or serious harm in this case, and that defendant immediately reported the accident. Counsel argued that defendant had an RDP and believed he was legally driving his vehicle for work at the time of the accident. Counsel acknowledged that defendant had a significant criminal history, but argued that he had taken significant steps to ensure that no further criminal activity would occur by obtaining his RDP and employment, and by successfully participating in a 12-step program. Counsel also argued that defendant was responsible for caring for his aging and ailing mother.

¶ 21 The State argued that based on defendant's extensive criminal history, he was subject to an extended-term sentence with a range of one to six years' imprisonment. The State pointed out that defendant's most recent prior conviction was from 2013 when he was convicted of felony driving while his license was suspended or revoked and possession of a controlled substance, and was sentenced to 18 months' imprisonment. The State noted that defendant had an additional felony conviction for aggravated driving while his license was suspended or revoked for which he was sentenced to two years of felony probation, which was terminated unsatisfactorily. The State asked the court to deny defendant's motion to reduce his sentence.

¶ 22 The trial court stated that "[t]he truth of the matter is and the evidence demonstrated to me that he wasn't driving for work at the time that this happened. He was neither going to work nor coming from work." The court recalled that defendant was coming from seeing his girlfriend, with whom he had an argument. The court found "that's what lured him out, for lack of a better term, caused him to stray from the confines of the parameters of the restricted driving permit and

that's why he was out and about, had nothing to do with work." In response to counsel's argument that defendant had taken positive steps to ensure that no further criminal activity would occur, the court stated "I don't see how the getting of a restrictive driving permit erases his history." The court further commented that defendant knew that he was on "such thin ice" but still disregarded the parameters of his RDP to do something that was important to him. Consequently, the court found that it could not, with any confidence, say that defendant would not commit the offense again in the future. The court stated:

"Given those factors, plus the fact that he has such an extensive criminal history. He was facing up to 6 years. I didn't even give[] him the maximum, which certainly could be justified and probably should have been imposed; but I didn't do it.

And so I find that my sentence is well within the parameters of sentencing. I have reasons for that. There are objective factors for that."

Accordingly, the trial court denied defendant's motion to reconsider his sentence.

¶ 23 On appeal, defendant first contends that the State failed to prove him guilty beyond a reasonable doubt because it failed to disprove his affirmative defense that he was driving within the parameters of his RDP. Defendant argues that the evidence showed that he was driving within the hours permitted by the RDP, he told Kalik that he was working, and he received a text message from his mother for a job assignment to fix a leak which proved he was "on the clock." Defendant further claims that the evidence showed that he met with his girlfriend while on a break, and was driving to a second job when he encountered car trouble and pulled into the Meineke lot. Defendant argues that the burden shifted to the State to disprove his claim, and it

failed to meet its burden. Defendant acknowledges that there were “some inconsistencies” in his statements to Kalik, but claims his statements tended to support his defense more than rebut it.

¶ 24 The State responds that the evidence both established defendant’s guilt and negated his defense beyond a reasonable doubt. The State argues that the evidence showed that none of the activities for which defendant claimed that he was driving his vehicle were within the scope of the restrictions of his RDP. The State notes that defendant told Kalik that he met with his girlfriend to confront her about infidelity, dropped her off in Hoffman Estates, and claimed he was on his way to church. The State asserts that none of these activities were permissible destinations under the RDP. The State also points out that the text message to fix a leak was sent to defendant 30 minutes after Kalik arrived at the accident scene, and indicated that defendant’s presence was not required at the job site in Hoffman Estates until 1 p.m. The State argues that the timing and contents of the text message did not establish that defendant was working at 11:10 a.m., and also undermined his credibility that he was on his way to a job site in Hanover Park.

¶ 25 When defendant claims that the evidence is insufficient to sustain his conviction, this court must determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the elements of the offense proved beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48 (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). This standard applies whether the evidence is direct or circumstantial, and does not allow this court to substitute its judgment for that of the fact finder on issues involving witness credibility and the weight of the evidence. *People v. Jackson*, 232 Ill. 2d 246, 280-81 (2009). Under this standard, all reasonable inferences from the evidence must be allowed in favor of the State. *People v. Lloyd*, 2013 IL 113510, ¶ 42.

¶ 26 In a bench trial, the trial court is responsible for determining the credibility of the witnesses, weighing the evidence, resolving conflicts in the evidence, and drawing reasonable inferences from therein. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). We will not reverse a criminal conviction based upon insufficient evidence unless the evidence is so improbable or unsatisfactory that there is reasonable doubt as to defendant's guilt (*People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011)), nor simply because defendant claims that a witness was not credible or that the evidence was contradictory (*Siguenza-Brito*, 235 Ill. 2d at 228).

¶ 27 To prove defendant guilty of driving while his driver's license was suspended or revoked, the State was required to show that he drove a motor vehicle on any highway in Illinois at a time when his driver's license was suspended or revoked. 625 ILCS 5/6-303(a) (West 2016). Section 6-303(a), however, also provides an exception whereby a person is not guilty of committing the offense when he is driving "as may be specifically allowed by *** a restricted driving permit issued pursuant to this Code." *Id.* When an exception is included in the body of a substantive offense, it is the State's burden to disprove the existence of the exception beyond a reasonable doubt to sustain a conviction. *People v. Laubscher*, 183 Ill. 2d 330, 335 (1998).

¶ 28 In this case, it is undisputed that at the time of the offense, defendant possessed a valid RDP. It is further undisputed that, pursuant to the restrictions of the RDP, defendant was allowed to drive between the hours of 7 a.m. and 7 p.m., Monday through Saturday, for employment purposes. The issue is whether defendant was driving for employment purposes at the time of the offense, about 11:10 a.m. on Saturday, June 4. Consequently, in addition to proving the elements of the offense, the State was also required to prove beyond a reasonable doubt that defendant was not driving for employment purposes at the time of the offense. *Id.*

¶ 29 Here, viewed in the light most favorable to the State, the record shows that the State met its burden and proved beyond a reasonable doubt that defendant was not driving for employment purposes at the time of the offense, and therefore, was not driving within the restrictions specifically allowed by his RDP. Kalik testified that she responded to a report of an automobile accident in the Enterprise parking lot about 11:10 a.m. on Saturday, June 4. When she arrived at the scene, defendant told her that his vehicle was experiencing brake problems, and he was driving to the Meineke auto shop next to the Enterprise agency when he struck a parked vehicle. When Kalik asked defendant where he had been prior to the accident, defendant told her that he met with his girlfriend at a plaza in Schaumburg to confront her about her infidelity. Defendant then told Kalik that he dropped off his girlfriend at an address in Hoffman Estates just prior to the accident. Defendant later told Kalik that he was “having a break with his girlfriend *prior* to working.” Kalik’s testimony thereby established that defendant’s driving activity on the morning of June 4, leading up to and including the time of the accident, did not involve any purpose related to his employment.

¶ 30 Kalik further testified that she specifically asked defendant about his work and “whether he was working at the time.” Defendant initially told Kalik that he was on his way to church. Kalik observed that the RDP permitted defendant to attend a church in Cicero only on Sundays between noon and 2 p.m. Thus, defendant’s initial explanation did not comply with the restrictions in his RDP. Kalik testified that defendant then “changed his story” and claimed that he was on his way to a second place of employment in Hanover Park. Kalik observed, however, that the RDP did not include an employer’s address in Hanover Park. The RDP indicates that defendant had only one employer whose address was in St. Charles. Kalik then asked defendant

for his employer's phone number, at which time defendant stated that his mother was his employer. When Kalik asked defendant if she could call his mother, defendant replied "it wouldn't matter if [you] did any ways." Kalik explained that she then placed defendant under arrest because he was "changing his stories" and did not provide her with an explanation that matched his RDP, nor did he provide her with any permissible use of his RDP for 11:10 a.m. on June 4. The RDP indicates that it was "[s]ubject to law enforcement verification upon request." Kalik testified that at no time during her investigation did defendant provide her with a valid place of employment that he was either returning from or driving to. The record therefore shows that Kalik was unable to verify defendant's claim that he was en route to a second place of employment at the time of the offense.

¶ 31 Furthermore, we find no merit in defendant's claim that the text message from his mother proved that he was working at the time of the offense. Kalik reported to the scene of the accident at 11:10 a.m. Defendant received the text message at 11:47 a.m., more than 30 minutes after Kalik spoke with defendant at the scene. The text message directed defendant to go to a specific address in Hoffman Estates at 1 p.m. "for a leak." Consequently, defendant did not have to report to the job assignment for more than an hour after he received the text message. The timing and content of the text message did not establish that defendant was working or driving for employment purposes at the time of the offense, but instead, showed that he received a work assignment more than a half hour *after* the offense occurred.

¶ 32 The trial court found that the evidence did not place defendant within the allowable uses set forth in his RDP, and therefore, found that the State had proved him guilty beyond a reasonable doubt of driving while his license was revoked. Based on this record, we conclude

that the State not only proved the elements of the offense, but also met its burden of disproving defendant's affirmative defense that he was driving within the parameters of his RDP. Accordingly, we find no basis to disturb the trial court's guilty finding.

¶ 33 Defendant next contends that the trial court erroneously shifted the burden of proving his affirmative defense to him when it was the State's burden to rebut his defense beyond a reasonable doubt, thereby violating his right to due process. Defendant bases his argument on comments made by the trial court when it rendered its guilty finding. Specifically, defendant points to the court's notation that Kalik called defendant's mother, and challenges the following remarks made immediately thereafter by the court:

“And whatever happened during that conversation, the charges were still pursued. So I don't know that there is a favorable inference I could take from that. And, furthermore, the mother is not called to testify.

I mean, the easiest thing, if that's what the defense wanted to establish, was to call the mother to establish that her son worked for her, was working on that day, and was going to go to his next assignment pursuant to this text.”

Defendant claims that these comments show that the trial court found that gaps in the evidence weighed against him rather than the State, and that it was his burden to call his mother to testify to prove up his defense. Defendant asserts that his case should be remanded for a new trial.

¶ 34 Defendant acknowledges that he forfeited this issue for appeal because he did not object to the trial court's comments at trial and did not raise the issue in a posttrial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). He argues, however, that his claim is reviewable under the plain error doctrine. See Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). Alternatively, defendant contends

that his claim should not be considered forfeited because the basis of his objection is the trial court's conduct. See *People v. Sprinkle*, 27 Ill. 2d 398, 401 (1963).

¶ 35 The State responds that defendant's claim is forfeited and cannot be reviewed as plain error because no error occurred where the record shows that the trial court did not shift the burden of proof to defendant. The State argues that the comments show that the court gave thorough consideration and testing to defendant's theory that he was driving as permitted by his RDP, but based on the evidence, found that his theory was not credible. The State further argues that the record shows that the trial court properly based its guilty finding on the evidence presented at trial, not on the absence of evidence.

¶ 36 The plain error doctrine is a limited and narrow exception to the forfeiture rule that exists to protect defendant's rights and the reputation and integrity of the judicial process. *People v. Herron*, 215 Ill. 2d 167, 177 (2005). To obtain plain error relief, defendant must demonstrate that a clear or obvious error occurred, and either: (1) that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him, or (2) that the error was so serious that it affected the fairness of his trial and challenged the integrity of the judicial process. *People v. Seby*, 2017 IL 119445, ¶ 48. The burden of persuasion is on defendant, and if he fails to meet his burden, his procedural default will be honored. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010).

¶ 37 Defendant asserts that his claim is reviewable under both prongs of the plain error doctrine. The first step of plain error review is to determine whether a clear or obvious error occurred. *Seby*, 2017 IL 119445, ¶ 49. Accordingly, we must first determine whether the trial court improperly shifted the burden of proof to defendant.

¶ 38 Whether defendant was denied his right to due process is a question of law which we review *de novo*. *People v. Williams*, 2013 IL App (1st) 111116, ¶ 75. Due process dictates that it is the State's burden to prove beyond a reasonable doubt all of the elements of the offense. *People v. Howery*, 178 Ill. 2d 1, 32 (1997). As stated above, when an exception is included in the body of a substantive offense, it is the State's burden to disprove the existence of the exception beyond a reasonable doubt. *Laubscher*, 183 Ill. 2d at 335. The burden of proof remains with the State and never shifts to the defendant. *Howery*, 178 Ill. 2d at 32. Throughout the trial, defendant is presumed innocent and does not have to testify, present evidence, or prove his innocence. *People v. Cameron*, 2012 IL App (3d) 110020, ¶ 27.

¶ 39 It is presumed that the trial court knows the law regarding the burden of proof and has applied it properly. *Howery*, 178 Ill. 2d at 32. That presumption may be rebutted where the reviewing court determines that the record contains strong affirmative evidence that the trial court incorrectly shifted the burden of proof to the defendant. *Id.* at 32-33. "The trial court's efforts to test, support, or sustain the defense's theories cannot be viewed as improperly diluting the State's burden of proof or improperly shifting that burden to the defendant." *Cameron*, 2012 IL App (3d) 110020, ¶ 28 (citing *Howery*, 178 Ill. 2d at 35). The trial court may comment on the implausibility of the defense theory, as long as it is clear from the record that the court properly applied the burden of proof in finding the defendant guilty. *Howery*, 178 Ill. 2d at 34-35.

¶ 40 Here, our review of the record reveals that the trial court did not shift the burden of proof to defendant. When considered in context, the record shows that the challenged comments were made by the court as it thoroughly assessed the evidence to determine if it supported defendant's theory that he was driving within the allowable restrictions of his RDP. The court began by

finding that the date, time, and location where the offense occurred all fell within the restrictions specifically allowed by the RDP. The court then considered each of the claimed uses defendant provided to Kalik. The court noted that defendant initially told Kalik that he had met with his girlfriend, dropped her off in Hoffman Estates, and was returning from that errand when he discovered a problem with his brakes and drove into the parking lot. The court expressly found that “[s]uch a use would not fall within the purpose of the driving permit because it has nothing to do with work.” The court next found that defendant’s second claim that he was on his way to church also fell outside the parameters of the RDP because driving to church was limited to Sundays and the offense occurred on a Saturday.

¶ 41 The court then considered defendant’s claim that he was working and that his mother was his employer. The court noted that Kalik called defendant’s mother. The court then commented that “whatever happened during that conversation, the charges were still pursued. So I don’t know that there is a favorable inference I could take from that.” These remarks reflect the court’s assessment that, although defendant brought out on cross-examination that Kalik called his mother to verify his employment, the details of that conversation were unknown. The comments show that the court reasoned that, because the State still pursued charges against defendant, it could not draw an inference in defendant’s favor that his mother had, in fact, verified his employment.

¶ 42 Immediately thereafter, the court pointed out that defendant’s mother did not testify, and commented “the easiest thing, if that’s what the defense wanted to establish, was to call the mother to establish that her son worked for her, was working on that day, and was going to go to his next assignment pursuant to this text.” When considered in context, the comments show that

the trial court was reflecting on defendant's unsuccessful attempt during cross-examination to elicit from Kalik that his mother had verified his employment during their phone conversation. The record shows that during cross-examination, defense counsel asked Kalik if defendant's mother had verified his employment. When the trial court sustained the State's objection, counsel explained that she was not asking about what defendant's mother said specifically, but was asking whether or not she verified his employment. The court explained that counsel's question was objectionable as to hearsay because counsel was attempting "to elicit something from another individual for the purpose of establishing the truth therein." Based on this record, we find that the challenged remarks merely indicate that the trial court thoroughly considered defendant's theory, and determined that it was not supported by the evidence presented.

¶ 43 Moreover, the trial court determined that the evidence did not support a finding that defendant was not guilty. The court expressly stated "[a]ll the evidence is to the contrary; and under the state of the record here and the evidence that was adduced, I don't have any choice but to find the defendant guilty of felony driving while his driver's license was suspended or revoked." The record thereby shows that the trial court based its guilty finding on the evidence presented at trial. We find no evidence in the record that the trial court incorrectly shifted the burden of proof to defendant. Consequently, because no error occurred, the plain error doctrine does not apply. *Sebby*, 2017 IL 119445, ¶ 48.

¶ 44 Similarly, we reject defendant's alternative argument to consider his claim under the *Sprinkle* doctrine, which provides a basis for relaxing the forfeiture rule where an error arises from judicial misconduct. *Sprinkle*, 27 Ill. 2d at 400-01. There was no error by the trial court, and

thus, no judicial misconduct. Accordingly, we honor defendant's procedural default of this issue. *Hillier*, 237 Ill. 2d at 545.

¶ 45 Defendant next contends that his five-year prison sentence is excessive because it is unduly harsh and the court failed to give proper consideration to his mitigating evidence. Defendant argues that his sentence is grossly disproportionate to the nature of the offense, which did not cause or threaten serious harm to anyone. He further argues that he believed he was driving within the parameters of his RDP and had no intention to flagrantly violate the law. Defendant asserts that although he has an extensive criminal history, almost all of it is for nonviolent offenses, and therefore, this factor alone did not justify a sentence one year below the maximum extended term. Defendant also argues that the court should have considered that his imprisonment would cause an excessive hardship on his family where defendant was responsible for caring for his elderly mother who suffers from health problems. In addition, defendant argues that he has significant potential for rehabilitation which was demonstrated by his evidence that he successfully addressed his alcohol addiction and has been sober since 2006, he attends church, he was employed, and he was attending college at night to earn a business degree.

¶ 46 The State responds that defendant's sentence is not excessive where it is within the statutory range and defendant had eight prior convictions for driving on a suspended or revoked license. The State argues that the trial court thoroughly considered and rejected defendant's same arguments in mitigation during the sentencing hearing and the hearing on defendant's motion to reconsider his sentence. The State further asserts that the sentence is proper where defendant has demonstrated that he is unwilling to conform with the law and has again committed the same offense by driving while his license was revoked.

¶ 47 As a Class 4 offender with eight prior convictions for the same offense, defendant was subject to a statutory extended-term sentencing range of one to six years' imprisonment. 730 ILCS 5/5-4.5-45(a) (West 2016); 730 ILCS 5/5-8-2(a)(6) (West 2016). The trial court has broad discretion in imposing an appropriate sentence, and where, as here, that sentence falls within the statutory range, it will not be disturbed on review absent an abuse of discretion. *People v. Jones*, 168 Ill. 2d 367, 373-74 (1995). An abuse of discretion exists where a sentence is at great variance with the spirit and purpose of the law, or is manifestly disproportionate to the nature of the offense. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010).

¶ 48 The Illinois Constitution mandates that criminal penalties be determined according to the seriousness of the offense, and with the objective of restoring the offender to useful citizenship. Ill. Const.1970, art. I, § 11; *People v. Ligon*, 2016 IL 118023, ¶ 10. In light of these objectives, “[t]he trial court is charged with fashioning a sentence based upon the particular circumstances of the individual case, including the nature of the offense and the character of the defendant.” *People v. Fern*, 189 Ill. 2d 48, 55 (1999). The court’s sentencing decision is entitled to great deference because, having observed the defendant and the proceedings, it had the opportunity to weigh defendant’s demeanor, credibility, general moral character, mentality, habits, social environment and age. *Alexander*, 239 Ill. 2d at 213. “The sentencing judge is to consider ‘all matters reflecting upon the defendant’s personality, propensities, purposes, tendencies, and indeed every aspect of his life relevant to the sentencing proceeding.’ ” *Fern*, 189 Ill. 2d at 55 (quoting *People v. Barrow*, 133 Ill. 2d 226, 281 (1989)).

¶ 49 Here, we find no abuse of discretion by the trial court in sentencing defendant to an extended term of five years' imprisonment, which falls within the statutory range. The record

shows that at the sentencing hearing, the trial court expressly acknowledged that defendant had gotten his affairs in order and obtained an RDP, and that his act of driving outside the parameters of his RDP was not the most offensive conduct. The court found, however, “to be very candid, this gentleman’s criminal history is horrendous.” In addition to defendant’s eight prior convictions for driving while his license was suspended or revoked, the court listed all of defendant’s prior convictions reflected in the PSI. The court then listed all of the prison terms defendant had previously served, which included two prior sentences of four years each, a sentence of three and a half years, two prior sentences of three years each, a sentence of two years, and most recently, a sentence of a year and a half for driving on a revoked license. The trial court noted that defendant had 23 prior convictions and had been to prison 7 times. The court stated “that’s the gravamen of this sentencing issue” as it imposed the five-year term. The record thus shows that the trial court considered the nature of the offense, but determined that in light of defendant’s numerous prior convictions and prison terms, the five-year sentence was warranted.

¶ 50 Defendant’s argument that the trial court failed to give proper consideration to his mitigating evidence is unpersuasive. The record shows that the trial court thoroughly considered and rejected these same arguments at the hearing on defendant’s motion to reconsider his sentence. The court found that defendant was “lured” out and strayed from the parameters of his RDP to confront his girlfriend, which “had nothing to do with work.” The court further commented that defendant knew that he was on “such thin ice” but still disregarded the parameters of his RDP to do something that was important to him. Consequently, the court found that it could not, with any confidence, say that defendant would not commit the offense again in

the future. The court again emphasized defendant's "extensive criminal history." The court pointed out that it did not sentence defendant to the maximum term of six years, and stated that such term "certainly could be justified and probably should have been imposed; but I didn't do it." The court noted that the sentence was "well within the parameters of sentencing," and stated that there were "objective factors for that." The record therefore shows that the trial court had serious doubts about defendant's potential for rehabilitation based on his conduct in this case and his repeated violations for the same offense.

¶ 51 This court will not reweigh the sentencing factors or substitute our judgment for that of the trial court. *Alexander*, 239 Ill. 2d at 213. Based on the record before us, we cannot say that the sentence imposed by the court is excessive, manifestly disproportionate to the nature of the offense, or that it departs significantly from the intent and purpose of the law. *Fern*, 189 Ill. 2d at 56.

¶ 52 Finally, defendant contends that his fines and fees order should be corrected. Defendant argues that monetary credit for the days he spent in presentencing custody should be applied against the \$15 state police operations fee (705 ILCS 105/27.3a(1.5) (West 2016)), the \$50 court system fee (55 ILCS 5/5-1101(c) (West 2016)), and the \$25 court services (sheriff) fee (55 ILCS 5/5-1103 (West 2016)). Defendant also argues that the \$250 DNA ID system fee (730 ILCS 5/5-4-3(j) (West 2016)) was erroneously assessed and should be vacated.

¶ 53 We note that in his opening brief, defendant also contended that he was entitled to apply presentence monetary credit against five additional assessments that are labeled as fees, but he claimed were fines. Those assessments included the \$190 felony complaint filed fee (705 ILCS 105/27.2a(w)(1)(A) (West 2016)), the \$25 automation fee (705 ILCS 105/27.3a(1) (West 2016)),

the \$25 document storage fee (705 ILCS 105/27.3c(a) (West 2016)), the \$2 State's Attorney records automation fee (55 ILCS 5/4-2002.1(c) (West 2016)) and the \$2 Public Defender records automation fee (55 ILCS 5/3-4012 (West 2016)). In his reply brief, however, defendant conceded his challenges to these assessments, acknowledging that our supreme court recently determined that all five of these assessments are fees, not fines, and therefore, are not subject to offset by the presentence monetary credit. See *People v. Clark*, 2018 IL 122495.

¶ 54 On February 26, 2019, while this appeal was pending, our supreme court adopted new Illinois Supreme Court Rule 472, which sets forth the procedure in criminal cases for correcting sentencing errors in, as relevant here, the “imposition or calculation of fines, fees, and assessments or costs” and “application of *per diem* credit against fines.” Ill. S. Ct. R. 472 (a)(1), (2) (eff. Mar. 1, 2019). On May 17, 2019, Rule 472 was amended to provide that “[i]n all criminal cases pending on appeal as of March 1, 2019, or appeals filed thereafter in which a party has attempted to raise sentencing errors covered by this rule for the first time on appeal, the reviewing court shall remand to the circuit court to allow the party to file a motion pursuant to this rule.” Ill. S. Ct. R. 472(e) (eff. May 17, 2019). “No appeal may be taken” on the ground of any of the sentencing errors enumerated in the rule unless that alleged error “has first been raised in the circuit court.” Ill. S. Ct. R. 472(c) (eff. May 17, 2019). Therefore, pursuant to Rule 472, we “remand to the circuit court to allow [defendant] to file a motion pursuant to this rule,” raising the alleged errors regarding the imposition of fees and the application of *per diem* credit against fines. Ill. S. Ct. R. 472(e) (eff. May 17, 2019).

¶ 55 Affirmed; remanded as to fines, fees and costs.