

No. 1-12-2193

**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 JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 3371
	)	
PARIS MILLER,	)	Honorable
	)	Michael Brown,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.  
Presiding Justice Hoffman and Justice Lampkin concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where it was uncertain that the trial court considered a statement made by a codefendant at his guilty-plea proceedings, but which was not presented at trial against defendant, if the error did occur, it did not rise to the level of plain error; and defendant's sentence was not excessive.

¶ 2 Following a bench trial, defendant was found guilty of two counts of aggravated robbery pursuant to section 18-5(a) of the Criminal Code of 1961 (the Code) (720 ILCS 5/18-5(a) (West 2010)), under an accountability theory and sentenced to 10 years in prison. On appeal, defendant contends his sentence was excessive, and that the trial court improperly considered a statement from a codefendant's guilty-plea proceeding, which was not presented at defendant's trial, in finding defendant guilty of aggravated robbery. We affirm defendant's conviction and sentence.

¶ 3 Defendant, and codefendants Richard Washington and Michael Elem, were charged by indictment with armed robbery, aggravated robbery, unlawful vehicle invasion, and misuse of a credit card. Prior to trial, defendant filed a motion to sever his case from both codefendants, arguing they had made "written and/or oral statements implicating [defendant]," and their defenses were inconsistent and antagonistic toward his defense. The trial court granted defendant's motion to sever. However, both defendant and codefendant Washington proceeded with a simultaneous bench trial. Codefendant Elem pled guilty prior to his codefendants' bench trial.

¶ 4 At trial, victims Nara Kim and Yena Kim testified that on January 25, 2011, at 1 a.m., Nara was parked at 1211 South Newberry Street in Chicago, when two men approached their vehicle. One man walked up to the driver-side window and knocked on it, then told Nara to open the door. When Nara refused, the man raised a gun to the window, and she opened the door. The man grabbed her purse, placing a gun approximately two to three inches from her head and demanding the keys to the vehicle. The other man leaned into the open passenger-side window, began searching through the vehicle, and took Yena's purse.

¶ 5 Detective Steve Buglio testified that he was assigned to investigate the robbery. On February 9, 2011, he spoke to codefendant Washington at the police station. Codefendant Washington gave the police consent to search his residence. The police found a plastic replica gun in the residence. Nara identified a photo of that gun in court as the gun which one of the men had pointed at her head during the robbery. Detective Buglio then arrested and interviewed defendant at the police station, showing him video-surveillance footage from a red-light camera, and video-surveillance footage from a Dominick's grocery store. Defendant identified both himself and the red van from which he was arrested in the footage. Defendant then informed the

officer that he knew of the robbery, but that it was not his idea. He stated that he was waiting for codefendants Washington and Elem in his van while the men committed the robbery, and that he agreed to be the getaway driver because he did not want to be considered a "rat" on the streets. Defendant also stated that the police "had the right two people."

¶ 6 Codefendant Elem testified that on February 17, 2012, he pled guilty to armed robbery in exchange for an eight-year sentence. He stated that on the night of the robbery, he had been in a van which belonged to Solese, who was defendant's girlfriend or wife. Codefendant Elem testified he did not know who was driving the van, and could not remember who was with him that night. When asked various questions about the incident, codefendant Elem answered that he did not remember, did not recall, or did not know. Codefendant Elem denied signing a statement he made about the robbery on a prior occasion. Following codefendant Elem's testimony, the trial court held codefendant Elem in direct contempt of court for refusing to answer certain questions.

¶ 7 The State then asked to recall Detective Buglio to testify about codefendant Elem's prior statement because codefendant Elem "didn't remember anything." The following discussion took place:

"THE COURT: Overruled. I have heard enough as far as Mr. Elem goes.

[THE STATE]: Okay, Judge.

THE COURT: All right. And I do recall his plea and the reference to that statement, and I will consider that.

[THE STATE]: Thank you, Judge.

THE COURT: That was in front of me. I don't need to hear from Detective Buglio. All right."

There was no further discussion about codefendant Elem's prior statement. The defense rested without presenting any evidence. The State did not refer to any prior statement by codefendant Elem during closing arguments. The trial court found defendant guilty of two counts of aggravated robbery under an accountability theory, "based on the statement [defendant] made as corroborated by all of the evidence."

¶ 8 Defendant's presentence investigation report (PSI) set forth defendant's criminal history which included two Class 2 convictions for delivery of a controlled substance in 1992 and possession of a stolen motor vehicle in 1993, and four Class 3 and Class 4 convictions from 1990 to 1997. Additionally, the PSI showed defendant received his commercial driver's license in 1998 and had been gainfully employed as a truck driver until he was laid off in 2010; took classes at Loyola University for asbestos and hazard waste removal in 1989; and that he began to use cocaine in 1989 and had participated in substance abuse treatment while in jail in 1995. Defendant, however, stated that prior to his arrest, he used heroin and cocaine daily.

¶ 9 At the sentencing hearing, in aggravation, the State highlighted defendant's criminal history, argued defendant was required to be sentenced as a Class X offender due to his two previous Class 2 convictions, and recommended a 10-year sentence.

¶ 10 In mitigation, defendant offered the testimony of his brother Kenneth Kimbrough, a church minister, and Roland Collins, a member of defendant's church. Mr. Kimbrough testified defendant was a "level headed young man" who faithfully attended church, but that defendant associated with the wrong crowd and abused drugs. Mr. Collins testified that he studied the bible with defendant over the last four years, and that defendant had "learned a lesson of what happens when you run around with the wrong people."

¶ 11 Addressing the court, defendant apologized for his actions, stated he had a drug addiction problem, and closed by stating: "I would like to become a better man and hopefully the best husband, father, and citizen I can be."

¶ 12 Before entering a sentence, the trial court stated that it had considered the PSI and the evidence presented at the sentencing hearing. The trial court noted defendant struggled with his drug addiction and encouraged him "to come to grips" with his drug problem. The trial court then, merged defendant's two convictions and sentenced him to 10 years in prison.

¶ 13 On appeal, defendant argues he was denied a fair trial because, in finding him guilty of armed robbery, the trial court relied on a statement introduced at codefendant Elem's guilty-plea proceedings but not introduced at defendant's trial and, therefore, not subject to cross-examination nor the rules of evidence, and entirely unknown in substance.

¶ 14 However, defendant forfeited this issue by failing to object at trial and including it in a written posttrial motion. See *People v. Herron*, 215 Ill. 2d 167, 175 (2005) (both a trial objection and a written post-trial motion raising the issue are required for alleged errors that could have been raised during trial). Defendant seeks review of this argument under the *Sprinkle* doctrine. See *People v. Sprinkle*, 27 Ill. 2d 398, 401 (1963). The *Sprinkle* doctrine relaxes the forfeiture rule where the forfeited issue relates to a trial court which "has overstepped its authority in the presence of the jury or when counsel is effectively prevented from objecting as any objection would have 'fallen on deaf ears.'" *People v. Hanson*, 238 Ill. 2d 74, 118 (2010) (quoting *People v. McLaurin*, 235 Ill.2d 478, 488 (2009)). However, the forfeiture of an issue has been excused under the *Sprinkle* doctrine only in extraordinary situations, such as when a judge makes inappropriate remarks to a jury, or when the judge relies on social commentary as opposed to the evidence, in imposing a death sentence. See *People v. Thompson*, 238 Ill. 2d 598, 612 (2010).

In this case, defense counsel made no attempt to object or to seek clarification when the trial court referenced codefendant Elem's guilty-plea proceedings during defendant's trial after denying the State's request to recall Detective Buglio. Additionally, we find nothing in the trial record which indicates defendant was prevented from raising an objection, or that an objection would have "fallen on deaf ears." *McLaurin*, 235 Ill. 2d at 488. Thus, the record on appeal does not warrant application of the *Sprinkle* doctrine. Nonetheless, we will review defendant's claim under the plain-error doctrine. See *People v. Enoch*, 122 Ill. 2d 176, 190 (1988).

¶ 15 The plain-error doctrine allows a reviewing court to reach a forfeited error affecting substantial rights in two circumstances: (1) when "a clear or obvious error occurs 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" (*People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)); and (2) when "a clear or obvious error occurs 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." *Id.* Under the first prong, it is well documented that a reviewing court " 'cannot correct the forfeited error unless the defendant shows that the error was prejudicial.' " *Herron*, 215 Ill. 2d at 181 (quoting *United States v. Olano*, 507 U.S. 725, 734 (1993)). Under both prongs, the burden of persuasion rests with the defendant. *Herron*, 215 Ill. 2d at 182. We must first consider, however, whether an error occurred at all. *People v. Sargent*, 239 Ill. 2d 166, 189 (2010).

¶ 16 When the trial court stated: "I have heard enough as far as Mr. Elem goes;" and "I do recall his plea and the reference to that statement, and I will consider that;" we cannot say for certain the trial court was finding it would use the prior statement of codefendant Elem at his sentencing against defendant. *Piatkowski*, 225 Ill. 2d at 565. However, even if we assume the

trial court erred and considered codefendant Elem's prior statement as evidence against defendant, we do not find the error would rise to the level of plain error.

¶ 17 We find the first prong of the plain-error doctrine inapplicable here because, a review of the record shows the evidence which was properly admitted at trial was not so closely balanced that the trial court's guilty verdict may have resulted from error and not from the alleged error. *Herron*, 215 Ill. 2d at 178.

¶ 18 Detective Buglio testified that defendant made a voluntary statement and confessed his involvement in the crime. Defendant admitted that although he did not participate in the robbery itself, he agreed to wait in the van during the robbery and act as the getaway driver for codefendants Washington and Elem. Defendant also identified both himself and the van he was driving on the night of the robbery in surveillance footage. Defendant was arrested after the robbery in that same van. The van belonged to a woman with whom defendant had a relationship. Codefendant Elem testified that he pled guilty to the armed robbery and was in the van on the night of the offense. The replica gun used in the robbery was found in codefendant Washington's home. Thus, after reviewing the trial testimony, we conclude the evidence was not so closely balanced that any error, based on codefendant Elem's prior statement, threatened to tip the scales of justice against defendant. See *Piatkowski*, 225 Ill. 2d at 551. We conclude that, even without any consideration of codefendant Elem's statement during his guilty-plea proceedings, defendant would have been found guilty of aggravated robbery on an accountability theory. In reaching this conclusion, that defendant has not shown prejudice from the claimed error, we note that the State never described the nature of the statement made by codefendant Elem at any stage of the trial, and did not refer to the statement during its closing arguments.

The trial court never referenced codefendant Elem's statement when finding the evidence supported defendant's guilt.

¶ 19 Additionally, we find the second prong of the plain-error doctrine to be inapplicable in this case because defendant has not shown the trial court's alleged error was so serious that it denied him a substantial right to a fair trial. As stated above, it is difficult to determine whether the trial judge actually relied on codefendant Elem's statement in finding defendant guilty. However, assuming that the trial court did consider that statement in finding defendant guilty, we find defendant has not shown " 'the error was so serious that it demonstrably affected the fairness of defendant's trial and challenged the integrity of the judicial process.' " *People v. Averett*, 237 Ill. 2d 1, 20 (2010) (quoting *People v. Walker*, 232 Ill. 2d 113, 131 (2009)). This court has held that simply alleging an error occurred is not enough to trigger plain-error review. See *People v. Olson*, 241 Ill. App. 3d 488, 493 (1993) (quoting *People v. Baker*, 195 Ill. App. 3d 785, 790 (1990) (holding that the plain-error doctrine "is not a 'catch-all' provision permitting this court to review any order or judgment of the trial court simply because this court may think the trial court erred.")).

¶ 20 A review of the record as a whole indicates the trial court found defendant guilty "based on the statement [defendant] made as corroborated by all of the evidence." Thus, the reference to codefendant Elem's guilty plea had very little, if any, effect on the fairness of defendant's trial. We conclude that even if the court did err when it made a reference to a statement made during codefendant Elem's guilty-plea proceedings, we do not believe this error rose to the level of a clear and obvious error under the second prong of plain error.

¶ 21 Because defendant has not satisfied his burden of persuasion under either prong of the plain-error doctrine (*Herron*, 215 Ill. 2d at 182)), he has forfeited his claim (*Thompson*, 238 Ill. 2d at 605).

¶ 20 Finally, defendant argues that his 10-year sentence was excessive, and asks that we reduce his sentence. A reviewing court may not modify a defendant's sentence absent an abuse of discretion by the trial court. *People v. Snyder*, 2011 IL 111382, ¶ 36. When mitigating factors are presented to the trial court, there is a presumption that the trial court considered them, absent some contrary evidence from the record. *People v. Payne*, 294 Ill. App. 3d 254, 260 (1998). A sentence which is within statutory limits will be found to have been an abuse of discretion when the sentence is "greatly at variance with the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense." *People v. Fern*, 189 Ill. 2d 48, 54 (1999). A reviewing court may not substitute its judgment for that of a sentencing court merely because it would have weighed the factors in aggravation and mitigation differently. *Alexander*, 239 Ill. 2d at 212-13.

¶ 22 Here, the trial court considered the relevant mitigating and aggravating factors in imposing defendant's sentence. Defendant was convicted of aggravated robbery, a Class 1 felony carrying a sentence of "not less than 4 years and not more than 15 years." 720 ILCS 5/18-5 (West 2010); 730 ILCS 5/5-4.5-30 (West 2010). However, based on defendant's two prior Class 2 convictions for delivery of a controlled substance in 1992 and possession of a stolen motor vehicle in 1993, he was subject to Class X sentencing, which carries a sentencing range of 6 to 30 years. 730 ILCS 5/5-4.5-95(b) (West 2010); 730 ILCS 5/5-4.5-25(a) (West 2010). The court sentenced defendant to 10 years, well within the statutory range. Although the sentence

imposed falls within the limitations prescribed by statute, defendant urges that we exercise our discretionary power to reduce his sentence based on the mitigating factors.

¶ 23 The nature of defendant's participation in the offense, work history, lack of violent convictions or any conviction at all since 1997, drug addiction, and expression of remorse were presented to the trial court. The trial court stated, in fashioning defendant's sentence, that it considered the PSI, the evidence as to mitigation, the position of the parties, and defendant's allocution. Further, we presume, absent contrary evidence from the record, that mitigating factors were properly considered by the trial court. See *Payne*, 294 Ill. App. 3d at 260. In light of this record, we cannot find the trial court abused its discretion in imposing a sentence within the statutory limits.

¶ 24 Furthermore, we disagree with defendant's contention that his sentence reflected insufficient consideration of the nature of his participation in the offense and his rehabilitative potential. Although defendant was not a participant in the actual robbery, he acted as the getaway driver and helped codefendants' escape after the robbery, serving a crucial role in accomplishment of the crime. Furthermore, defendant has a history of substance abuse since 1989. The record shows defendant made one attempt at treatment while in prison over 17 years ago. While defendant presented testimony from Kenneth Kimbrough and Roland Collins at his sentencing hearing regarding his religious studies and rehabilitative potential, there is no indication that defendant has sought additional substance abuse treatment outside of prison or, otherwise, sought medical help for his ongoing drug addiction. Thus, we decline defendant's request to reduce his sentence and to substitute our judgment for that of the trial court in reweighing these mitigating factors. See *Alexander*, 239 Ill. 2d at 212-13.

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

No. 1-12-2193

¶ 26 Affirmed.