2016 IL App (1st) 14-1817-U

No. 1-14-1817

Third Division
December 21, 2016

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IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	No. 12 CR 124
V.	)	Honorable Michael B. McHale, Judge, presiding.
MUSILIUDEEN KALIKU,	)	
Defendant-Appellant.	)	

JUSTICE COBBS delivered the judgment of the court.
Justices Lavin and Pucinski concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's waiver of counsel was valid where he did not suffer prejudice from the waiver despite an incorrect admonishment regarding the maximum sentence because he was informed of the maximum sentence prior to his rights being substantially affected and was represented by counsel at trial; Court did not admit improper hearsay evidence where the out of court statement was not offered for its truth; defendant was not denied a fair trial where he was not prejudiced by prosecutor's objectionable questions and; defendant's sentence was not excessive where he was sentenced within the statutory range and the court considered relevant factors in aggravation and mitigation and there is no evidence that the court imposed a greater sentence to punish defendant for exercising his right to stand trial.

¶ 2 Following a jury trial, defendant Musiliudeen Kaliku was convicted of robbery and sentenced to 12 years in prison. Defendant appeals his conviction contending (1) his fundamental right to counsel was violated because his waiver of counsel was not knowing, voluntary, and intelligent because the trial court did not correctly state the maximum possible sentence; (2) the trial court erred when it allowed inadmissible hearsay testimony; (3) he was denied his right to a fair trial when the prosecutor attempted to solicit improper testimony on cross-examination; and (4) his sentence is excessive. For the following reasons we affirm the judgments of the circuit court.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged with robbery in connection with an incident that occurred on December 9, 2011. He was appointed a public defender on January 6, 2012. Almost a year later, on December 7, 2012, defendant informed the court that he would like to proceed *pro se*. The court admonished defendant as follows:

> "THE COURT: Now, I need to advise you of certain things under the law. You are charged with a Class 2 felony. A Class 2 felony is punishable by up to seven years in the Illinois Department of Corrections. Under certain circumstances that can be extended out to fourteen years. You could be fined up to $25,000 and in that case be given a period of mandatory supervised release or parole for two years.
>
> You are also on probation for a Class 4 felony and another Class 4 felony. A Class 4 felony is punishable by up to three years in the Illinois Department of Corrections. Under certain circumstances it could be extended out to six years. You could be fined up to $25,000 and be given mandatory supervised release or parole for one year. Do you understand that?

* * *

You need to understand that a lawyer has substantial training and experience. [The public defender] I know has been a lawyer for the past decade or so. This is his sole area of practice. He doesn't do anything but practice criminal defense work. My Assistant State's Attorney's [sic] are in the same boat, they have at least a decade of trial experience."

¶ 5 The court continued to admonish defendant by analogizing the judicial process to the game Monopoly. The court explained that the attorneys have played the game several times before and it would be difficult for defendant, who does not have the same experience, to understand it as well as the attorneys. It also emphasized that, unlike defendant, the attorneys' lives are not at stake. The court made clear that it believed that it would be a mistake for defendant to represent himself and stated "Sir, you have the right to throw your life away. A constitutional right to throw your life away and believe me if you represent yourself that's exactly what you're going to be doing." Nevertheless, the court concluded based upon defendant's education and experience that he could represent himself. It then reserved a date for trial and told defendant to reflect on whether he actually wanted to proceed *pro se* and to return for another hearing on January 11, 2013. On that date, defendant informed the court that he had decided to represent himself. The court accepted his waiver and his public defender was granted leave to withdraw.

¶ 6 On March 6, 2013, defendant mentioned that the State had "an offer on the table," which his attorney had told him about before he decided to represent himself. The court instructed defendant that the offer may not be available any longer; however, the issue of whether there was a plea offer was not resolved at that time. At a hearing on March 11, 2013, defendant

again raised the issue of whether the State was offering a plea deal. The State informed the court that it had previously offered six years in the Illinois Department of Corrections (IDOC) but defendant had rejected it. Defendant stated that he would like to accept the offer at that time but the State responded that it was no longer available. Defendant then requested a conference pursuant to Illinois Supreme Court Rule 402. Ill. S. Ct. R. 402 (eff. July 1, 2012). At the conference, the prosecutor recited the facts of the case and noted that defendant was subject to mandatory Class X sentencing of 6 to 30 years in prison and recommended 10 years. Afterward, the following colloquy occurred:

"DEFENDANT: I believe because I am X by mandatory I should be eligible for the minimum.

THE COURT: Now, you understand that a Class X mandatory means that the maximum sentence that I can give you is 30 years in the penitentiary?

DEFENDANT: Yes, your Honor.

* * *

THE COURT: Frankly, I think the State's offer's a little low. But if you plead guilty today right now, I will give you eight years IDOC, but that is for today and today only. If you don't take my offer right now, I will revoke it. You will never see anything close to eight years again if this matter goes to trial."

¶ 7 Defendant rejected the court's offer and immediately asked for legal representation. The court re-appointed the public defender and defendant later hired a private attorney. Prior to trial, defendant's counsel filed a motion *in limine* to prevent the State from presenting testimony from a police officer involved in the case regarding a statement made by an unidentified cab driver the night of the incident. The court conducted an *in camera* hearing

and denied the motion finding that the officer's testimony was offered to show the officer's course of investigation, not for its truth.

¶ 8 At trial, the State presented the victim, Philip Leodoro. Leodoro testified that on December 8, 2011, at approximately 10 p.m., he went to a bar with friends where he consumed three or four vodka drinks. He testified that the alcohol caused him to be "buzzed" but not "drunk." After a few hours, the group went to a nightclub located near Belmont and Sheffield where he drank water and did not drink alcohol. He left around 4 or 4:15 a.m. and went to a 24-hour Subway restaurant before walking home. He testified that he was no longer "buzzed" because he had been dancing, drinking water, and had stopped to eat. At approximately 4:40 a.m. on December 9, 2011, he was walking north on Broadway near Stratford when defendant ran up behind him and grabbed for his wallet, which was in his left rear pocket. Leodoro turned and tried to hold on to his wallet. The two struggled for a few minutes as defendant tried to grab the wallet and Leodoro tried to hold on to it. During the struggle Leodoro was able to clearly see defendant's face. Eventually defendant pulled hard enough and Leodoro's pants ripped. Leodoro lost his balance and fell to the ground, scraping his knee. At that point he no longer had his wallet. He saw defendant running east on Stratford. The police arrived, Leodoro spoke to them, and then sat in the backseat of the squad car. Leodoro was "in a daze" as the police officer drove. At some point the squad car stopped and the police officers brought someone toward the car, whom Leodoro "instantly" recognized as the person who had stolen his wallet. On cross-examination Leodoro denied asking defendant if he could give defendant a "blow job," and denied grabbing for him.

¶ 9 Officer Carlos Ortiz testified for the State that on December 9, 2011, he was working routine patrol with his partner officer Aleksa Little in the area where the incident occurred.

At approximately 4:20 in the morning, he received a radio dispatch of an armed robbery that had just occurred at Stratford and Broadway. Ortiz arrived at the scene around 5 or 10 minutes later and observed Sergeant Isaacson and Leodoro. He spoke to Leodoro and began to fill out a police report. Isaacson left the area and Ortiz put Leodoro in the back seat of his squad car and searched for the offender. Ortiz drove south and then eastbound toward Lake Shore Drive. He did not see anyone until approximately15 minutes later. At 3300 North Lake Shore Drive, he was flagged down by a cab driver who was flashing his lights and yelling. During Ortiz's direct examination, the following colloquy ensued:

> "STATE'S ATTORNEY: What did the cab driver say to you?
>
> DEFENSE ATTORNEY: I'm going to object, your Honor.
>
> THE COURT: I will overrule this at this time. Ladies and gentlemen, the statements made by the cab driver are not being offered for the truth of their statement, but only to show what this officer did next in his investigation."

Ortiz then testified that the cab driver told him "that's the guy" and pointed. Ortiz looked to where the cab driver pointed and saw defendant about 30 feet south of his location. Ortiz exited his vehicle and started to approach defendant and yelled "Stop." Defendant turned around and made eye contact with Ortiz and then ran away. Ortiz went back into his car and pursued defendant. After about half a block Ortiz jumped out of his car and entered an alley to his left. He saw defendant hiding on the other side of a parking lot behind a building. Ortiz ran around to the front of the building and saw defendant take two or three steps from where he had been hiding. Defendant had taken off his hat and his jacket. Ortiz pulled out his gun and told defendant to stop. Defendant stopped and was placed into custody. Little drove the

squad car with Leodoro in the back seat to the location where defendant was stopped. Leodoro then positively identified defendant as the man who had robbed him.

¶ 10 Defendant testified that on December 9, 2011, he was at a friend's house at Clark and Division and took the red line train to Belmont. He exited the train at Belmont and walked east on Belmont and then north on Broadway. He intended to stop at the Jewel on Addison and Broadway to purchase cigarettes on his way to another friend's house. At approximately 4:30 a.m., however, Leodoro walked up to him. Leodoro smelled of alcohol and was staggering. He asked defendant where he was going and if he could give defendant a "blow job." Defendant said no and kept walking. Leodoro followed him and continued to ask him the same question and defendant continued to say no. Leodoro then grabbed defendant's crotch, and defendant responded by grabbing Leodoro's shirt. They both fell and fought on the ground for three to four minutes.

¶ 11 After the fight, defendant ran to Jewel and bought cigarettes. Then he walked to Lake Shore Drive and began walking south. When he reached Addison a police car stopped and shined a light on him. Defendant continued to walk south on Lake Shore Drive. At Belmont a police officer yelled "hey you." Defendant panicked and ran. He testified that he panicked because he had just gotten into a fight and was on probation for a different offense. Then, the officer walked down Belmont toward him with a "rod-like" weapon and ordered defendant to the ground.

¶ 12 Defendant denied that he took off his jacket and his hat when he ran from the police. He also denied taking a wallet from the victim. At the time of his arrest defendant was carrying his ID, keys, a cell phone, cigarettes, and $20.

¶ 13 II. ANALYSIS

¶ 14 A. Waiver of Right to Counsel

¶ 15 Defendant contends that the court failed to comply with Illinois Supreme Court Rule 401(a) (eff. July 1, 1984) when he waived his right to counsel because the court improperly admonished him on his maximum possible sentence. The State responds that defendant forfeited this argument because he did not object at trial or raise the matter in a posttrial motion. Defendant acknowledges that he did not object to the admonishment below and thus it would normally be forfeited. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (explaining that both a trial objection and a written posttrial motion are required to preserve an error for review). He maintains, however, that this issue can be reviewed for plain error. The State alternatively asserts that the admonishment substantially complied with rule 401(a) and defendant was not prejudiced because defendant was represented by counsel at trial and sentencing and was ultimately given a sentence below the maximum that he had been admonished.

¶ 16 The plain error doctrine allows courts to review arguments that have been forfeited when: (1) the evidence is close, regardless of the seriousness of the error; or (2) the error is so serious that the defendant was denied a substantial right, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 187 (2005). A defendant has a fundamental right to be represented by counsel (*People v. Black*, 2011 IL App (5th) 080089, ¶ 24), and it is well settled that a trial court's failure to substantially comply with Rule 401(a) denies that right. *People v. LeFlore*, 2013 IL App (2d) 100659, ¶ 51; *Black*, 2011 IL App (5th) 080089, ¶ 24. Accordingly, regardless of whether the argument was preserved, whether the court's admonishments substantially complied with Rule 401(a) is reviewable under the second prong of plain error. *Black*, 2011 IL App (5th) 080089, ¶ 24. There can be no plain error,

however, unless we first determine that error occurred. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 17 The sixth amendment of the United States Constitution guarantees a criminal defendant the right to effective assistance of counsel at all critical stages of judicial proceedings. U.S. Const., amend. VI; *People v. Hughes*, 2012 IL 112817, ¶ 44. The right attaches at the commencement of proceedings (*Black*, 2011 IL App (5th) 080080, ¶ 11) and is guaranteed at all stages where a defendant's rights may be substantially affected. *Hughes*, 2012 IL 112817, ¶ 44. The right of self-representation is " 'as basic and fundamental as [the] right to be represented by counsel.' " *People v. Haynes*, 174 Ill. 2d 204, 235 (1996). Therefore, a criminal defendant may waive the right to counsel so long as the waiver is voluntary, knowing, and intelligent. *Id.* A trial court may only allow the waiver, however, after it first admonishes the defendant in accordance with Rule 401 (a). Ill. S. Ct. R. 401(a); *People v. Campbell*, 224 Ill. 2d 80, 84 (2016). Rule 401(a) provides:

> "(a) Waiver of Counsel. Any waiver of counsel shall be in open court. The court shall not permit a waiver of counsel by a person accused of an offense punishable by imprisonment without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:
>
> (1) the nature of the charge;
>
> (2) the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences; and
>
> (3) that he has a right to counsel and, if he is indigent, to have counsel appointed for him by the court." Ill. S. Ct. R. 401(a).

The purpose of the Rule is to ensure that a waiver of counsel is knowingly and intelligently made. See *People v. Johnson*, 119 Ill. 2d 119, 132. Strict compliance with Rule 401(a) is not always necessary: "[s]ubstantial compliance with Rule 401(a) is sufficient to effectuate a valid waiver of counsel if the record indicates the waiver was made knowingly and intelligently [citation] and the admonishment the defendant received did not prejudice his rights." *People v. Kidd*, 178 Ill. 2d 92, 113 (1997). We will not find prejudice from an imperfect admonishment where the defendant was already aware of the information that was omitted from the admonishment or his level of legal sophistication indicates that he was aware of the information that would have been conveyed had the court complied with the rule. *LeFlore*, 2013 IL App (2d) 100659, ¶ 52 (rev'd on other grounds) (quoting *People v. Gilkey*, 263 Ill. App. 3d 706, 711 (1994)). "The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances of the case, including the background, experience, and conduct of the accused." *Kidd*, 178 Ill. 2d at 105 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

¶ 18 Here, when defendant stated that he wished to proceed *pro se* the court admonished him that he was charged with a Class 2 felony, which is punishable by up to 7 years in the IDOC and could be enhanced up to 14 years. The court did not inform defendant that the sentencing range that applied to him was 6 to 30 years based upon his Class X status. Rule 401(a) requires the court to inform a defendant of the maximum possible sentence he could receive, including any sentencing enhancements. Ill. S. Ct. R. 401(a). Thus, the court did not strictly comply with Rule 401 (a).

¶ 19 We note, however, that the court's admonishment regarding the dangers of proceeding *pro se* was far from brief. When defendant indicated that he wished to represent himself, the

court first questioned him extensively regarding his education and determined that he was competent to waive his right to counsel. The court then admonished defendant at length that representing himself would be unwise, but that it was his constitutional right. The court explained the nature of the charges against him and the roles of the attorneys, emphasizing that the attorneys, including his public defender, were experts in criminal law. Defendant indicated that he understood. Thus, defendant was "made aware of the dangers and disadvantages of [self representation]" and the record establishes that he knew what he was doing and his choice was made with eyes open. *Kidd*, 178 Ill. 2d at 104 (quoting *Faretta v. California*, 422 U.S. 806, 835 (1975)). After receiving these admonishments and being aware of the dangers of self-representation, defendant expressed the desire to represent himself on multiple occasions.

¶ 20 Furthermore, after reviewing the entire record, it is clear that defendant was not prejudiced from the limited time he represented himself. Defendant was represented by counsel for approximately one year before he decided to proceed *pro se*. Significantly, after his wavier was accepted, he only represented himself at two status hearings and the 402 conference. At the conference, the court told defendant the information that was omitted from the Rule 401 (a) admonishment – that he was a Class X offender and therefore could be sentenced between 6 and 30 years. Defendant stated that he understood. The court then offered him 8 years in prison, which he rejected. Thus, prior to making a decision that would substantially affect his rights – whether to plead guilty – he was admonished of the correct maximum sentencing range. Further, defendant ultimately rejected the offer and his self-representation ended immediately after the conference because he requested counsel. At that time, the public defender was reappointed and defendant later hired a private attorney who

represented him at trial. Accordingly, under the facts of this case, we find that defendant was not prejudiced and his waiver was valid.

¶ 21 B. Hearsay

¶ 22 We now turn to the alleged trial errors. Defendant contends that the court improperly admitted hearsay testimony at trial. Specifically, he argues that Ortiz's testimony of the cab driver's identification was offered for no purpose other than to assert the truth of the identification. A police officer may testify about statements made by others when the statement is not offered for its truth, but to show the investigative steps taken by the officer. *People v. Banks*, 237 Ill. 2d 154, 181 (2010). Here Ortiz testified that the cab driver yelled "there's the guy" and then Ortiz began pursuing defendant. Thus, knowing that the cab driver made a statement to Ortiz was essential to understanding how defendant came to Ortiz's attention and why Ortiz began pursuing him. In addition, it is evident that the statement was not offered for its truth because identity was not an issue to be decided by the jury in this case. Defendant admitted that he was the person who was involved in a struggle with Leodoro. Therefore, Ortiz's testimony regarding the cab driver's statement was not inadmissible hearsay. Moreover, the court gave the jury a limiting instruction that instructed it to only consider the cab driver's statement for its effect on the officer's investigation, and not for its truth. Thus, any concern that the jury would consider the statement for an improper purpose was eliminated.

¶ 23 C. Alleged Prosecutorial Misconduct

¶ 24 Defendant next contends that he was denied a fair trial because the prosecutor engaged in a pattern of misconduct by repeatedly attempting to solicit improper testimony from him on cross-examination after receiving adverse rulings from the court. The State responds that

defendant forfeited this claim because he did not raise it at trial and in a posttrial motion. It further asserts that even if the claim is not forfeited, the prosecutor's comments were proper, and defendant was not deprived of a fair trial.

¶ 25 A reviewing court may invoke the plain error doctrine to review errors that have otherwise been forfeited when "the evidence in a criminal case is closely balanced or *** the error is so fundamental and of such magnitude that the accused is denied the right to a fair trial and remedying the error is necessary to preserve the integrity of the judicial process." *People v. Johnson*, 208 Ill. 2d 53, 64 (2003). Here, defendant contends that he was denied his fundamental right to a fair trial because the prosecutor repeatedly attempted to solicit improper testimony. "A pattern of intentional prosecutorial misconduct may so seriously undermine the integrity of judicial proceedings as to support reversal under the plain error doctrine." *Id.* Accordingly, we may review defendant's claim for whether the prosecutor's questioning undermined the integrity of the trial.

¶ 26 The federal and state constitutions guarantee all criminal defendants a fair, orderly, and impartial trial. U.S. Const., amend. XIV, §1; Ill. Const. 1970, art. 1, § 2; *People v. Blue*, 189 Ill. 2d 99, 138 (2000). To determine whether a defendant was denied a fair trial, "we ask whether a substantial right has been affected to such a degree that we cannot confidently state that defendant's trial was fundamentally fair." *Blue*, 189 Ill. 2d at 138 (citing Ill. S. Ct. R. 615(a); *People v. Keene*, 169 Ill. 2d 1, 17 (1995); *People v. Terrell*, 185 Ill. 2d 467, 522-23 (1998)). In determining whether the trial was fundamentally fair, we look to whether the prosecutor's misconduct was a material factor in the defendant's conviction or whether the defendant was substantially prejudiced. *People v. Linscott*, 142 Ill. 2d 22, 28 (1991). We note that the parties disagree as to whether the standard of review is *de novo* or an abuse of

discretion. Although we agree with the State that we review a court's ruling on an objection for an abuse of discretion (*People v. Stevens*, 2014 IL 116300, ¶ 16), we review whether a prosecutor's comments deprived a defendant of a fair trial *de novo* (*People v. Wheeler*, 226 Ill. 2d 92, 121 (2007)).

¶ 27 Cross-examination is generally limited to matters that were raised on direct examination and matters that affect the credibility of the witness. *Stevens*, 2014 IL 116300, ¶ 16. "[T]his rule has been modified to the extent that it is proper on cross-examination to develop all circumstances within the knowledge of the witness that explain, qualify, discredit or destroy his direct testimony." *Id.* We will not tolerate questions that are designed to harass, annoy, or humiliate a witness. *People v. Baugh*, 358 Ill. App. 3d 718 (2005).

¶ 28 Here, there were twelve sustained objections during the prosecutor's cross-examination of defendant. Defendant maintains that their cumulative effect undermined the fairness of trial. He specifically points to the prosecutor's questions regarding why he decided to purchase cigarettes from the Jewel on Addison and Broadway, whether he actually thought he was in danger of being sexually assaulted, and whether defendant stopped running from the police because the officer had a gun, as opposed to defendant's testimony that the officer had a "rod-like" weapon. Additionally, defendant points out that the prosecutor persisted in objectionable lines of questioning after adverse rulings on multiple occasions. Nevertheless, we do not find that defendant was denied a fair trial. Although some of the prosecutor's questions could be viewed as argumentative and we do not condone his behavior, it is apparent from review of the record that his questions were meant to question defendant's credibility and were not meant to harass, annoy, or humiliate him. Further, any error in the prosecutor's questioning was cured by the court, which sustained the objections and

admonished the prosecutor to rephrase the question when necessary, to "stick to the testimony," and to not ask "gratuitous questions." See *Johnson*, 208 Ill. 2d 53, 116 (2003) (holding that an improper comment by a prosecutor is usually cured by sustaining the objection and properly instructing the jury). It is clear that the court maintained control of the courtroom and that the prosecutor's questions, individually and taken together, did not affect a material factor or substantially contribute to defendant's conviction.

¶ 29 Defendant cites *People v. Larry*, 218 Ill. App. 3d 658 (1991) to support his contention that the prosecutor's questioning prejudiced him even though the court sustained defense counsel's objections. In *Larry*, the defendant was arrested and charged with unlawful use of a weapon by a felon after he was stopped for a traffic violation and a gun was found in the vehicle. *Id.* at 660-661. He testified that he had borrowed the vehicle from a friend and that the gun did not belong to him. *Id.* Thus, the main issue in that case was whether the defendant was the owner of the gun. *Id.* During trial, the prosecutor introduced a hearsay statement from the friend that made clear that she was the owner of the car but was not the owner of the gun. *Id.* at 661. Despite the court sustaining defense counsel's objection and ruling that the statement could not be introduced, the prosecutor repeatedly asked witnesses about the friend's statement. *Id.* at 661-62. The prosecutor compounded this error by referring to the friend's statement in closing arguments. *Id.* at 663. The court found that the defendant had been denied a fair trial because where "prosecutors defy the trial court's ruling by repeating the same questions after objections have been sustained, the court's rulings can have no salutary effect." *Id.* The court further noted that the prosecutor's continuous questioning regarding the objectionable statement increased prejudice to the defendant by

suggesting to the jury that defense counsel was trying to prevent it from hearing relevant evidence. *Id.*

¶ 30 We find *Larry* distinguishable from the instant appeal. Here, there were 12 objections during the prosecutor's cross-examination of defendant, however, the objectionable questions referred to many different issues. By contrast, in *Larry*, the prosecutor repeatedly asked about the same hearsay statement. We are aware that in this case there were a few occasions where the prosecutor continued with a line of questioning after the court sustained an objection; however, when this occured the court quickly stopped the questioning and directed the prosecutor to move on. Significantly, unlike in *Larry*, the objectionable questions did not relate to a material question in the case. In *Larry*, the prosecutor's questions were particularly prejudicial because the ultimate issue for the jury to decide was whether the defendant owned the gun. *Id.* Here, the prosecutor's objectionable comments did not improperly introduce evidence that would have proved a necessary element of robbery. In addition, review of the record reveals that, when viewing the cross-examination as a whole, it did not appear as if defense counsel was preventing the jury from hearing evidence. Rather, because of the court's admonishments, it appeared as if the prosecutor was asking "gratuitous" questions. Thus, despite the prosecutor's improper questions, we do not have any doubt of the integrity of the verdict in this case. Accordingly, we conclude that defendant received a fair trial.

¶ 31 D. Excessive Sentence

¶ 32 Defendant next contends that his sentence of 12 years in prison was excessive because the court failed to adequately consider mitigating factors. Specifically, defendant asserts that he should have received the minimum sentence of six years in prison because the victim was

not seriously injured, he did not use a weapon, and the court did not acknowledge his personal history, his rehabilitative potential, and his remorse for his criminal background.

¶ 33 A sentence within the statutory range will not be modified absent an abuse of discretion. *People v. Jones*, 2014 IL App (1st) 120927, ¶¶ 56-58; *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). "A reviewing court gives great deference to the trial court's judgment regarding sentencing because the trial judge, having observed the defendant and the proceedings, has a far better opportunity to consider" the aggravating and mitigating factors than the reviewing court. *People v. Fern*, 189 Ill. 2d 48, 53 (1999). Further, we may not reverse the sentencing court just because we would have waived factors differently. *People v. Pittman*, 2014 IL App (1st) 123499, ¶ 25 (citing *People v. Streit*, 142 Ill. 2d 13, 19 (1991)). When reviewing the propriety of a sentence, we presume that the trial court properly considered all mitigating factors and rehabilitative potential, and it is the defendant's burden to affirmatively prove otherwise. *People v. Brazziel*, 406 Ill. App. 3d 412, 434 (2010). We will find an abuse of discretion, however, when a sentence is "greatly at variance with the purpose and spirit of the law." *People v. Sharp*, 2015 IL App (1st) 130438, ¶134 (citing People v. Center, 198 Ill. App. 3d 1025, 1032 (1990)).

¶ 34 Here, defendant was a mandatory Class X offender due to two prior felony convictions. 730 ILCS 5/5-4.5-95(b) (West 2012). Accordingly, once defendant was found guilty, the trial court was required to sentence him to between 6 and 30 years in prison. 730 ILCS 5/5-4.5-25(a) (West 2012). Thus, as the sentence was within the statutory range, defendant's 12-year sentence is presumptively proper. *Brazziel*, 406 Ill. App. 3d at 434. Defendant contends that the court did not adequately consider his educational achievements, his history of gainful employment, the lack of violence in his background, and that he maintained close

relationships with his daughters. The State responds that the trial court properly exercised its discretion in sentencing defendant to 12 years, a term that is six years above the statutory minimum and 18 years below the maximum possible sentence.

¶ 35 We agree with the State that defendant's sentence was not excessive and that the court did not abuse its discretion in sentencing defendant. The record reveals that the trial court was in possession of the presentence investigation report, which contained all of the factors in mitigation that defendant argues the court did not adequately consider. In addition, at the sentencing hearing, the court listened to arguments from both the prosecutor and defense counsel as to what the proper sentence should be. Defense counsel emphasized that defendant had a difficult childhood, received some education, did not have a violent background, and suffered from a drug problem. Additionally, in allocution defendant explained to the court that he was sorry for the mistakes he had made in the past and for his actions that led to the current situation and asked for leniency. The court then demonstrated careful consideration of the factors in aggravation and mitigation. It stated that it agreed that it should consider the fact that the victim was not seriously injured but that defendant had a long criminal history of impulsive and reckless behavior. The court acknowledged defendant's drug problem and stated that "an attack on a public street really poses a danger to the entire community and people have the right to be able to walk down the street without feeling that they would be subjected to something like this." Additionally, although the court did not mention the financial impact of incarceration, "[i]t is reasonable to presume, absent evidence to the contrary, that the trial court performed its obligations and considered the financial impact statement before sentencing defendant." *People v. Canizalez-Cordena*, 2012 Ill App. (4th) 110720, ¶ 24. Accordingly, we conclude that defendant did not prove that the court failed to

consider the relevant mitigating factors and the court did not abuse its discretion in sentencing defendant to 12 years in prison.

¶ 36 Defendant finally contends that his sentence was excessive because the court improperly penalized him for exercising his constitutional right to trial. Specifically, defendant argues that he was penalized with a 12-year sentence, which is evidenced by the fact that the court had previously offered him 8 years in prison at the 402 conference. He concedes that this claim was not preserved for review because he failed to raise this argument below. *Enoch*, 122 Ill. 2d at 186-87. However, a claim that a sentence is excessive that would otherwise be forfeited can be reviewed for plain error. *People v. Sauseda*, 2016 IL App (1st) 140134, ¶11.

¶ 37 Defendant's argument is based upon the court's statement during plea negotiations that defendant "will never see anything close to 8 years again if this matter goes to trial." He asserts that this statement shows that he was punished for exercising his right because he was ultimately sentenced to 12 years in prison. It is well established that a trial court may not penalize a defendant for choosing to exercise his right to stand trial. *People v. Ward*, 113 Ill. 2d 516, 526 (1986). However, "the mere fact that the defendant was given a greater sentence than that offered during the plea bargaining does not, in and of itself, support an inference that the greater sentence was imposed as a punishment for demanding trial." *People v. Carroll*, 49 Ill. App. 3d 387, 396 (1977) (citing *People v. Perry*, 47 Ill. 2d 402, 408 (1971). Rather, the record must show that the greater sentence was imposed because defendant chose to stand trial or there is a substantial difference between the two sentences. *Id.* at 349. In this case, the court's statement does not show that defendant received a greater sentence because he chose to go forward with trial. Instead, it shows that the court was attempting to encourage defendant to take the plea because it was likely that he would receive a greater sentence after

trial. We note that the judge who presided over the 402 conference was not the same judge that sentenced defendant and there is nothing in the record to suggest that the sentencing judge was influenced by the plea negotiations. Additionally, the four-year difference between sentences is not so substantial that it indicates defendant was punished for exercising his right to trial. Accordingly, defendant did not establish plain error and his sentence was not excessive.

¶ 38 III. CONCLUSION

¶ 39 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 40 Affirmed.