2013 IL App (4th) 120049-U

NO. 4-12-0049

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
May 28, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
DAVID BOSWELL,	)	No. 10CF1117
Defendant-Appellant.	)	
	)	Honorable
	)	Robert L. Freitag,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Pope and Holder White concurred in the judgment.

ORDER

¶ 1 *Held:* The State's evidence was sufficient to prove defendant guilty of first degree murder where ample evidence showed the victim was standing in the truck's path when defendant drove the vehicle into the victim at a high rate of speed and did not stop once the victim was hit.

¶ 2 The trial court did not abuse its discretion in admitting evidence of defendant's comment revealing a prior prison term made shortly after leaving the scene where the evidence was relevant to his state of mind when he struck the victim as well as an absence of accident and mistake.

¶ 3 Since the trial court's comment about the distance the victim was on the hood of the truck was a reasonable inference from the evidence presented at defendant's trial, the court did not sentence defendant based on a mistaken belief about the nature of the offense.

¶ 4 Given defendant's lengthy criminal history for a 24-year-old and the nature of the offense, defendant's 45-year prison term for first degree murder was not excessive.

¶ 5 Where defendant failed to challenge the restitution payment method in the trial court, defendant forfeited his issue on appeal.

¶ 6 In November 2010, the grand jury charged defendant, David Boswell, with three counts of first degree murder (720 ILCS 5/9-1(a)(1), (a)(2) (West 2010)). After an August 2011 trial, a jury found defendant guilty of first degree murder. Defendant filed a posttrial motion, asserting, *inter alia*, (1) the State failed to prove beyond a reasonable doubt the elements of first degree murder and (2) the court erred by allowing codefendant Frankie Trimby's testimony about defendant's statement he did not want to go back to prison. At a joint October 2011 hearing, the court denied defendant's posttrial motion, sentenced defendant to 45 years' imprisonment, and ordered him to pay the restitution as outlined in the presentence investigation report. Defendant filed a motion to reconsider his sentence, which the court denied.

¶ 7 Defendant appeals, asserting (1) the State's evidence was insufficient to prove him guilty beyond a reasonable doubt of first degree murder, (2) the trial court erred in admitting evidence of defendant's prior imprisonment, (3) his sentence is erroneous because (a) the court relied on its mistaken belief about the nature of the offense and (b) the sentence is excessive, and (4) the court's restitution order is void because the court did not assess defendant's ability to pay. We affirm.

¶ 8 I. BACKGROUND

¶ 9 Sometime around 6:40 p.m. on the evening of November 14, 2010, Mark Olson confronted defendant and Frankie about a grill the pair had put in the back of Frankie's father's truck in an alley near 400 South Madison in Bloomington, Illinois. Olson told the pair the grill was his, and the grill was unloaded from the truck. When Olson got out his cellular telephone to call the police, defendant and Frankie got into the truck with defendant driving. Defendant

turned the truck around to exit the alley. At the time, the alley had two sawhorse-type barricades, which narrowed the opening. While accounts varied as to what transpired, the truck hit Olson and continued down the alley at a high rate of speed. Defendant turned left out of the alley and fled the scene. Two witnesses to the altercation, Chrystal Osborn and Samuel Cordell, found Olson lying in Madison Street. The police discovered the truck at Frankie's father's house, and defendant was later apprehended in Tennessee.

¶ 10 All three counts of the grand jury's indictment against defendant included accountability language and asserted defendant or someone for whom he was legally accountable killed Olson by running into him with a vehicle. The first count asserted that, in performing the acts that killed Olson, defendant intended to kill or cause great bodily harm to Olson. The second and third counts asserted defendant knew his acts created a strong probability of death (count II) or great bodily harm (count III) to Olson.

¶ 11 Prior to trial, the State filed a motion *in limine* seeking to, if defendant testified, introduce testimony of statements defendant made to Frankie regarding defendant's previous criminal record. Specifically, Frankie stated he asked defendant to stop and return to the scene and defendant refused, stating he did not want to go back to prison. The motion asserted the statements should be allowed because they were relevant to defendant's intent and/or lack of mistake or accident. Defendant also filed a motion *in limine* to prohibit the State from introducing testimony of defendant's prior crimes, wrongs, bad acts, and imprisonment in the Department of Corrections (DOC). After hearing the parties' oral arguments on the issue, the trial court allowed the State's motion *in limine* over defendant's objection, finding its probative value outweighed its prejudicial effect. The court noted it would give Illinois Pattern Jury Instructions,

Criminal, No. 3.14 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 3.14) at the time the testimony was elicited.

¶ 12 In August 2011, the trial court held defendant's jury trial. The jury heard from 20 witnesses and viewed more than 100 exhibits. The parties are familiar with evidence, and thus we will set forth the evidence relevant to the issues on appeal. Frankie testified he and defendant intended to scrap the grill for metal. After Olson said the grill was his and he was calling the police, Frankie unloaded the grill from the truck while defendant got into the driver's seat of the truck. After defendant got the truck turned around to face the alley, Frankie testified "Olson was standing by some barricades over on the left side of the alley." At that point, defendant rapidly accelerated, and Olson stepped out to the middle of the right passenger side of the vehicle and was struck by the truck. Defendant continued to drive, and Olson went to the right of the truck. Frankie believed Olson went between the truck and the vehicle in which Olson arrived. However, "it wasn't until the end of the alley that [Frankie] felt a slight bump, which [he] assumed was Mr. Olson." Frankie testified Olson was not on top of the vehicle. At a speed of 40 to 50 miles per hour, defendant took a left out of the alley. Frankie testified he was in shock, and defendant was talking to himself. At some point down Madison Street, Frankie told defendant they needed to turn around. Defendant responded, "oh, f**k, you know, what just happened; I'm not going back to prison." After that testimony, the trial court gave IPI Criminal 4th No. 3.14. The pair returned to Frankie's father's home, had a discussion, and then went to Decatur, Illinois, in a different vehicle.

¶ 13 Defendant and Frankie stayed in Decatur for an hour and then returned to Bloomington. On Monday, November 15, 2010, the pair learned Olson had passed away.

Frankie wanted to go to the police, but defendant did not. They took the truck down to Lincoln, Illinois, washed it, and returned to Bloomington. That evening, the police were looking at the truck in the driveway, and defendant left out the back of the residence. On Tuesday, the police questioned Frankie, and he lied to the police about his whereabouts on Sunday. Frankie admitted lying several times to the police. Pursuant to a plea agreement, Frankie pleaded guilty to reckless homicide with a possible sentence of two to five years' probation and agreed to cooperate with the State.

¶ 14 Osborn testified that on November 14, 2010, she, Olson, and Olson's girlfriend, Wendy Simonovic, had been working at the Festival of Trees. As they were packing up everything, they realized they needed a dolly, and Olson had one at a nearby warehouse. Osborn drove Olson to the warehouse. When Olson noticed the two men taking his grill, he exited Osborn's vehicle. Osborn remained in the car and called Simonovic to tell her what was happening. Osborn observed the two men get into the truck and do a three-point turn. The men then got out of the truck and began to approach Olson. However, they returned to the truck before reaching Olson. According to Osborn, the truck then moved like the driver had one foot on the gas and one foot on the brake at the same time. She explained the truck "surge[d] and stop[ped] a few times." She did not see the truck strike Olson during the surge and stop. Osborn opined the truck's actions looked like a warning to get out of the way. Osborn testified Olson was standing about a third of the way into the opening when the truck was surging and stopping.

¶ 15 Before defendant rapidly accelerated the truck striking Olson, Olson "put his hand out and sidestepped so he was directly in the middle of the opening." Osborn testified the truck came right at Olson. To her, the truck acceleration seemed like the driver had "floored it." The

middle of the truck struck Olson, and he ended up face down on the hood with his arms at his sides and facing Osborn. After Olson was hit, the truck did not stop and appeared to speed up. As the truck passed by her vehicle, Olson was still on the hood. Osborn was still on the telephone with Simonovic describing what she was seeing. Osborn could no longer see the truck after it passed her vehicle so she turned her vehicle around. She started pulling forward to look for Olson. The truck was already gone. She finally saw Olson lying in the middle of the road. According to Osborn, the entire incident lasted only two to three minutes.

¶ 16 Without objection, Simonovic testified about the statements Osborn was making during their telephone call during the incident. She also testified about Olson's nature.

¶ 17 Cordell testified that, on November 14, 2010, he was cleaning up a building in the warehouse area and had been the one who put up the two barricades. That evening, he heard arguing and went to a doorway to see what was happening. Cordell testified he had "a whole wide-view [of the] area." He heard Olson accuse the men of taking the grill, and the men apologize and indicate they thought it was scrap metal. Cordell then observed the men remove the grill from the truck. When Olson took out his cellular telephone, the men got in the truck and tried to leave. Since the truck was not facing the exit, they had to do a three-point turn. Cordell then saw the truck stop in front of Olson. Olson remained standing in front of the truck. The truck then "bumped" or "nudge[d]" Olson. Olson was near the center but more on the passenger's side when the truck bumped him. After a pause during which Olson could not get out of the way, the truck took off "very fast." Cordell believed Olson "slammed on the hood." Cordell testified he lost sight of the truck after it accelerated and then ran 20 feet closer to the street. He did not see the truck but did see Olson lying in the road.

¶ 18 The defense impeached Cordell's description of the driver's age, hair color, and facial hair as well as his belief the vehicle had tinted windows and a "Nike-type sign." However, his description of defendant's hair type was correct and his description of the vehicle was very close to Frankie's father's truck.

¶ 19 Laura McBride, an investigator with the McLean County Public Defender's office, testified she met with Cordell on May 18, 2011, at the crime scene. During the meeting, Cordell explained the only time the truck hesitated was to avoid hitting Olson before Olson walked in front of the moving vehicle. McBride acknowledged she did not record the conversation or take notes during it.

¶ 20 Many Bloomington police officers and detectives analyzed the crime scene. Officer Gregory Scott testified he made a diagram of the crime scene using "Total Station," which measures distances, angles, and height. The diagram, State's exhibit No. 38, shows, *inter alia*, two acceleration marks near the south barricade and Olson's final rest position. The diagram notes the distance between the two aforementioned locations was 214.6 feet. Officer Scott also testified he had no way to associate the acceleration markings with a particular vehicle. Officer Clayton Arnold took photographs of the crime scene and noted the barricades restricted the flow of traffic in that area of the alley.

¶ 21 Dr. John Denton, a forensic pathologist, performed Olson's autopsy. Olson suffered numerous injuries to his face, head, neck, shoulder, back, hands, wrists, and legs. In his opinion, Olson's cause of death was "cranial cerebral injuries" sustained as a pedestrian struck by a motor vehicle. Dr. Denton opined Olson's face had impacted something and found the injuries to the front and left side of Olson's face were consistent with being struck from the front and

hitting his face on the hood of a vehicle. Olson also suffered "severe trauma to the base of his skull." Dr. Denton also opined Olson's injuries were consistent with "being struck by a vehicle, carried on the hood of that vehicle for some distance, and then being thrown off the vehicle, striking the pavement or roadway." He did not believe Olson's injuries were consistent with being run over in one stationary spot and did not find any evidence that Olson had been drug by a vehicle.

¶ 22 After closing arguments, the trial court instructed the jury on the lesser-included offense of reckless homicide (720 ILCS 5/9-3 (West 2010)) and again gave IPI Criminal 4th No. 3.14 regarding other-crimes evidence. On August 19, 2011, a jury found defendant guilty of first degree murder.

¶ 23 On August 31, 2011, defendant filed his posttrial motion challenging, *inter alia*, (1) the sufficiency of the State's evidence as to first degree murder and (2) the court's allowance of Frankie's testimony regarding defendant's prior imprisonment. At a joint October 7, 2011, hearing, the court denied defendant's posttrial motion, sentenced defendant to 45 years' imprisonment on the first count of first degree murder, and ordered him to pay the restitution set forth in the presentence investigation report. The report listed the following amounts of restitution, which totaled $10,966.13: $1,919 to Advocate Medical Group CBO; $1,723 Bloomington Radiology; $642.72 City of Bloomington/EMS; $2,501.25 Kibler Smith Memorial Home; $350.16 Park Hill Cemetery; and $3,830 Chris Olson. The presentence investigation report also noted Frankie had been ordered to pay the enumerated restitution amounts. As to defendant's prior criminal record, the report noted defendant's convictions included three felonies, five misdemeanors, one driving under the influence, and three ordinance violations. Defendant, who

was 24 at the time of sentencing, had been sentenced to DOC for one of the aforementioned convictions. In sentencing defendant, the court stated, *inter alia*, the following: "He gunned the engine of that truck, he struck Mr. Olson full on, throwing him on to the hood, and then continuing to think only of his own desire to get away, he drove some 214 feet at a high rate of speed while Mr. Olson clung to the hood of that truck."

¶ 24 On October 18, 2011, defendant filed a motion to reconsider his sentence, asserting the trial court's sentence was excessive. After a December 19, 2011, hearing, the court denied defendant's motion. On January 17, 2012, defendant filed a timely notice of appeal in sufficient compliance with Illinois Supreme Court Rule 606 (eff. Mar. 20, 2009), and thus this court has jurisdiction under Illinois Supreme Court Rule 603 (eff. Oct. 1, 2010).

¶ 25 II. ANALYSIS

¶ 26 A. Sufficiency of the Evidence

¶ 27 Defendant asserts the State failed to prove beyond a reasonable doubt defendant committed the offense of first degree murder. Specifically, he argues the evidence shows Olson inexplicably stepped into the path of the truck, and thus his conviction should be reduced to reckless homicide. The State disagrees, noting it presented the testimony of two corroborating eyewitnesses that Olson was in the path of the truck throughout the incident and the fact defendant continued to drive with Olson dragging from the hood.

¶ 28 When presented with a challenge to the sufficiency of the evidence, a reviewing court's function is not to retry the defendant. *People v. Givens*, 237 Ill. 2d 311, 334, 934 N.E.2d 470, 484 (2010). Rather, we consider " 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of

the crime beyond a reasonable doubt.' " (Emphasis in original.) *People v. Davison*, 233 Ill. 2d 30, 43, 906 N.E.2d 545, 553 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Under that standard, a reviewing court must draw all reasonable inferences from the record in the prosecution's favor. *Davison*, 233 Ill. 2d at 43, 906 N.E.2d at 553. Further, we note a reviewing court will not overturn a criminal conviction "unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt." *Givens*, 237 Ill. 2d at 334, 934 N.E.2d at 484. Last, "[i]n its discretion, a reviewing court 'may reduce the degree of an offense to a lesser[-]included offense when the evidence fails to prove the defendant guilty beyond a reasonable doubt of the greater offense.' " *People v. Alsup*, 373 Ill. App. 3d 745, 749, 869 N.E.2d 157, 161 (2007) (quoting *People v. Thomas*, 266 Ill. App. 3d 914, 926, 641 N.E.2d 867, 876 (1994)).

¶ 29 The basic difference between reckless homicide and first degree murder involving a vehicle is "the mental state that accompanies the conduct resulting in the victim's death." *Alsup*, 373 Ill. App. 3d at 750, 869 N.E.2d at 162. Often, "the distinction 'rests in the degree to which the acts [that the] defendant performed risk death or great bodily harm.' " *Alsup*, 373 Ill. App. 3d at 750, 869 N.E.2d at 162 (quoting *People v. Mifflin*, 120 Ill. App. 3d 1072, 1077, 458 N.E.2d 1343, 1346 (1984)). Whether the defendant's particular acts (1) create a " 'practical certainty' " of death or great bodily harm needed to establish intentional first degree murder, (2) produce a " 'strong probability' " of death or great bodily harm for knowing first degree murder, or (3) are " 'likely' " to cause death or great bodily harm for reckless homicide presents a question of fact to be determined by the trier of fact based on all the circumstances presented. 720 ILCS Ann. 5/9-1, Committee Comments, at 17 (Smith-Hurd 2002); *Alsup*, 373 Ill. App. 3d at 750, 869

N.E.2d at 162. Our supreme court has emphasized "inferences as to defendant's mental state are a matter particularly within the province of the jury." *People v. DiVincenzo*, 183 Ill. 2d 239, 253, 700 N.E.2d 981, 989 (1998).

¶ 30 Defendant argues the evidence at trial showed he only acted recklessly because Frankie testified that, after defendant accelerated, Olson stepped into the path of the truck. He further contends Frankie's testimony is supported by Osborn's testimony, the tire mark running across Olson's upper back, and the fact the damage to the truck was on the passenger's side. Contrary to defendant's assertion, Osborn's testimony does not suggest Olson stepped into the path of the moving truck. She testified defendant made the truck surge and stop several times before "floor[ing]" it and going down the alley. According to Osborn, during the surge and stop, Olson was standing a third of the way into the truck's path, and then before flooring it, Olson moved into the middle of the opening. Osborn testified Olson was already in the truck's path when defendant did the final acceleration. Thus, while Osborn testified Olson moved after the final acceleration, she consistently testified Olson was in the truck's path before Olson moved. Osborn's testimony is reasonable as the surging and stopping only makes sense if Olson was in the truck's path. Additionally, Osborn stated the truck appeared to speed up once Olson was hit. Olson was on the hood of the truck when the truck passed Osborn's car.

¶ 31 Osborn's testimony Olson was in the path of the truck before defendant drove down the alley was corroborated by the testimony of Simonovic. Simonovic testified Osborn told her the two men kept charging at Olson with the vehicle. Osborn stated she believed the men were trying to scare Olson to make him move. Simonovic also testified that, when Osborn initially explained the situation to her, Simonovic asked Osborn not to let Olson do anything.

Simonovic explained she knew how stubborn Olson was and would stand his ground and do what was right no matter what. Such testimony suggests Olson would have stood in the truck's path to prevent it from leaving.

¶ 32 Cordell, the other witness to the incident, also testified Olson was in front of the vehicle before the final acceleration. When questioned by defense counsel, Cordell stated Olson did not step out in front of a moving truck. Cordell explained Olson was standing between the barricades and the building, which was the only opening, when the truck stopped before its final acceleration. Cordell also testified he observed the truck bump Olson before it accelerated the final time. In Cordell's opinion, Olson had no time to get out of the way. Defendant attacks Cordell's credibility because his description of the truck's driver was inconsistent with defendant's age, facial characteristics, and hair color and his description of the truck's actions before the final acceleration differed from Osborn's. However, we will not reverse a defendant's conviction simply because the evidence is contradictory or the defendant claims a witness was not credible. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228, 920 N.E.2d 233, 243 (2009). The jury had the responsibility of determining the witnesses' credibility, the weight to be given their testimony, and the reasonable inferences to be drawn from the evidence. *People v. Moss*, 205 Ill. 2d 139, 164, 792 N.E.2d 1217, 1232 (2001). The jury's determination is entitled to great deference, and we find its determination was reasonable. See *Moss*, 205 Ill. 2d at 165, 792 N.E.2d at 1232.

¶ 33 Here, ample evidence existed from which the jury could have found Olson was clearly standing in front of the truck's path when defendant accelerated the truck right at Olson. Morever, defendant continued to drive down the alley with Olson on the hood and appeared to

even increase speed, which supports the inference defendant intended to hit Olson. Accordingly, the jury could have found beyond a reasonable doubt defendant accelerated the truck at Olson knowing Olson's death was a practical certainty. Thus, we find the State's evidence was sufficient.

¶ 34 B. Other-Crimes Evidence

¶ 35 Defendant next argues he was denied a fair trial because the trial court allowed the State to introduce evidence he had been in prison before the incident at issue. The court had allowed the testimony before trial by granting the State's third motion *in limine* and denying the defendant's motion that sought to prohibit it. The State asserts the court did not err by allowing the evidence, but if it did, any error was harmless.

¶ 36 The trial court possesses the responsibility to determine the admissibility of evidence, and a reviewing court will not disturb the trial court's ruling on a motion *in limine* absent an abuse of discretion. *People v. Kirchner*, 194 Ill. 2d 502, 539, 743 N.E.2d 94, 113-14 (2000). "A trial court abuses its discretion where its decision is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the trial court's view." *People v. Atherton*, 406 Ill. App. 3d 598, 615, 940 N.E.2d 775, 791 (2010).

¶ 37 Our supreme court has repeatedly held other-crimes evidence is admissible if it is relevant for any purpose other than to show the defendant's propensity to commit crimes. *People v. Wilson*, 214 Ill. 2d 127, 135, 824 N.E.2d 191, 196 (2005). Illinois courts have found other-crimes evidence admissible to show *modus operandi*, intent, identity, motive or absence of mistake. *Wilson*, 214 Ill. 2d at 135-36, 824 N.E.2d at 196. "Relevant evidence is defined as evidence having any tendency to make the existence of a fact that is of consequence to the

determination of the action more or less probable than it would be without the evidence." *People v. Gonzalez*, 142 Ill. 2d 481, 487-88, 568 N.E.2d 864, 867 (1991). Even if other-crimes evidence is relevant to one of the aforementioned purposes, the court still can exclude the evidence if its prejudicial effect substantially outweighs its probative value. *People v. Donoho*, 204 Ill. 2d 159, 170, 788 N.E.2d 707, 714-15 (2003).

¶ 38 In this case, Frankie testified that, at some point, while they were driving away on Madison Street, he told defendant they needed to turn around. According to Frankie, defendant responded, "Oh, f**k, you know, what just happened; I'm not going back to prison." Thereafter, the trial court read the jury IPI Criminal 4th No. 3.14, noting the evidence could only be considered for the issues of defendant's state of mind, intent, motive, and lack of mistake. Frankie also made a second reference to defendant's statement he was not going back to prison. The prosecutor also made references to defendant's comment in closing arguments. At trial, defendant argued he was not the driver, and that if the jury believed he was the driver, he committed reckless homicide and not first degree murder. Defense counsel argued the driver did not intend to murder Olson and the vehicle was already in motion when Olson stepped in front of the truck.

¶ 39 We agree with the State that defendant's prison comment while he was fleeing the scene makes it more probable defendant did not accidentally or mistakenly hit Olson with the truck. A reasonable person that accidentally or unintentionally hit a person with a vehicle would stop and see if they could render assistance, not flee the scene and think he or she committed a crime. Moreover, we disagree with defendant the "what just happened" language suggests defendant did not know what had happened. A full reading of defendant's comment to Frankie

indicates he knew what had happened. Here, defendant's mental state was at issue as defendant argued that, if he was the driver, he acted recklessly, not knowingly or intentionally. Accordingly, we find defendant's prison comment was relevant.

¶ 40 Defendant argues that, if his comment was relevant, then its prejudicial effect substantially outweighed its probative value. In the trial court, both the State and the court recognized the comment had a prejudicial effect. Thus, the trial court needed to conduct a balancing test, which the transcript of the motion hearing shows it did. See *People v. Dea*, 353 Ill. App. 3d 898, 903-04, 819 N.E.2d 1175, 1179 (2004) (Steigmann, J., specially concurring). In conducting the balancing tests, Illinois law is very similar to Federal Rule of Evidence 403, which has been explained as follows:

> " 'Once the weighing process is begun, there is no simple right or wrong answer [regarding the admissibility of relevant evidence]. The judge is open to persuasion. Everyone involved in the decision will visualize a balancing scale. That scale, however, is not evenly balanced. It starts out tipped toward admissibility because there is presumptive admissibility of probative evidence under [Federal Rule of Evidence] 403. The opponent of the evidence bears the burden of tipping the scale toward exclusion.' " *Dea*, 353 Ill. App. 3d at 904, 819 N.E.2d at 1179-80 (Steigmann, J., specially concurring) (quoting T. Mauet & W. Wolfson, Trial Evidence 5 (1997)).

¶ 41 Defendant argues the prejudicial effect substantially outweighed the comment's

probative value because the issue of whether defendant committed first degree murder or reckless homicide was a close issue. However, defendant again misrepresents Osborn's testimony and attacks the credibility of Cordell's testimony that was similar to Osborn's. While the jury had to resolve the conflict between Frankie's version of the incident and Osborn and Cordell's, we disagree with defendant the issue was very close. While defendant's comment supported the State's theory of the case, it did not make or break the State's case as evidence showed Olson was in the truck's path when defendant accelerated the truck a final time.

¶ 42 Accordingly, we find the trial court did not abuse its discretion in admitting Frankie's testimony regarding defendant's statement about returning to prison.

¶ 43 C. Defendant's Sentence

¶ 44 Defendant asserts we must remand his case for resentencing because of the trial court's mistaken belief about the nature of the offense. He also asserts his 45-year prison term is excessive.

¶ 45 1. *Nature of the Offense*

¶ 46 Specifically, defendant contends the trial court's finding defendant drove "some 214 feet at a high rate of speed while Mr. Olson clung to the hood of that truck" was not based on the evidence presented at defendant's trial. Defendant acknowledges he did not raise this issue in the trial court and requests that we review the issue under the plain-error doctrine (Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967)).

¶ 47 The plain-error doctrine permits a reviewing court to consider unpreserved error under the following two scenarios:

"(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 that 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." *People v. Sargent*, 239 Ill. 2d 166, 189, 940 N.E.2d 1045, 1058 (2010).

We begin our plain-error analysis by first determining whether any error occurred at all. *Sargent*, 239 Ill. 2d at 189, 940 N.E.2d at 1059. If error did occur, this court then considers whether either of the two prongs of the plain-error doctrine has been satisfied. *Sargent*, 239 Ill. 2d at 189-90, 940 N.E.2d at 1059. Under both prongs, the defendant bears the burden of persuasion. *Sargent*, 239 Ill. 2d at 190, 940 N.E.2d at 1059.

¶ 48 Contrary to defendant's assertion, the trial court's comment was a reasonable inference from the evidence presented at trial. Officer Gregory Scott testified the distance between an acceleration mark he observed in the alley and the "rest position" of Olson's body was 214.6 feet. While Officer Scott could not associate the acceleration mark with a particular vehicle, the map he created, State's Exhibit No. 38, showed the acceleration mark was in the vicinity of the barricades, and Osborn, Cordell, and Frankie all testified Olson was located in that area when he was hit by the truck. Osborn testified that, when the truck hit him, Olson landed facedown on the hood of the truck. She further testified Olson was still on the truck's hood when the truck passed her vehicle. Frankie testified that, after Olson was hit, Frankie "thought Mr. Olson went to the right of truck," but Frankie did not feel a slight bump until "the end of the

alley," which he assumed was Olson. Dr. Denton did not find any evidence Olson was drug underneath the vehicle. He also opined "Olson's injuries were consistent with being struck by a vehicle, carried on the hood of that vehicle for some distance, and then being thrown off the vehicle, striking the pavement or roadway." According to the various maps admitted into evidence and the witnesses' testimony, Olson's final resting position was in Madison Street, not far from the alley. Although the evidence at trial did not expressly provide the distance Olson was carried on the hood of the truck, the evidence showed Olson was on the truck's hood for a substantial distance and a reasonable inference from that evidence was a distance around 214 feet. Thus, the court did not err by saying Olson was on the hood of the truck for "some 214 feet."

¶ 49 Additionally, we note the precise distance Olson was on the hood of the truck in this case is insignificant since the evidence showed Olson was on the hood of the truck for a substantial distance. Accordingly, even if the court's stated distance was erroneous, any error would be *de minimis* and not plain error.

¶ 50 2. *Excessive Sentence*

¶ 51 Defendant further asserts his 45-year prison term was excessive given the mitigating factors and the circumstances in this case. The State disagrees defendant's sentence was erroneous.

¶ 52 For excessive-sentence claims, this court has explained appellate review of a defendant's sentence as follows:

> "A trial court's sentencing determination must be based on the particular circumstances of each case, including factors such as

> the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. [Citations.] Generally, the trial court is in a better position than a court of review to determine an appropriate sentence based upon the particular facts and circumstances of each individual case. [Citation.] Thus, the trial court is the proper forum for the determination of a defendant's sentence, and the trial court's decisions in regard to sentencing are entitled to great deference and weight. [Citation.] Absent an abuse of discretion by the trial court, a sentence may not be altered upon review. [Citation.] If the sentence imposed is within the statutory range, it will not be deemed excessive unless it is greatly at variance with the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense." (Internal quotation marks omitted.) *People v. Price*, 2011 IL App (4th) 100311, ¶ 36, 958 N.E.2d 341 (quoting *People v. Hensley*, 354 Ill. App. 3d 224, 234-35, 819 N.E.2d 1274, 1284 (2004)).

¶ 53 Here, defendant acknowledges his sentence falls within the statutory range. The record shows the trial court did consider the matters raised by defendant in his appellate brief, *i.e.*, defendant's difficult childhood, mental-health issues, and statement in allocution. While defendant contends he was in shock and unable to comprehend what had happened after the incident, the court found the incident was not an accident and "was completely avoidable by defendant." The court further noted defendant's "choices and his voluntary and intentional

actions *** led to the death of Mr. Olson." The court's conclusions are consistent with the jury's verdict finding defendant guilty of first degree murder. Moreover, at 24 years of age, defendant already had three prior felony convictions and a misdemeanor battery conviction.

¶ 54 Accordingly, we find the trial court did not abuse its discretion in sentencing defendant to 45 years in prison.

¶ 55 D. Restitution

¶ 56 Defendant last argues the trial court's restitution order is void because the court did not assess defendant's ability to pay it. The State asserts defendant has forfeited this issue. We agree with the State.

¶ 57 Defendant insists his restitution order is void. However, section 5-5-6(f) of the Unified Code of Corrections (730 ILCS 5/5-5-6(f) (West 2010) (text of section effective until July 1, 2011)) "does not require any preliminary determination of defendant's financial capacity before ordering defendant to pay restitution. This requirement was eliminated by statutory amendment in 1983." *People v. Gray*, 234 Ill. App. 3d 441, 444, 600 N.E.2d 887, 888 (1992). Thus, defendant's ability to pay is not connected to the amount of restitution or the court's authority to impose restitution.

¶ 58 Section 5-5-6(f) does provide, in pertinent part, the following:

> "Taking into consideration the ability of the defendant to pay, *** the court shall determine whether restitution shall be paid in a single payment or in installments, and shall fix a period of time not in excess of 5 years or the period of time specified in subsection (f-1), not including periods of incarceration, within which payment of

restitution is to be paid in full." 730 ILCS 5/5-5-6(f) (West 2010) (text of section effective until July 1, 2011).

Accordingly, a defendant's ability to pay restitution is only a consideration when determining the manner in which the defendant should pay the restitution order. *Gray*, 234 Ill. App. 3d at 444, 600 N.E.2d at 888.

¶ 59 To the extent defendant has raised a challenge to the manner in which he must pay the restitution order, we find defendant has forfeited any such argument because he did not raise it at his sentencing hearing or in his postsentencing motion. See *People v. Graham*, 406 Ill. App. 3d 1183, 1194, 947 N.E.2d 294, 305 (2011) (citing *People v. Eades*, 123 Ill. App. 3d 113, 118-19, 462 N.E.2d 819, 823 (1984)) ("As for the defendant's argument that the trial court's restitution order should be set aside because the court failed to consider his ability to pay restitution and failed to specify, *inter alia*, a payment schedule, these objections have been forfeited by the defendant's failure to raise them at his sentencing hearing."); *People v. Kirkpatrick*, 272 Ill. App. 3d 67, 72-73, 650 N.E.2d 267, 271 (1995) ("[T]he record contains no showing that defendant objected to the trial court's failure to set a time for payment either at the time the court imposed the restitution order or in any subsequent motion contesting that order. Accordingly, we hold that he has waived this issue on appeal. [Citation.] To hold otherwise would require this court on appeal to address and correct a matter which, if it were of any real import to defendant in the first place, could have been—and should have been—called to the attention of the trial court for easy corrective action at that level. Permitting defendants to raise this sort of issue for the first time on appeal squanders our scarce judicial resources and should not be permitted."). Additionally, we point out the presentence investigation report thoroughly sets forth defendant's economic

status as well as his health history. We also note the futility of fashioning a payment plan based on defendant's ability to pay 45 years from now.

¶ 60 III. CONCLUSION

¶ 61 For the reasons stated, we affirm the McLean County circuit court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 62 Affirmed.