

home invasion in return for the dismissal of the remaining aggravated-domestic-battery and theft charges. No agreement was reached with regard to sentencing. The factual basis for the plea was stated as follows:

**** Deputy Spitzner was dispatched to the scene at around 3:00 a.m. February 26, 2009, the scene being Kathy Lister's home, which is a mobile home owned by Kathy Lister solely located at 248 North Second Street NE, Clay City, Clay County, Illinois, and there he learned of an incident that happened by speaking with the victim and Kathy Lister advised him around 3:00 a.m. that day that Freddie Jackson, a man known to her, had been walking around the trailer knocking on the windows and doors. She did nothing at first thinking he would leave.

He finally woke up her daughter, Breanna, so after she got the child calmed down, she went to the door and opened it just a crack and told him to leave, he needed to leave there now. He had no authority to go on to this property. He then shoved his way into the door through the door, held her down with his right hand around her throat and grabbed with his left hand a knife and repeatedly stabbed her about her face, elbow and abdomen. He entered this place knowing she was present and he intentionally caused this injury to her on the date and time I mentioned above and he was not a peace officer acting in the line of his duty and he had no authority to enter into the dwelling of Kathy Lister.

The extent of the injuries resulted in, we have pictures of them, she was cut on her, I believe it's her right chin toward the back toward her neck, she was cut in the abdomen near the navel more than one place and in the elbow, I'm not sure which arm that is, and in the hand. This did result in her being taken to the Clay County Hospital for medical care and then sent on to St. Louis where she was in the hospital for several days.

She was pregnant also at the time of this incident, I think within the first trimester. I'm not sure of the number of weeks actually."

¶ 4 The court accepted the plea and a presentence investigation report was ordered.

¶ 5 During the June 3, 2009, sentencing hearing, the State offered the following evidence in aggravation. Tera Conklin, a Clay County probation officer, testified that she prepared the May 13, 2009, presentence investigation report and the May 21, 2009, addendum to the report in this case. She testified that the defendant contacted her following the completion of the reports. According to Conklin, the defendant indicated a desire to contact the victim to inquire about the welfare of the baby. The defendant is the baby's father. He expressed concern for the health of the baby, and he revealed that he loved the victim. He indicated that he had been in contact with his ex-wife, Melissa Rollins, despite the existence of an active order of protection.

¶ 6 Conklin further testified that she spoke to the defendant's sister, Virginia Tidwell, twice. She initially contacted Tidwell in reference to the presentence investigation report. Tidwell subsequently contacted Conklin by telephone and reported that the defendant had contacted her four or five times within an hour making threats to her and other people. The defendant had stated that he was going to start "hurting or killing people" once he was released. According to Conklin, Tidwell contacted her, but she was not in the office and had to return the call. She testified that the person she spoke to on the telephone was the same person that she had spoken to originally during the investigation.

¶ 7 Kathy Lister, the victim in this case, testified concerning the details of the offense and gave a victim impact statement. She testified that the defendant shoved his way into her residence. Once he was inside, he grabbed her neck with both hands and started strangling her. He removed one hand from her neck and grabbed a knife that he had in his pocket. He stabbed her twice in the stomach, once on the hand, once on the elbow, and once in the chin.

The defendant knew that she was pregnant with his baby, and one of the abdomen wounds was in the area where she was carrying the baby. She testified that her two daughters were in the home at the time of the incident. She explained that she suffered physical and emotional scarring as a result of the offense. She also suffered financial loss because she was off work for six weeks. The defendant did not present any evidence in mitigation.

¶ 8 In argument, the State recommended a sentence of 30 years' imprisonment, the maximum sentence for this offense. The State noted the defendant had the following criminal history: (1) convictions for assault and battery in 1995 and 2003; (2) a disorderly-conduct conviction in 1995; (3) domestic-abuse convictions in 2001 and 2002; (4) disturbing-the-peace convictions in August 2003, September 2003, and 2006; (5) a conviction for attempted aggravated battery of a police officer in 2007; (6) a conviction for resisting a police officer in 2008; and (7) a battery conviction in 2008 where the victim was his ex-wife. The State further noted that two of these offenses involved a knife, three of the offenses included threats and statements made by the defendant that he wanted to kill someone, and most of the offenses were in a domestic setting. The State pointed out that Lister carried physical and emotional scars from the incident, that the defendant continued to contact his ex-wife despite the existence of an active order of protection, and that the defendant wanted to maintain contact with Lister despite the incident.

¶ 9 The defense argued in mitigation that the defendant had been abused by his father and uncle from the time he was a small child and that much of the violence perpetrated by the defendant in the past was directed toward his father, brother, and uncle. The defense noted that the defendant was under the influence of alcohol the evening of the incident. The presentence investigation report indicated that the defendant spent \$400 on alcohol within a two-week period, and he regularly drank two or three 30-packs per day. The defendant also reported that he was taking Depakote, a seizure medicine, with the alcohol that night. The

defense noted that the defendant had suffered two heart attacks, and he would likely die in prison if given a lengthy sentence. He had previous psychiatric commitments and had attempted suicide. The defense recommended a sentence in the range of 10 to 12 years.

¶ 10 The defendant then made a statement in allocution. He apologized and expressed remorse for the incident. He explained that he had been mentally and physically abused by his father and uncles since he was two years old. He admitted that he had a problem with alcohol, but expressed a desire to seek help. He was scared that a sentence of 20 or more years would result in a "death sentence" because of his health.

¶ 11 Following the defendant's statement in allocution, the trial court announced the sentence. The court explained that it considered the factual basis of the plea, the evidentiary matters contained in the police reports concerning this particular incident, the presentence investigation report and addendum, the financial impact incarceration statement, the evidence offered in aggravation, the victim impact statement, the arguments of counsel in mitigation, and the defendant's statement in allocution. The court stated as follows concerning the sentence:

"Court finds that in this case there was suffered by this victim great bodily harm in the commission of an offense of home invasion. The court specifically finds that the cuts to this victim, which are depicted in the photographs and contained in the presentence investigation, and the scars which are still visible upon her face today as well as her elbow which was exhibited during her testimony and the fact that the wounds that she suffered were in her abdomen area at a time when she was pregnant and still remains pregnant all constituted great bodily harm.

The court further finds that the defendant's prior criminality is a factor to be considered for purposes of aggravation. The court further finds that the likelihood of creating and causing great bodily harm is an aggravating factor in this cause.

The court does not find that any of the information which has been presented by the defendant as to mitigation in argument is sufficient for the court to consider mitigation."

¶ 12 Thereafter, the court sentenced the defendant to 20 years' imprisonment with credit for 98 days served. The court ordered him to pay \$4,000 in restitution for Lister's unpaid medical expenses and for her loss of income during the time of recovery from her hospitalizations and treatment.

¶ 13 On August 18, 2009, the defendant filed a *pro se* motion for reduction of sentence. On September 15, 2009, an amended motion for reduction of sentence was filed by the defendant's counsel, arguing that the defendant's sentence was excessive because he (1) was extremely intoxicated at the time of the offense; (2) had a lengthy history of alcohol abuse, which had been the "main contributing factor" in all of his past criminal offenses; (3) did not contemplate that his criminal conduct would cause or threaten serious physical harm to another due to being in a state of "black out" caused by the combination of alcohol and prescription medication; (4) was unable to contemplate the consequences of his actions due to his severe state of intoxication; (5) intended to compensate the victim by paying for her lost income and for her medical bills resulting from the offense; (6) cannot provide support for his daughter while he is incarcerated; (7) will be incarcerated until within a year of his daughter reaching adulthood; (8) suffered from seizures and a 20-year sentence would endanger his health; (9) suffered severe physical abuse from his father and uncles beginning at a very young age; (10) was sexually abused by his uncle when he was young; and (11) had a very limited education, which prevented him from understanding the mental harm and anguish he inflicted on the victim, inhibited him from clearly expressing himself to the court and the probation officer prior to and during sentencing, and resulted in him having difficulty understanding much of the language used in the court proceedings.

¶ 14 On October 26, 2009, the trial court denied the defendant's motions. The defendant appealed, and this court remanded the cause for a new hearing because the defendant's trial counsel failed to file a certificate of compliance pursuant to Illinois Supreme Court Rule 604(d) (eff. July 1, 2006). *People v. Jackson*, No. 5-09-0617 (Dec. 20, 2010) (unpublished summary order under Supreme Court Rule 23(c)(2)).

¶ 15 On March 25, 2011, the defendant's counsel filed a certificate of compliance with Rule 604(d) and a motion to reconsider sentence, making the same arguments as contained in his September 2009 amended motion to reconsider sentence. On May 13, 2011, the trial court denied the latest motion to reconsider sentence. The defendant appeals.

¶ 16 The defendant argues that he was denied a fair sentencing hearing because unreliable and prejudicial hearsay information was presented to the trial court as evidence in aggravation. Specifically, he argues that Conklin testified that a "person whom she had never met told her by telephone that [the defendant] was calling and threatening that he would kill or injure people the moment he was released from prison." The State points out that this issue was not raised at sentencing or in any of the defendant's motions to reconsider the sentence. The State notes that it is "difficult" to determine, from the defendant's initial brief, whether the legal basis for the defendant's argument is plain error or ineffective assistance of counsel. Therefore, the State addresses both and argues that the defendant's sentencing hearing was neither unfair nor prejudicial. Specifically, the State argues that (1) the record is clear that Conklin was speaking to the defendant's sister with regard to the threats, (2) Conklin's testimony was never mentioned by the trial court when it announced sentence or by the State during argument, and (3) testimony at sentencing was not rendered *per se* inadmissible just because it contained hearsay. We agree with the State.

¶ 17 The defendant forfeited his challenge to Conklin's testimony concerning the threats by failing to make an objection at the sentencing hearing and by failing to raise an objection

in his subsequent motions to reconsider sentence. See *People v. Hall*, 194 Ill. 2d 305, 352 (2000). However, we will consider an otherwise forfeited issue if the trial court committed plain error. Under the plain-error doctrine, an otherwise forfeited and unpreserved sentencing error will be reviewed if the error was clear and obvious and either (1) the evidence is closely balanced or (2) the error is so serious that it deprived the defendant of a fair sentencing hearing. *People v. Ahlers*, 402 Ill. App. 3d 726, 733-34 (2010). "Absent reversible error, however, there can be no plain error." *People v. Williams*, 193 Ill. 2d 306, 349 (2000).

¶ 18 Here, the defendant argues that he was denied a fair sentencing hearing because the trial court erred by considering, as aggravation, Conklin's testimony concerning the threats made to Tidwell.

¶ 19 The ordinary rules of evidence are relaxed during sentencing. *People v. Varghese*, 391 Ill. App. 3d 866, 873 (2009). During the aggravation and mitigation phase of the sentencing hearing, evidence is admissible as long as it is relevant and reliable. *Id.* An inquiry can be made into the defendant's general moral character, habits, social environment, abnormal tendencies, age, natural inclination or aversion to commit crime, stimuli motivating his conduct, family life, occupation, criminal record, and criminal conduct not resulting in prosecution or conviction. *Id.*

¶ 20 Further, hearsay evidence is also admissible as long as it is relevant and reliable. *Hall*, 194 Ill. 2d at 352. Evidence containing double hearsay should be corroborated, at least in part, by other evidence. *Varghese*, 391 Ill. App. 3d at 873. "A hearsay objection at sentencing goes to the weight of the evidence rather than its admissibility." *Id.* The determination of whether the evidence meets the relevance and reliability requirements is within the sound discretion of the sentencing judge. *Hall*, 194 Ill. 2d at 352.

¶ 21 The court "must exercise care to insure the accuracy of information considered."

(Internal quotation marks omitted.) *People v. Jackson*, 149 Ill. 2d 540, 549 (1992). Consideration of an improper aggravating factor at sentencing affects the defendant's fundamental right to liberty; therefore, a court of review must remand for resentencing unless the factor is an insignificant element of the sentence. *People v. Dempsey*, 242 Ill. App. 3d 568, 597-98 (1993). "Where the sentencing judge relies on improper factors, including prejudice or speculation, the sentence should be vacated and the cause remanded for resentencing." *People v. Zapata*, 347 Ill. App. 3d 956, 964 (2004).

¶ 22 In this case, Conklin testified that she spoke with Tidwell twice, once in reference to the presentence investigation report and once after the report was filed. Conklin testified that Tidwell reported that the defendant contacted her and threatened that he was going to start "hurting or killing people" once he was released. Conklin explained that she knew the person reporting the threats was Tidwell because the person had the same voice as the person whom she had originally spoken to during the investigation.

¶ 23 We note that the information obtained from Tidwell (during the initial conversation with Conklin) in preparation of the presentence investigation report was sufficiently reliable to be used by defense counsel as support for his argument that the defendant should receive a lesser sentence. Because the record indicates that Conklin had previously spoken to Tidwell and Conklin identified the second voice as the same voice as in the original conversation, we conclude that the trial court did not err by allowing Conklin's testimony concerning the threats to be offered as evidence in aggravation at sentencing.

¶ 24 Further, a review of the record indicates that the testimony concerning the threats was corroborated by other evidence presented at the sentencing hearing. The victim testified that she was concerned that the defendant might attempt to harm her or the children once he was released. Evidence was also presented that the defendant had a history of violence against family members. The evidence indicated that he remained in contact with his ex-wife despite

the existence of an active order of protection. Therefore, Conklin's testimony concerning the reported threats was reliable, relevant, and corroborated, at least in part, by other evidence presented during the sentencing hearing. Accordingly, the evidence was admissible and no error occurred to warrant plain-error review.

¶ 25 Even assuming *arguendo* that the trial court erred by considering the testimony concerning the threats, we conclude that the defendant's sentencing hearing was not fundamentally unfair. The defendant pleaded guilty to a Class X felony that carried a sentencing range of 6 to 30 years' imprisonment. The State recommended that the defendant receive a sentence of 30 years and noted that the defendant had an extensive criminal history, which included multiple offenses against family members and two offenses involving a knife, which was the weapon used in this case. The State also noted that Lister carried physical and emotional scars from the incident. The State further noted that Lister suffered a wound in her abdomen area at a time when she was pregnant, and Lister was concerned about what would happen when the defendant was released from custody.

¶ 26 The trial court sentenced the defendant to 20 years' imprisonment. Although the court noted that it considered the information offered in aggravation by the State, it never specifically referenced Conklin's testimony concerning the threats. Instead, the court noted that Lister suffered great bodily harm, she had visible scars on her face and elbow, and she suffered a wound to the abdomen at a time when she was pregnant. The court explained that the defendant's prior criminality and the likelihood of creating and causing great bodily harm were both aggravating factors in this cause. Accordingly, we conclude that the defendant's sentencing hearing was not fundamentally unfair.

¶ 27 Further, we reject the defendant's ineffective-assistance-of-counsel argument. To establish that the defendant's trial counsel provided ineffective assistance, the defendant must show that his counsel's "performance was so deficient that his representation fell below an

objective standard of reasonableness," and a reasonable probability exists that the outcome of the proceeding would have been different absent his counsel's deficient performance. *People v. Pulliam*, 206 Ill. 2d 218, 238 (2002).

¶ 28 The defendant claims his trial counsel provided ineffective assistance of counsel by failing to object to Conklin's testimony concerning the threats. As previously explained, the trial court did not err by allowing the testimony of the threats to be admitted as evidence in aggravation, and even if error occurred, the defendant had a fair sentencing hearing. Therefore, the defendant cannot demonstrate either prong of the ineffective-assistance-of-counsel requirements. Further, we note that defense counsel challenged the testimony concerning the threats by questioning Conklin on the details of the phone conversation and how she knew that she was speaking to the defendant's sister. In doing this, defense counsel challenged the credibility of the testimony, and the court was made aware that the statements were made during a phone conversation where Conklin was returning a phone call after receiving a message that the defendant's sister had called her. Therefore, the court was able to determine the credibility of the testimony. Accordingly, we conclude that the defendant's trial counsel was not ineffective for failing to object to the testimony concerning the threats.

¶ 29 For the foregoing reasons, the judgment of the circuit court of Clay County is hereby affirmed.

¶ 30 Affirmed.