2019 IL App (5th) 160096-U

NO. 5-16-0096

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Effingham County.
	)	
v.	)	No. 14-CF-140
	)	
CHRISTOPHER P. MILLER,	)	Honorable
	)	Kimberly G. Koester,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE OVERSTREET delivered the judgment of the court.
Justices Chapman and Moore concurred in the judgment.

ORDER

¶ 1 *Held*: When sentencing the defendant, the circuit court did not rely on improper aggravating factors so as to require reversal of the defendant's sentence.

¶ 2 Following a jury trial, the circuit court of Effingham County sentenced the defendant to concurrent prison terms of 15 years for home invasion (accountability) (720 ILCS 5/19-6(a)(2) (West 2012)) and 10 years for residential burglary (accountability) (*id.* § 19-3). On appeal, the defendant challenges his sentence, contending that the circuit court considered improper testimony in aggravation. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 The evidence at the defendant's jury trial revealed that on March 11, 2013, the defendant drove Aaron Broadnax and Zach Curtis to the residence of Nicholas Cutright to collect drug money due the defendant. Wearing masks, Broadnax and Curtis broke into Cutright's residence and beat him. They took Cutright's phone, computer, and approximately $840 cash. During the break-in, the defendant waited in the vehicle, and after the break-in, the defendant, Broadnax, and Curtis returned to the defendant's apartment, where they divided the proceeds. After hearing the evidence at trial, the jury found the defendant responsible under an accountability theory for the actions of Broadnax and Curtis, and thus, found the defendant guilty of home invasion (720 ILCS 5/19-6(a)(2) (West 2012)) and residential burglary (*id.* § 19-3).

¶ 5 Pending sentencing, the circuit court allowed the defendant to remain on electronic home confinement. On May 19, 2015, before the defendant was sentenced, the defendant removed his home monitor and fled, and the State filed an amended motion for posttrial detention based upon the violation of his home confinement terms. The circuit court then issued a no-bond warrant, and the defendant, once captured on May 31, 2015, was detained pending sentencing and charged with escape as a result of his actions. On June 15, 2015, prior to sentencing in this case, the defendant pled guilty to the charge, a Class 3 felony, and was sentenced to two years in prison.

¶ 6 At the sentencing hearing held on June 15, 2015, the State presented the testimony of Todd Ebbert. Ebbert, the supervisor of investigations with the Effingham Police Department, testified that in February 2013, he investigated the break-in of two

apartments on Illini Drive, wherein items had been taken while the residents were at work. One of the residents, Emily Quast, noted she was missing jewelry and a .40-caliber handgun. Ebbert testified that he contacted Dealer Maker Pawn Shop and found Quast's jewelry. Ebbert testified that as part of the pawn shop process, the defendant had completed documents with his name and driver's license number, noting that he had pawned the jewelry. Ebbert testified that when he interviewed the defendant, the defendant acknowledged that he took the jewelry to the pawn shop for Jamel Wright but denied involvement in the residential burglaries on Illini Drive. Ebbert acknowledged that no charges were brought against the defendant as a result of the incident.

¶ 7 Tony Stephens, of the Effingham Police Department, testified that on June 6, 2013, the patrol division received a retail theft claim from Wal-Mart. Stephens testified, "They determined [the defendant] and Kendra Davis were involved and since I was familiar with both of them I assisted patrol." Stephens testified that he interviewed the defendant, who stated that he and Kendra entered Wal-Mart, Kendra stole three video games and two Wii controllers, and the defendant sold them at Game Stop in Mattoon for $30-$40.

¶ 8 Stephens testified that on May 27, 2013, law enforcement was notified about a home invasion on Third Street, wherein the perpetrator had broken the sliding glass door on the back side of the victim's residence. Stephens testified that the perpetrator had stolen several items, including a purse and camera, while the female resident was in the living room area. Stephens testified that the female identified one perpetrator as possibly a Hispanic male but could not identify the other. Stephens testified that the female

resident contacted John Maguire, of the Effingham Police Department, because she had located her camera being sold on Ebay. Upon investigation, Maguire determined that the person selling the camera on Ebay had purchased it from the defendant at the IGA parking lot. Stephens testified that he was present with Maguire when he questioned the defendant about it. Stephens testified that the defendant admitted to having the camera but stated that he received it from James Davis, Kendra Davis's brother. Stephens testified that defendant had admitted to listing the stolen camera for sale.

¶ 9 Stephens further testified regarding five controlled drug buys from the defendant, using a confidential source. These controlled buys were conducted as part of a criminal investigation that resulted in the defendant's conviction for distribution of heroin in 2013. Stephens testified that his confidential source started purchasing synthetic cannabis, K2, from the defendant in October 2012, purchased "a couple pills" of morphine from the defendant in February 2013, and purchased two-tenths of a gram of heroin in May 2013.

¶ 10 Stephens also testified that during an investigation of Scottie Bone in May 2014, Bone sold methamphetamine and a .22-caliber revolver. Stephens testified that an individual named Blake Pilcher informed police that the defendant had stolen the handgun from his grandfather and had sold it to Bone in exchange for K2. Stephens testified that Maguire contacted Gerald Timmons, the defendant's grandfather, who claimed ownership of the gun, stated that it was missing from his home, and filed a corresponding report in March 2015. Stephens testified that at one point, the defendant had lived with Timmons. Stephens acknowledged that he did not discuss the handgun with the defendant.

¶ 11 Stephens testified that in January 2015, Maguire located via Facebook and YouTube an audio recording of Stephens' interview with Kendra Davis regarding the defendant's actions in the case *sub judice*. Davis stated during the interview that the defendant, Curtis, and Broadnax were discussing Cutright's robbery at the defendant and Davis's shared residence and later returned with stolen property they divided between them. Stephens testified that the police had not determined who uploaded the recording but that the only attorney to whom the audio had been released was the defendant's original attorney. Stephens testified that he spoke to Curtis's attorney and Broadnax's attorney, both of whom indicated that they had not released the audiotape. Stephens testified that he "was informed that [the defendant's attorney] gave those audio video and audio recording to [the defendant] to review." Stephens testified that he believed the defendant provided the recording to Jesse Fisher, who uploaded it online. Stephens testified that as a result of the post, Davis was scared for her safety. Stephens acknowledged that the defendant had not been charged in connection with the investigation. Stephens testified that the defendant was the only one with access to the recording, other than Stephens. Stephens testified, "Only thing I can figure is he tried to intimidate her to have her not testify."

¶ 12 In mitigation, the defendant testified that he earned his G.E.D. at 17 years old and had suffered from Crohn's disease since he was 18 years old. The defendant testified that he experienced severe, lower-right abdominal pain and was unable to eat or drink. The defendant testified that he first began using narcotics at 14 years old. The defendant testified that he started with marijuana, then moved up to cocaine, heroin, and "basically

everything except for like PCP and Mescaline." The defendant testified that he self-medicated by using heroin to relieve his pain from Crohn's disease. The defendant testified that he realized he was addicted to heroin after four or five months of use. The defendant testified that other than minor traffic tickets, he had no criminal record other than those related to his drug addiction.

¶ 13 The defendant testified that dealing with Crohn's disease and his drug addiction had prevented him from holding steady employment. The defendant testified that he was first employed when he was 17 years old, working at a truck wash, washing semi-tractor trailers for a week or two, then he was promoted to the chrome shop store, where he was employed for a year. The defendant testified that he "was smoking marijuana at the time," "got arrested" for possession, and quit his job after he refused a drug test his employer requested after reading about the arrest in the newspaper. The defendant testified that he was thereafter employed by a print shop for approximately one year and a refrigeration company for six to seven months. The defendant testified that he later worked at a gas station but that he again faced a drug-related charge, refused a work-requested drug test, and was fired. The defendant testified that he worked at a pizza restaurant for four or five months until he was arrested for delivery of a controlled substance. The defendant testified that he worked for a pork producer until he was arrested for the current charge.

¶ 14 In closing, the State argued as factors in aggravation that the defendant received compensation for committing the offense, that the defendant had a prior criminal history, including a prior felony conviction for distributing heroin, and that the sentence was

necessary to deter others. The State referenced Ebbert's testimony of the burglary of two homes on Illini Drive and the Wal-Mart burglary. The State argued:

> "Quite frankly the Defendant Your Honor I mean he's almost a one-man, you know, crime machine. Thefts, selling drugs, selling guns, intimidating people. And then when you pin him down and you convict him of these things Your Honor says well I am going to let you go out and get help for your medical needs prior to sentencing and what does he do? He runs away. So you throw in escape, [and] that's just the icing on the cake.
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> Again, [the defendant's] criminality, his record indicates that a long sentence to D.O.C. would be appropriate. He's been given opportunities in the past and he was a one-man crime spree. It's amazing the amount of different types of criminal activity he was engaged in. And then when he was committing these acts he was using other drug addicts to do the dirty work."

¶ 15 After hearing arguments, the circuit court noted the defendant's prior felony conviction and several misdemeanor convictions involving controlled substances, including possession of a controlled substance, possession of drug paraphernalia, and possession of cannabis less than 2.5 grams. The circuit court found that "[i]n addition to the misdemeanors and felony," the defendant had priors that involved improper lane usage, reckless driving, and speeding. The circuit court addressed the defendant's written statement in the presentence investigation report, revealing that when the circuit court had allowed electronic home confinement to allow the defendant to tend to his illness, the

defendant had abused K2 and cut off his ankle bracelet to escape confinement. The circuit court further stated:

> "I hear today testimony from the State of several incidents in which although you may not have [*sic*] the home invasion on Illini Drive, you may not have committed the home invasion on Third Street, you may not have been the one that took the games and controllers out of Wal-[M]art, you may not have been the one actually handing over the drugs or the gun, but you were certainly involved in those incidents and in all of those incidents you had somebody else do your dirty work for you and you received the fruits of those crimes."

¶ 16 In issuing its sentence, the circuit court further cited as factors in aggravation the defendant's receipt of compensation for committing the offense, the defendant's "glaring refusal to accept responsibility," and the defendant's "history of prior delinquency." The circuit court found that a prison sentence was necessary to deter others from committing the crime and sentenced the defendant to 15 years in prison for the home invasion and 10 years in prison for residential burglary.

¶ 17 On September 28, 2015, the defendant filed a motion for reduction of sentence, wherein he argued that if his sentence were reduced, he would overcome his drug addiction and avoid reoffending. On February 18, 2016, the circuit court denied the defendant's motion to reduce sentence. On March 7, 2016, the defendant filed a timely notice of appeal.

¶ 18 DISCUSSION

¶ 19 A sentencing judge is charged with the difficult task of fashioning a sentence which strikes the appropriate balance between society's protection and the offender's rehabilitation. *People v. La Pointe,* 88 Ill. 2d 482, 493 (1981). A sentence should reflect both the seriousness of the offense and the objective of restoring the defendant to useful citizenship. Ill. Const. 1970, art. I, § 11; *People v. McWilliams,* 2015 IL App (1st) 130913, ¶ 27. "To find the proper balance, the trial court must consider a number of aggravating and mitigating factors including: 'the nature and circumstances of the crime, the defendant's conduct in the commission of the crime, and the defendant's personal history, including his age, demeanor, habits, mentality, credibility, criminal history, general moral character, social environment, and education.' " *People v. Knox,* 2014 IL App (1st) 120349, ¶ 46 (quoting *People v. Maldonado*, 240 Ill. App. 3d 470, 485-86 (1992)); see also *People v. Jackson,* 149 Ill. 2d 540, 547-48 (1992). The trial court is presumed to consider all relevant factors and any mitigation evidence presented but is not obligated to recite or assign a value to each factor. *People v. Meeks*, 81 Ill. 2d 524, 534 (1980). A sentence within the statutory range is presumed proper and will not be disturbed absent an affirmative showing that the sentence is at variance with the purpose and spirit of the law or is manifestly disproportionate to the nature of the offense. *Knox*, 2014 IL App (1st) 120349, ¶ 46.

¶ 20 "The rigid rules of evidence applicable during trial are not required at sentencing." *Jackson*, 149 Ill. 2d at 547-48. At sentencing, the defendant's guilt has already been settled, and the sentencing judge is charged with the task of determining the type and

extent of punishment, within statutory and constitutional limits. *Id.* at 548. " ' "Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics." ' " *Id.* at 548-49 (quoting *People v. Adkins*, 41 Ill. 2d 297, 300 (1968), quoting *Williams v. New York*, 337 U.S. 241, 247 (1949)). To determine the nature and degree of punishment, the trial court is not confined to the evidence presented at trial but may search anywhere, within reasonable bounds, for facts which aid it in crafting a proper sentence. *Id.* at 547-48; *People v. Wright*, 161 Ill. App. 3d 967, 977 (1987). "For evidence to be admissible in a sentencing hearing, it is required only to be reliable and relevant, a determination that is within the trial court's discretion." *People v. Rose*, 384 Ill. App. 3d 937, 941 (2008).

¶ 21 Although evidence of past criminal conduct is often not admissible at trial, it is relevant information at sentencing. *Jackson*, 149 Ill. 2d at 548. "Previous convictions are routinely considered." *Id.* "In addition, outstanding indictments or other criminal conduct for which there has been no prosecution or conviction may be considered in sentencing." *Id.* "Such evidence, however, should be presented by witnesses who can be confronted and cross-examined, rather than by hearsay allegations in the presentence report, and the defendant should have an opportunity to rebut the testimony." *Id.*; see also *People v. Thomas*, 137 Ill. 2d 500, 547 (1990) (evidence of prior criminal conduct must be relevant, reliable, and subject to cross-examination); *People v. Spears*, 221 Ill. App. 3d 430, 437 (1991) (evidence of crimes with which the defendant has not been convicted is admissible when the testimony is trustworthy and subject to cross-examination).

¶ 22 "A sentencing court may go so far as to consider hearsay evidence of uncharged or unconvicted crimes as long as the evidence is relevant and reliable, with the hearsay nature of the evidence going toward its weight rather than its admissibility." *Rose*, 384 Ill. App. 3d at 946; see also *People v. Richardson*, 123 Ill. 2d 322, 361 (1988); *People v. Foster*, 119 Ill. 2d 69, 98 (1987); *People v. Null*, 2013 IL App (2d) 110189, ¶ 56. The "hearsay testimony is not *per se* inadmissible at a sentencing hearing as unreliable or as denying a defendant's right to confront accusers." *Foster*, 119 Ill. 2d at 98. "[H]owever, *** where [the supreme] court has approved the admission of double hearsay, at least some parts of the double hearsay have been corroborated by other evidence." *Id.*; see also *People v. Erickson*, 117 Ill. 2d 271, 300 (1987); *People v. Perez*, 108 Ill. 2d 70, 86-87 (1985). A trial court must exercise care to insure that the information it considers is accurate and to shield itself from what might be the prejudicial effect of improper materials. *Jackson*, 149 Ill. 2d at 549.

¶ 23 In the present case, the defendant argues that the circuit court considered improper information during sentencing, including double hearsay and speculation, after the State accused the defendant of witness harassment, selling a firearm, and thefts without reliable or sufficient proof. The defendant argues that because the circuit court considered this improper information, this court should reduce the defendant's sentence to the minimum or remand this cause to the circuit court for resentencing.

¶ 24 The State counters that the defendant has forfeited review of this issue for failing to raise it before the trial court. See *People v. Hillier*, 237 Ill. 2d 539, 544 (2010) (a defendant forfeits review of a sentencing issue that he fails to raise in the trial court

through both a contemporaneous objection and a written postsentencing motion). However, plain-error review allows a court to consider otherwise forfeited claims of error. *People v. Thompson*, 238 Ill. 2d 598, 614 (2010). To obtain relief on a forfeited issue in the sentencing context, a defendant must show either (1) the evidence at the sentencing hearing was closely balanced or (2) the error was so egregious as to deny the defendant a fair sentencing hearing. *Hillier*, 237 Ill. 2d at 545. Once a forfeiture occurs, and a plain-error review is triggered, the burden is on the defendant to demonstrate that one of these two prongs has been satisfied. See *People v. Thurow*, 203 Ill. 2d 352, 363 (2003). The defendant bears the burden of persuasion with respect to prejudice, and if the defendant fails to meet his burden, the procedural default will be honored. *Hillier*, 237 Ill. 2d at 545; *Thurow*, 203 Ill. 2d at 363. A defendant who fails to argue for plain-error review, or fails to present an argument on how either of the two prongs is satisfied, cannot meet the requisite burden of persuasion and thus forfeits the review. *Hillier*, 237 Ill. 2d at 545-46.

¶ 25 The testimony that the defendant pawned jewelry taken from Illini Drive, the defendant listed for sale a camera taken from the Third Street residence, and the defendant stole, and later sold, merchandise from Wal-Mart was relevant and reliable. See *People v. Deleon*, 227 Ill. 2d 322, 340 (2008); *Jackson*, 149 Ill. 2d at 548-51. The record reveals that the officers compiled this information during an official investigation and interviews with the defendant (*People v. Morgan*, 112 Ill. 2d 111, 144 (1986)), and the officers were subject to cross-examination. Accordingly, because the evidence was relevant and reliable, the circuit court properly considered it even though the

investigations had not yet resulted in criminal charges against the defendant. See *Foster*, 119 Ill. 2d at 98-99 (even though testimony lacked corroboration, it was not inherently unreliable because officer compiled information during official investigation and evidence was never directly challenged). Moreover, the evidence was never directly challenged as improper (*People v. Hall*, 114 Ill. 2d 376, 417 (1986); *People v. Johnson*, 114 Ill. 2d 170, 206 (1986)), and the circuit court is presumed to have considered only properly admitted evidence in determining the sentence (*People v. Kliner*, 185 Ill. 2d 81, 172 (1998)).

¶ 26 Nevertheless, the State concedes that the testimony that the defendant posted an audio recording on social media to intimidate Davis and the testimony that the defendant stole a gun from his grandfather and sold it in exchange for K2 involved speculation, with tenuous and uncorroborated links between the defendant and those two offenses. The State contends, however, that the defendant failed to object to their admission and has failed to argue plain-error on appeal. The State contends that the defendant has failed to demonstrate that the circuit court relied on this testimony when formulating the defendant's sentence. See *People v. Fields*, 198 Ill. App. 3d 438, 441 (1990) (trial judge is presumed to have recognized and disregarded any incompetent evidence introduced during sentencing). In reply, the defendant argues that the errors were so egregious as to deny him a fair sentencing hearing because they allowed the State to paint him as a "one-man crime machine" who went on a "one-man crime spree."

¶ 27 As noted by the State, the defendant failed to argue plain-error review in his opening brief and has therefore forfeited his plain-error argument. See *Burlington*

Northern & Santa Fe Ry. Co. v. ABC-NACO, 389 Ill. App. 3d 691, 717 (2009) ("[p]oints not raised in a brief are waived and cannot be argued for the first time in a reply brief, pursuant to Illinois Supreme Court Rule 341(h)(7)"). Notwithstanding this forfeiture, the defendant cannot demonstrate plain error because the evidence presented at the sentencing hearing was not closely balanced, and any error was not so egregious as to deny the defendant a fair sentencing hearing.

¶ 28 The defendant was eligible for a minimum sentence of 6 years and a maximum sentence of 30 years in prison for home invasion. See 720 ILCS 5/19-6(c) (West 2012); 730 ILCS 5/5-4.5-25(a) (West 2012). The record reveals that the circuit court weighed the factors in aggravation and mitigation and sentenced the defendant within requisite statutory guidelines. In sentencing the defendant, the circuit court properly considered the defendant's prior criminal convictions and the need for deterrence. The circuit court also properly emphasized the defendant's lack of remorse. See *People v. Barrow*, 133 Ill. 2d 226, 281 (1989) (convicted defendant's absence of remorse is proper subject for consideration at sentencing). The circuit court also heard relevant and reliable evidence of the defendant's involvement with property stolen from Illini Drive, Third Street, and Wal-Mart, activity for which the defendant had not been criminally charged. Compare *People v. Minter*, 2015 IL App (1st) 120958, ¶¶ 149-50 (trial court's sentencing comments revealed that it improperly considered as aggravating factor the bare fact, with no testimony, that defendant had been charged with two offenses). The circuit court did not reference as a factor in sentencing the testimony with regard to the audio recording of Davis's statement to police, and its passing reference to the fact that the defendant

participated in an incident involving "handing over the drugs or the gun," when considered in context, revealed that the circuit court's consideration of this evidence was insignificant. See *People v. Ward*, 113 Ill. 2d 516, 526-27 (1986) (in reviewing sentence imposed by trial court, reviewing court should not focus on a few words or statements but must consider entire record as a whole); *People v. Reed*, 376 Ill. App. 3d 121, 128 (2007) (resentencing not required where record revealed no indication that trial court placed significant weight on improper factor in sentencing). The evidence at the sentencing hearing was not closely balanced and the alleged error was not so egregious as to deny the defendant a fair sentencing hearing. See *Hillier*, 237 Ill. 2d at 545. Accordingly, the defendant failed to satisfy the requirements of the plain-error rule, and his request for resentencing is hereby denied. See *id.*

¶ 29 CONCLUSION

¶ 30 For the foregoing reasons, we hereby affirm the defendant's sentence.

¶ 31 Affirmed.