FIFTH DIVISION
DECEMBER 30, 2016

No. 1-14-0775

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. 10 CR 18559
	)	
ANDRE SCOTT,	)	Honorable
	)	Brian Flaherty,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE GORDON delivered the judgment of the court.
Justice Reyes concurred in the judgment.
Justice Lampkin concurred in part and dissented in part.

O R D E R

¶ 1 *Held:* (1) We affirm defendant's conviction for armed robbery with a firearm where the trial court did not err in refusing to instruct the jury regarding the affirmative defenses of necessity and compulsion, and (2) defendant's 26-year prison term is not excessive because the record establishes that the trial court considered all appropriate factors.

¶ 2 Following a jury trial, defendant Andre Scott, age 21 at the time of the robbery, was convicted of armed robbery with a firearm and sentenced to 26 years' imprisonment. On appeal, defendant contends that (1) the trial court erred by not instructing the jury regarding the affirmative defenses of necessity and compulsion where other offenders carried the firearm and ordered him to assist in the offense, and (2) his sentence is excessive considering his participation in the offense and his criminal history, rehabilitative potential, family support, and youth. We affirm.

¶ 3 Defendant, along with codefendants Andre Johnson, Quenton Franklin, and Labarte Robinson, was charged, in relevant part, with one count of armed robbery of Elijah Jones and one count of armed robbery of Tommy Bowens.[1] The indictment alleged that both offenses involved a firearm. Defendant did not raise an affirmative defense in his three answers to discovery, but defense counsel stated during opening statements that defendant patted down Jones on the order of Johnson, whose "enforcer," Franklin, was waving a gun.

¶ 4 At trial, Jones testified that on July 26, 2010, he and his brother, Bowens, hosted a birthday "get together" for Bowens' friend, Curtis Smith, at Jones and Bowens' apartment in Homewood. The people at the party included Smith, an individual named "T-Man," three women, and defendant, whom Jones identified in court. The guests, including defendant, drank alcohol, and some of them smoked "weed." During the party, Smith answered a call on his phone. Defendant took the phone and left the apartment to talk outside. Approximately 20 minutes later, Jones heard a "loud commotion" and observed Johnson, Franklin, and Robinson

[1] Defendant's trial was severed and none of the codefendants are party to this appeal.

exiting a white vehicle. Jones was not friends with Johnson, but recognized him because, two or three weeks before the party, Johnson had entered the back seat of Jones' vehicle while he was sitting in the driver's seat. According to Jones, Johnson was "upset" that he had not been invited to the party. Around 15 people were gathered outside, and Jones invited them all into the apartment in order to "d[e]fuse" the situation.

¶ 5 Inside the apartment, Johnson again confronted Jones as to why he had not been invited and asked him to identify Bowens. Jones complied, and Johnson told Jones, "I need your chain and your watch. Up that. Up the chain." Franklin removed a semiautomatic firearm from his pants and pointed it "in whatever direction *** Johnson wanted." Franklin aimed the firearm at Jones' head and took his chain. Then, defendant entered the apartment and Johnson told defendant and Robinson to "check" Jones' pockets. Both men complied, and defendant removed Jones' phone. Robinson tried to take the phone from defendant, who refused to give it to him. Defendant also took Jones' left shoe, and Robinson took his right shoe and hat. Jones did not recall who took his watch. Franklin asked Johnson about Bowens, and Johnson said, "no, he's good." While Franklin pointed the gun at Bowens, another man entered the apartment, "checked" Bowens' pockets, and took money from him.

¶ 6 According to Jones, "[e]veryone" left the apartment at the "same time" but not necessarily "together." Jones believed that Johnson, Franklin, and Robinson left in the white vehicle. Smith spoke with Jones before leaving. Jones denied seeing defendant leave the party with Smith, but, on cross-examination, acknowledged providing the defense with a signed statement to that effect. In August 2010, he met with Homewood police detective Rolle and

identified defendant, Johnson, and Franklin in photo arrays. In September 2010, he identified defendant, Johnson, Franklin, and Robinson in physical lineups.

¶ 7 Bowens testified that the party began during the evening of July 25, 2010, and initially included Smith; T-Man; defendant's girlfriend, Mariyah; and defendant, whom Bowens identified in court. During the party, Bowens observed Smith's phone register a call from Labarte Robinson. Smith spoke to Robinson and gave the phone to defendant, who "step[ped] out for awhile." When defendant returned, Bowens and Mariyah left the party to meet one of her friends. As they returned to the apartment, a white sedan drove past and someone yelled Mariyah's name. The vehicle parked one block away and Bowens informed Jones and Smith that "somebody" had arrived. Afterwards, Bowens, Jones, Smith, and defendant went outside and encountered five men, including Robinson and Johnson. The entire group entered the apartment, where "[e]verybody" drank and smoked marijuana.

¶ 8 Inside the apartment, Johnson asked Jones and Bowens why he had not been invited to the party. Bowens ignored him, but noticed Franklin pointing a semiautomatic firearm at Jones' head. While Johnson "narrated," Robinson and two other individuals took a chain and watch from Jones. Defendant stood in Jones' "direction," but Bowens was "focus[ed]" on the gun and did not know whether defendant took anything from Jones. Then, Franklin pointed the gun at Bowens' head while defendant and another man stood on either side, patting him down. Bowens removed $140 from his back pocket but did not recall who took the money. Defendant, Franklin, Johnson, and Robinson left the apartment. One and a half to two minutes later, Bowens left the apartment and observed Robinson and Smith standing outside. The white sedan was gone, and

defendant and Mariyah were "running" approximately one block from where the sedan had been parked. In August 2010, Bowens met with Detective Rolle and identified defendant, Johnson, and Franklin in photo arrays. In September 2010, he identified defendant, Johnson, Franklin, and Robinson in physical lineups.

¶ 9 On cross-examination, Bowens stated that Johnson "told *** everybody that was there to rob me and my brother" and specified "what to do," but did not "directly" tell defendant to do anything. Bowens denied observing Robinson take anything from Jones. Additionally, he acknowledged providing the defense with a signed statement indicating that defendant did not "pat [him] down," take anything from him, or leave the apartment with Johnson and Franklin. On redirect examination, Bowens stated that he "didn't read the back end" of the statement.

¶ 10 Detective Rolle testified that he interviewed Jones and Bowens following the incident and compiled photo arrays in which both men identified defendant, Johnson, and Franklin. Detective Rolle arrested Franklin on September 22, 2010. That day, he also went to University Park based on information that "the subjects *** were staying in a house there." On September 23, 2010, Detective Rolle located a Range Rover that he learned had been "transporting" the "individuals," and identified the driver as Andrew Veal. Another officer stopped the vehicle, and when Rolle arrived at the scene, he identified and arrested defendant, Johnson, and Robinson, who had been inside. Afterwards, Jones and Bowens identified defendant, Franklin, Johnson, and Robinson in physical lineups at the Homewood police department. Rolle did not recover Jones' phone, shoes, watch, or chain.

¶ 11 The trial court denied defendant's motion for directed verdict and the defense rested. During the jury instruction conference, defense counsel acknowledged that defendant had not raised the affirmative defenses of compulsion or necessity in his answers to discovery, but argued that Jones' and Bowens' testimony "indicated that [defendant's] actions were based on the orders of Andre Johnson and Quinton waiving the gun," which, "in and of itself" permitted an instruction for either defense. The State objected and the court declined to issue either instruction, finding "no evidence that there was a necessity or compulsion [or] that the defendant was acting with that state of mind." During closing arguments, defense counsel contended that defendant lacked "free will," and, like Jones and Bowens, obeyed Johnson due to "fear."

¶ 12 The jury found defendant guilty of armed robbery of Jones and not guilty of armed robbery of Bowens. Defense counsel filed a posttrial motion for new trial and an amended motion for new trial, neither of which raised the issue of jury instructions. The court denied the motion and the matter proceeded to sentencing.

¶ 13 The presentence investigation report (PSI) indicated that defendant was 21 years old when the armed robbery occurred and 24 years old at sentencing. He had one felony conviction for theft (2008), and misdemeanor convictions for obstructing a peace officer (2008), retail theft (2009), theft (2009), aggravated assault (2010), and disorderly conduct (2010). Defendant was one of seven siblings and reported having a "good relationship" with his family. He had one daughter who was three years old and lived with her mother at the time of sentencing. He attended five semesters of high school and afterwards enrolled in the "Joliet Job Corps" but did not complete the program for "disciplinary" reasons. He had worked at two fast food restaurants

but was unemployed at the time of his arrest. The PSI also stated that defendant began using alcohol at age 13, marijuana at age 16, and ecstasy at age 17. At the time of his arrest, he consumed alcohol and marijuana daily and used ecstasy "five days out of seven." Defendant stated that he was "unable" to stop consuming alcohol and drugs, and that "every time he gets in trouble, he has been drinking and getting high."

¶ 14 At the sentencing hearing, the State called Park Forest police commander Sheets and Harvey police officer Ramsey. Commander Sheets testified that, on November 29, 2008, he investigated the theft of a phone and met with the victim 5 to 10 minutes after the incident occurred. According to Commander Sheets, the victim met defendant at the post office in order to sell him an iPhone valued at more than $350, and defendant took the phone and fled. Commander Sheets located defendant "hiding under bushes" approximately one block away. The victim identified defendant and the phone, which Commander Sheets found on defendant's person, and defendant was arrested.

¶ 15 Officer Ramsey testified that he interviewed Andrew Veal, defendant's cousin, on October 17, 2009. According to Officer Ramsey, Veal stated that he sold two vehicles for $10,000 and placed the proceeds in a "black plastic bag," which he hid under his mother's bed. Later, while using the computer with friends, he observed defendant in the doorway of his mother's bedroom, holding a black plastic bag and a "small chrome pistol." Veal asked defendant whether he was "going to take my money like that," and defendant laughed at him and left the house. Officer Ramsey denied that Veal mentioned a "party." He also interviewed Iricha Latting,

who indicated that she was at the house and observed defendant holding the black plastic bag and firearm. Officer Ramsey arrested defendant on October 21, 2009.

¶ 16 The defense called Veal and Dottie Scott, defendant's mother. Veal testified that he had a conviction for filing a false police report and multiple convictions and a pending case for vehicular theft. Veal stated that on October 16, 2009, he gave a black plastic bag containing money to his mother but did not see where she put it. The next day, he called the police to report $10,000 missing, and provided the names of "about fifty" people who had been at his house, including defendant. He denied seeing defendant take the money or hold a firearm. On cross-examination, Veal testified that he observed defendant on October 17, 2009, but denied knowing "where he came from" or "what he had in his hand." He acknowledged meeting with a State's Attorney on October 22, 2009, and signing a written statement indicating that he saw defendant in his mother's bathroom, holding a "small gun."

¶ 17 Scott testified that she attended court with defendant in November 2009. According to Scott, Officer Ramsey testified and the court issued a ruling of "[n]o probable cause."

¶ 18 In aggravation, the State argued that the instant offense occurred while defendant was on bond for a pending armed robbery case, which, in turn, had arisen while defendant was on bond for a pending theft case. In mitigation, defense counsel submitted that no one had been harmed in the theft case, and that Veal, the complaining witness in the armed robbery case, lacked credibility. Counsel noted that the court had received letters on defendant's behalf. Counsel also asked the court to let defendant "raise his daughter" and "reconnect with his father," who visited

him in jail "to give him the guidance that he did not have growing up." Counsel requested the minimum sentence of 21 years' imprisonment.

¶ 19 In allocution, defendant stated that he "accept[ed] one hundred percent responsibility" and apologized for "wasting [the] court's time." He asked to be sentenced to "anything around" the "initial offer [of] six years."[2]

¶ 20 The court sentenced defendant to 26 years' imprisonment. In imposing sentence, the court stated that it had considered the aggravating and mitigating factors, including defendant's criminal history, the fact that defendant and the other offenders had "caused or threatened serious harm," and the need for deterrence. The court observed that defendant's prior convictions contradicted the letters describing him as a "caring and loving person," and stated that defendant "knew what was right and wrong" but "decided *** to take the easy way out by stealing[.]" At the State's request, the court dismissed the pending cases involving theft and armed robbery. The court denied defendant's motion to reconsider sentence.

¶ 21 Defendant raises two issues on appeal.

¶ 22 First, defendant contends that the trial court erred by not instructing the jury regarding the affirmative defenses of necessity and compulsion. Defendant concedes that his answers to discovery did not allege either defense. However, he argues that the State's evidence supported a necessity instruction where he did not plan the robbery, did not arrive at or leave the apartment with the other offenders, and, like the victims, obeyed Johnson so as to prevent Franklin from

[2] The record indicates that prior to trial, defendant rejected a plea offer from the State. In relevant part, the State had offered six years' imprisonment in exchange for a guilty plea in the instant case.

discharging the firearm. Similarly, he maintains that the State's evidence supported a compulsion instruction where, like the victims, he acted under the "implicit threat" of the firearm. Consequently, defendant submits that necessity and compulsion were questions for the jury, and the trial court erred by not instructing the jury accordingly.

¶ 23 The State, in response, contends that the trial court's refusal to instruct the jury regarding necessity and compulsion properly sanctioned defendant for omitting either affirmative defense in his answers to discovery. Additionally, the State argues that the evidence, taken together, establishes that defendant "was a knowing and active participant in the armed robbery." The State maintains that defendant's phone conversation with Robinson led to the instant offense, and urges that defendant did not fear the other offenders when he left the apartment in their company, refused to give Jones' phone to Robinson, and, two months later, was apprehended while riding in a vehicle with Johnson and Robinson. Moreover, the State argues that Johnson did not threaten defendant with imminent death or great bodily harm, and no testimony indicated that Franklin pointed the gun at him.

¶ 24 In reply, defendant maintains that the trial court's refusal to issue jury instructions regarding necessity and compulsion represented an erroneous ruling on the evidence and not a discovery sanction. According to defendant, no evidence established that he instigated the armed robbery by talking to Robinson by phone or that he left the party with the other offenders. Rather, he submits that he refused to give Jones' phone to Robinson because Johnson had not ordered him. Additionally, defendant posits that Johnson's commands amounted to a threat of imminent death or great bodily harm, given that he controlled Franklin, who carried the firearm.

¶ 25 As an initial matter, we note, as does the State, that defendant did not preserve the jury instruction issue in a posttrial motion, and, therefore, forfeiture applies. *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007). Defendant submits that this court should consider the matter under Illinois Supreme Court Rule 451(c), which provides that, in criminal cases, "substantial defects [in jury instructions] are not waived by failure to make timely objections thereto if the interests of justice require." Ill. S. Ct. R. 451(c) (eff. Apr. 8, 2013). Noting that Rule 451(c) is "coextensive with the plain-error clause of Supreme Court Rule 615(a)," defendant maintains that plain-error review is appropriate in this case. *Piatkowski*, 225 Ill. 2d at 564; Ill. S. Ct. R 615(a) (eff. July 1, 2006).

¶ 26 The plain-error rule permits a reviewing court to consider unpreserved claims of error where the defendant establishes that a "clear or obvious" error occurred, and either (1) "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) "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." *Piatkowski*, 225 Ill. 2d at 565. The first inquiry before determining whether there was plain error is to determine whether there was clear and obvious error. *People v. Eppinger*, 2013 IL 114121, ¶ 19. Absent an error, there can be no plain error and defendant's forfeiture will be honored. *Eppinger*, 2013 IL 114121, ¶ 19. For the following reasons, we find that no error occurred.

¶ 27 The parties dispute the standard for reviewing a trial court's decision not to issue a jury instruction. Defendant, citing *People v. Washington*, 2012 IL 110283, ¶ 19, contends that our

review should be *de novo*. The State, citing *People v. Mohr*, 228 Ill. 2d 53, 66 (2008), argues that we should review for an abuse of discretion. Although the standard of review is "unclear," we need not resolve the conflict here because our determination is the same under either standard. *People v. Collins*, 2016 IL App (1st) 143422, ¶ 33.

¶ 28 Necessity and compulsion are affirmative defenses which must be raised by a defendant in an answer to discovery. 720 ILCS 5/7-13 (West 2010); 720 ILCS 5/7-11(a) (West 2010); Ill. S. Ct. R. 413(d) (eff. July 1, 1982). Here, defendant did not raise necessity or compulsion in his answers to discovery and did not present evidence of either affirmative defense at trial. However, a defendant need not present evidence of an affirmative defense "where the evidence presented by the State raises the issue of the affirmative defense." *People v. Jones*, 175 Ill. 2d 126, 132 (1997). Therefore, the issue in the present case is whether the State's evidence presented "slight evidence" of either necessity or compulsion. See *Washington*, 2012 IL 110283, ¶ 43 (a defendant is entitled to a jury instruction regarding an affirmative defense "if there is some evidence, however slight, in the record to support that defense").

¶ 29 The affirmative defense of necessity requires a defendant to establish that (1) he was without blame in occasioning or developing the situation, and (2) he reasonably believed that his conduct was necessary to avoid a greater public or private injury than that which might have reasonably resulted from his own conduct. 720 ILCS 5/7-13 (West 2010); *People v. Boston*, 2016 IL App (1st) 133497, ¶ 39. "The defense of necessity applies when the threat of harm was immediate, and defendant's conduct was the sole option to avoid injury." *People v. Guja*, 2016 IL App (1st) 140046, ¶ 47.

¶ 30 In relevant part, the affirmative defense of compulsion requires a defendant to establish that (1) the conduct was performed under the threat or menace of the imminent infliction of death or great bodily harm, and (2) the defendant reasonably believed that death or great bodily harm would be inflicted on him if the conduct was not performed. 720 ILCS 5/7-11(a) (West 2010); *Collins*, 2016 IL App (1st) 143422, ¶ 34. Compulsion "implies complete deprivation of free will and the absence of choice[.]" *People v. Roberson*, 335 Ill. App. 3d 798, 801 (2002). This defense is unavailable where the defendant "had an ample opportunity to withdraw from participation in the offense but failed to do so." *Collins*, 2016 IL App (1st) 143422, ¶ 34. A threat of future injury is insufficient to raise compulsion as a defense. *Collins*, 2016 IL App (1st) 143422, ¶ 34.

¶ 31 In the present case, defendant presented no evidence supporting necessity or compulsion but submits that both affirmative defenses were raised by the State's evidence. At trial, the State's witnesses testified that defendant attended a party at Jones and Bowens' apartment and spoke with Robinson, who called Smith's phone. Approximately 20 minutes later, Johnson, Franklin, and Robinson parked outside the apartment. Jones invited the men inside in order to "d[e]fuse" a confrontation with Johnson, who had not been invited to the party. Johnson demanded Jones' chain and watch and Franklin pointed a semiautomatic firearm at Jones' head. Franklin took Jones' chain, and Johnson ordered defendant and Robinson to "check" Jones' pockets. Defendant took Jones' cell phone and refused to give it to Robinson. Additionally, defendant and Robinson took Jones' shoes, Robinson took his hat, and someone took Jones' watch. Franklin then pointed the firearm at Bowens while defendant and another man patted him down and someone took his money. Defendant left the apartment at the same time as Johnson, Franklin, and Robinson, and

ran from the scene with his girlfriend. Two months later, he was apprehended while riding in a vehicle with Johnson and Robinson.

¶ 32 Here, the State's evidence did not present even "slight evidence" of necessity or compulsion, and, therefore, the trial court did not err in refusing to instruct the jury regarding either affirmative defense. Initially, we observe that both affirmative defenses require a requisite mental state. 720 ILCS 5/7-13 (West 2010) (to establish necessity, defendant must "reasonably believe[ ]" that conduct was necessary to avoid a greater public or private injury); 720 ILCS 5/7-11(a) (West 2010) (to establish compulsion, defendant must "reasonably believe[ ]" that death or great bodily harm will result from noncompliance). However, the record lacks any evidence regarding defendant's state of mind during the armed robbery. Defendant contends that his mental state may be inferred from Bowens' testimony, which described how Bowens cooperated with the offenders because Franklin pointed a firearm at his head. This comparison fails, as no evidence indicated that Johnson directed Franklin to point the firearm at defendant, or that Franklin trained the firearm on defendant at any point during the incident, or that defendant participated in the armed robbery due to his belief in the need to avoid any type of harm.

¶ 33 The dearth of evidence supporting necessity or compulsion is apparent in other respects, aside from the issue of defendant's mental state. Regarding necessity, the record does not indicate that defendant was blameless in "occasioning or developing" the armed robbery. 720 ILCS 5/7-13 (West 2010). To the contrary, the testimony suggested that defendant developed the situation when he spoke with Robinson by phone prior to the other offenders arriving at the party, seized Jones' shoe without orders from Johnson, and refused Robinson's request to

surrender Jones' cell phone. Moreover, although defendant now maintains that he participated in the offense in order to avoid gunfire at the party, nothing in the record indicates that his participation was the "sole option to avoid injury." *Guja*, 2016 IL App (1st) 140046, ¶ 47; see also *People v. Cord*, 258 Ill. App. 3d 188, 194 (1994) ("We are not persuaded that defendant's subjective concern regarding the potential danger equates with the imminent harm needed for the defense of necessity."). Consequently, the evidence did not support a jury instruction as to necessity.

¶ 34 Turning to compulsion, no evidence indicates that defendant participated in the armed robbery due to a "complete deprivation of free will" arising from the threat of imminent death or great bodily harm. *Roberson*, 335 Ill. App. 3d at 801; see also *People v. Milton*, 182 Ill. App. 3d 1082, 1092-93 (1989) (compulsion instruction not merited where the evidence demonstrated that defendant was "afraid" of a codefendant who carried a gun but had not been threatened). The evidence suggested that defendant willingly participated in the offense where he spoke with Robinson prior to the incident, fled the scene at the same time as the other offenders, and, two months later, was apprehended while traveling in a vehicle with Johnson and Robinson. This distinguishes the present case from *People v. Pegram*, 124 Ill. 2d 166, 169 (1988), relied on by defendant, where the defendant was entitled to a compulsion defense when two masked men pointed a gun at him and threatened to kill him if he did not assist in an armed robbery. Here, the evidence did not support a jury instruction regarding compulsion, and the trial court did not err in refusing to provide either of defendant's requested instructions.

¶ 35 Nevertheless, defendant argues that counsel's failure to preserve the jury instruction issue in a motion for new trial amounted to ineffective assistance, and submits that his burden for establishing prejudice, for purposes of an ineffective assistance claim, is "less[ ]" than the burden of proving plain error based on closely balanced evidence. Because we find no error with respect to the jury instructions, this theory of relief also fails and we need not consider it further. See *People v. Peeples*, 205 Ill. 2d 480, 532 (2002) (where underlying issue has no merit, defendant suffers no prejudice due to trial counsel's failure to preserve it for appeal).

¶ 36 Next, defendant contends that his sentence is excessive considering his participation in the armed robbery and his criminal history, rehabilitative potential, family support, and youth. Defendant submits that no evidence demonstrated that he planned the offense or carried a firearm, but maintains that he took Jones' phone during an incident when no shots were fired and no one was injured. He notes that he had just one felony conviction prior to the instant offense, and that two pending cases were dismissed. Additionally, he urges that he has a young daughter and support from his mother and relatives who sent letters in mitigation.

¶ 37 The reviewing court considers a trial court's sentencing decision under an abuse-of-discretion standard of review. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). "The trial court has broad discretionary powers in imposing a sentence, and its sentencing decisions are entitled to great deference," because the trial judge, "having observed the defendant and the proceedings," is in a much better position to consider factors such as the defendant's credibility, demeanor, moral character, mentality, social environment, habits, and age. *Alexander*, 239 Ill. 2d at 212-13.

¶ 38 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. The trial court is presumed to consider "all relevant factors and any mitigation evidence" (*People v. Jackson*, 2014 IL App (1st) 123258, ¶ 48), but "has no obligation to recite and assign a value to each factor presented at a sentencing hearing" (*People v. Perkins*, 408 Ill. App. 3d 752, 763 (2011)). Rather, a defendant "must make an affirmative showing that the sentencing court did not consider the relevant factors." *People v. Burton*, 2015 IL App (1st) 131600, ¶ 38. A reviewing court "must not substitute its judgment for that of the trial court merely because it would have weighed [the] factors differently." *Alexander*, 239 Ill. 2d at 213.

¶ 39 A sentence within the statutory range is presumed proper. *People v. Knox*, 2014 IL App (1st) 120349, ¶ 46. Armed robbery is a Class X felony with a sentencing range of 6 to 30 years. 720 ILCS 5/18-2(a)(2), (b) (West 2010); 730 ILCS 5/5-4.5-25(a) (West 2010). A 15-year enhancement applies where the offender is armed with a firearm. 720 ILCS 5/18-2(a)(2), (b) (West 2010). The firearm enhancement applies to offenders who, like defendant, are found guilty of armed robbery under a theory of accountability. *People v. Rodriguez*, 229 Ill. 2d 285, 293-94 (2008).

¶ 40 We find no abuse of discretion in defendant's sentence. His 26-year prison term for armed robbery is presumed proper, as it falls well within the statutory sentencing range for this offense and is 19 years less than the maximum term. *Knox*, 2014 IL App (1st) 120349, ¶ 46. Although the minimum term for armed robbery with a firearm is substantial, the fact that defendant was

sentenced to five years above the minimum term does not demonstrate that his sentence was excessive. To the contrary, the case at bar involves defendant's fourth conviction for theft or robbery in approximately three years. *People v. Evangelista*, 393 Ill. App. 3d 395, 399 (2009) ("criminal history alone" may "warrant sentences substantially above the minimum"). Moreover, defendant was on bond in two other cases when he committed the present offense, which the trial court could properly view as an aggravating factor. *People v. Williams*, 262 Ill. App. 3d 734, 746 (1994) (noting that, at sentencing, the court may consider pending charges and "evidence that defendant was on bond at the time he committed the present offense"). The court also heard testimony from Commander Sheets, Officer Ramsey, and Veal regarding defendant's other alleged crimes, and could rely on their testimony in formulating defendant's sentence. *People v. Minter*, 2015 IL App (1st) 120958, ¶ 148 (a sentencing court may "rely on evidence of a defendant's other criminal activity, even if that conduct has not resulted in a conviction, where the trial court finds the evidence to be relevant and accurate").

¶ 41 Citing the length of his sentence, defendant maintains that the trial court did not "seriously consider[ ]" the mitigating evidence, including his youth and family ties. We observe that the court was apprised of both factors at the sentencing hearing and in the PSI, but was not required to lend more weight to these factors than to the seriousness of the offense. *People v. Kelley*, 2015 IL App (1st) 132782, ¶ 94 (the seriousness of an offense, and not mitigating evidence, is the most important factor in sentencing). Moreover, defendant improperly attempts to rely on multiple studies to show that, due to his youth, areas of his brain associated with "reasoning" and "impulse control" might not have been fully developed when the armed robbery

occurred. Such sources do not qualify as relevant authority on appeal and will not be considered because they were not presented to the court below and were not part of the record on appeal. See, *e.g.*, *Vulcan Materials Co. v. Bee Construction*, 96 Ill. 2d 159, 166 (1983); *People v. Magee*, 374 Ill. App. 3d 1024, 1029-30 (2007); *People v. Heaton*, 266 Ill. App. 3d 469, 476-77 (1994); *People v. Mehlberg*, 249 Ill. App. 3d 499, 531-32 (1993).

¶ 42 Nevertheless, defendant maintains that his sentence is excessive where his "more culpable co-defendants" received lesser sentences for their participation in the same incident. In support of this argument, defendant asks this court to take judicial notice of records from the clerk of court indicating that, following guilty pleas, Johnson was sentenced to six years' imprisonment and Franklin was sentenced to 7½ years' imprisonment. See *Wells Fargo Bank, N.A., v. Simpson*, 2015 IL App (1st) 142925, ¶ 24, n.4 (taking judicial notice of clerk's "on-line docket report").

¶ 43 "Generally, an arbitrary and unreasonable disparity between the sentences of codefendants who are similarly situated is impermissible." *People v. Willis*, 2013 IL App (1st) 110233, ¶ 127 (citing *People v. Caballero*, 179 Ill. 2d 205, 216 (1997)). However, different sentences may be justified in view of each codefendant's character, culpability, rehabilitative potential, and criminal record. *Willis*, 2013 IL App (1st) 110233, ¶ 127. Moreover, "[a] sentence imposed on a codefendant who pleaded guilty as part of a plea agreement does not provide a valid basis of comparison to a sentence entered after a trial." *Caballero*, 179 Ill. 2d at 217.

¶ 44 Given these considerations, defendant's comparative sentencing argument lacks merit. Defendant was sentenced following a trial, whereas Johnson and Franklin were sentenced

following guilty pleas. The clerk's records proffered by defendant do not specify the offenses to which Johnson and Franklin pleaded guilty, and the record does not contain any information pertaining to their sentencing hearing, criminal background, or rehabilitative potential. Moreover, at sentencing, a defendant found guilty on an accountability theory is no less culpable than his or her codefendants. *Williams*, 262 Ill. App. 3d at 746-47.

¶ 45 The dissent finds that the trial court abused its discretion in sentencing defendant to 26 years for armed robbery. First, the minimum permissible sentence was 21 years. Armed robbery is a Class X felony with a sentencing range of 6 to 30 years. 720 ILCS 5/18-1(a)(2), (b) (West 2010); 730 ILCS 5/5-4/5-25(a) (West 2010). However, a 15-year enhancement applies where the offender is armed with a firearm. 720 ILCS 5/18-2(a)(2), (b) (West 2010). The firearm enhancement applies to offenders who, like defendant, are found guilty of armed robbery under a theory of accountability (*People v. Rodriguez*, 229 Ill. 2d 285, 293-94 (2008)), and defendant does not claim otherwise on appeal. Defendant's argument in his appellate brief is directed solely to the fact that the trial court chose to sentence him to five years over the minimum. Thus, the only question before us is whether the trial court abused its discretion by not sentencing defendant to the low end of a possible 21- to 45-year sentence.

¶ 46 Second, defendant committed the instant offense while he was out on bond for another armed robbery case which, in turn, was committed while defendant was out on bond for a pending theft case.

¶ 47 Third, after the trial court sentenced defendant to 26 years for the instant offense, the State moved to dismiss his other unrelated and pending armed robbery and theft charges, which

the trial court did. Thus, defendant received five years above the minimum for the instant armed robbery conviction, but also benefitted from the dismissal of another armed robbery charge and a theft charge.

¶ 48 Fourth, although defendant's appellate brief makes no argument about a pretrial six-year plea deal, the record indicates that defendant received a six-year plea offer for the instant charge. However, the deal also included an additional three years for the other armed robbery and an additional three years for the theft charge. The assistant State's Attorney described the deal in detail on the record on July 1, 2013, and stressed that all sentences were to run consecutively and thus "the total package" was 12 years–not six.

¶ 49 After the prosecutor stated the offer on the record and defendant turned it down, the trial court stressed to defendant that, if he was convicted on all three charges, the minimum sentence would be 45 years. Defendant acknowledged that he understood that and turned down the offer and demanded an immediate trial.

¶ 50 Fifth, the case at bar constitutes defendant's fourth conviction for theft or robbery in almost three years.

¶ 51 Sixth, while defense counsel argued during closing that defendant obeyed codefendant Johnson out of "fear," defendant was arrested two months later riding around in a vehicle with Johnson and another codefendant.

¶ 52 It would be difficult to find that the trial court abused its discretion, (1) when it sentenced defendant to the *low* end of the sentencing range, (2) when defendant benefitted from having other pending charges dismissed, (3) when he had *multiple* convictions for similar offenses in the

last three years, (4) when he committed *this* offense while out on bond for the *same* offense and (5) when, two months later, he was still riding around in a vehicle with the same codefenants with whom he committed this offense who he claimed he feared.

¶ 53 Consequently, defendant has not demonstrated that his sentence was excessive and we cannot find an abuse of discretion.

¶ 54 For the foregoing reasons, we affirm the judgment and sentence of the trial court.

¶ 55 Affirmed.

¶56 JUSTICE LAMPKIN, concurring in part and dissenting in part.

¶57 I agree with the majority's decision concerning the jury instruction issue but disagree with the majority's decision to affirm defendant's 26-year sentence. For the reasons that follow, I would reduce defendant's sentence to 21 years' imprisonment.

¶58 The possible sentencing range for defendant's armed robbery conviction where the jury found, based on a theory of accountability, that the offense was committed while his codefendant was armed with a firearm, was a minimum of 21 years' imprisonment and a maximum of 45 years' imprisonment. See 720 ILCS 5/18-2(a)(2), (b) (West 2010) (armed robbery while armed with a firearm is a Class X felony for which 15 years must be added to the term of imprisonment imposed by the court); 730 ILCS 5/5-4.5-25 (West 2010) (the sentencing range for a Class X felony is 6 to 30 years' imprisonment). Defendant argues that his 26-year prison sentence is excessive because, *inter alia*, it is disproportionate to the nature and circumstances of his offense.

¶59 The wide discretion vested with the trial court in sentencing matters is not without limitation; Supreme Court Rule 615(b)(4) (eff. Jan. 1, 1967) grants the reviewing court the power to reduce the sentence imposed by the trial court. *People v. Stacey*, 193 Ill. 2d 203, 209-11 (2000); see Ill. Const. 1970, art. I, § 11 (Illinois courts must adhere to our constitution's mandate that sentences must be determined "both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship"). A sentence within statutory limits will be deemed excessive and the result of an abuse of discretion by the trial court where the sentence is greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense. *People v. Hauschild*, 226 Ill. 2d 63, 90 (2007); *People v. Fern*, 189 Ill. 2d 48, 54 (1999). Although a reviewing court may reduce a defendant's sentence when the trial court has abused its discretion, the reviewing court must not substitute its judgment for the trial court's merely because the reviewing court would have weighed the sentencing factors differently. *People v. Alexander*, 239 Ill. 2d 205, 212-13 (2010); *Stacey*, 193 Ill. 2d at 209.

¶60 At the sentencing hearing, the State's evidence showed that the victim in defendant's pending November 2008 Class 3 felony theft case met him by prearrangement at a post office to sell him an iPhone worth over $350. Defendant, however, took the cell phone, fled, and attempted to hide under some bushes but was apprehended by a police officer, who recovered the cell phone from defendant.

¶61 Concerning defendant's pending October 2009 armed robbery case, the victim, defendant's cousin Veal, initially told the police that he had hidden a plastic bag containing $10,000 in a bedroom in his home. Veal and his friend told the police they saw defendant leave

the bedroom holding the plastic bag and a firearm. When Veal verbally confronted defendant, he just laughed at Veal and walked out the door. However, the defense's mitigation evidence established that Veal recanted his statements to the police and assistant State's Attorney that he saw defendant take the bag of money and hold a gun. Instead, Veal, who had a felony conviction for filing a false police report in 2008, asserted that defendant was simply one of about 50 people who had been at Veal's home before the bag of money went missing.

¶62 Defendant's PSI established that when he was out on bond on the November 2008 iPhone theft case, he allegedly committed the October 2009 armed robbery of Veal, and while on bond on that armed robbery, committed the July 2010 armed robbery of Jones in the instant case. Defendant was 21 years old when this 2010 armed robbery occurred and 24 years old at the time of sentencing. He had one felony conviction for theft (2008), and misdemeanor convictions for obstructing a peace officer (2008), retail theft (2009), theft (2009), aggravated assault (2010), and disorderly conduct (2010).

¶63 When the trial court sentenced defendant, the judge stated defendant decided to "h[a]ng around with the wrong people" and "take the easy way out by stealing" even though he knew right from wrong. Although defendant's witnesses asserted that he was a caring and loving person, the trial judge stated that the conduct of defendant and his codefendants threatened serious harm and concluded that defendant's history of delinquency and convictions showed he was "out for [him]self, to get the easy way out" even though he had said he accepted responsibility for what he had done. The trial judge imposed, based on the mitigating factors in

this matter and the need to deter others from committing the same crime, a 26-year sentence with three years mandatory supervised release.

¶64 I would find defendant's 26-year sentence excessive in light of the nature of the offense. In *Stacey,* our supreme court reduced a defendant's two consecutive Class X sentences from 25 years each to 6 years each based on unusual circumstances concerning the nature of the offense. 193 Ill. 2d at 205–06. The defendant in *Stacey* was convicted of aggravated criminal sexual abuse and criminal sexual abuse following incidents where he approached teenage girls on their way to school and forcibly grabbed their breasts. *Id*. at 205–07. Despite the defendant's eight previous convictions and poor record of rehabilitation, the court found the sentence manifestly disproportionate to the nature of the offense, where "defendant momentarily grabbed the breasts of two young girls, who were fully clothed at the time" and "made lewd comments and gestures." *Id*. at 208, 210. The court noted that the new sentence comported with our constitution's mandate "that penalties be determined according to the seriousness of the offense." Ill. Const.1970, art. I, § 11; *Stacey,* 193 Ill. 2d at 211.

¶65 As in *Stacey,* the sentence here was manifestly disproportionate to the nature of defendant's offense. Although his armed robbery at the crowded apartment party threatened serious harm where Franklin raised the gun and pointed it at the two victims, no one was physically harmed and this matter did not involve a struggle or the firing of the gun. Moreover, defendant and his codefendants were known to and readily identifiable by the victims and had robbed Jones of his hat, shoes, wristwatch, cell phone, and necklace chain in a room full of witnesses.

¶66 Although defendant's 2010 Class X felony armed robbery with a firearm is distinguishable from the Class 2 felonies at issue in *Stacey,* the unique facts that resulted in the excessive sentences in *Stacey* are not dissimilar from the present case. *Stacey,* 193 Ill. 2d at 210. Like the defendant in *Stacey,* defendant here has multiple prior convictions. Although he has one prior felony theft conviction in 2008, the record contains no information concerning the nature of that offense, whether it involved violence or the threat of violence, or the value of the property taken. Defendant's pending 2009 Class 3 felony theft of the cell phone was nonviolent and the phone was recovered. Furthermore, the State's evidence of defendant's pending 2009 armed robbery of Veal was insufficient to demonstrate defendant's violent nature where Veal recanted his statements to the police and assistant State's attorney. Specifically, Veal recanted his accusation that defendant held a firearm and took Veal's bag of money. Although defendant has incurred jail time for his prior brushes with the law and probation violations, he has never before been incarcerated in the penitentiary.

¶67 I would exercise the power we have as appellate justices under Rule 615(b)(4) to reduce defendant's sentence to 21 years in light of the nature of the offense. Where, as here, the legislature has already enhanced his sentence by 15 years based on his codefendant pointing a firearm at the two victims during the armed robbery, I do not believe it is completely accurate to describe his 26-year sentence as being on the low end of the sentencing range, merely 5 years above the minimum term. I agree with the majority that defendant's sentence falls within the statutory sentencing range of 21 to 45 years for armed robbery with a firearm and the record indicates the trial court properly considered the information contained in defendant's PSI and

aggravating and mitigating factors. Moreover, I acknowledge that the trial judge was responsible under the statutory scheme to impose a sentence of not less than 21 years in the instant case. Nevertheless, I believe that where even the minimum sentence of 21 years is harsh in this instance, the trial court's addition of 5 more years to that minimum was an abuse of discretion. In reaching this conclusion, I do not reweigh any aggravating or mitigating factors. Nor do I minimize defendant's callous, deceptive and reprehensible conduct. Nevertheless, we must adhere to our constitution's mandate that penalties be determined according to the seriousness of the offense (Ill. Const.1970, art. I, § 11), and the level of seriousness of defendant's offense here does not warrant the addition of 5 years to the already severe minimum possible sentence of 21 years' imprisonment.

¶68 Accordingly, I respectfully dissent as to the court's judgment that the trial court did not abuse its discretion when it sentenced defendant.