2017 IL App (1st) 141777-U

THIRD DIVISION
February 15, 2017

No. 1-14-1777

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 09053
	)	
ANTHONY DOW,	)	The Honorable
	)	Anna Helen Demacopoulos,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court. Justices Lavin and Pucinski concurred in the judgment.

ORDER

HELD: Aside from waiver concerns, there was no plain error or ineffective assistance of counsel when the instant jury was not instructed that a person may use deadly force to resist a forcible felony (Illinois Pattern Jury Instruction, Criminal, 24-25.06) and has no duty to retreat (Illinois Pattern Jury Instruction, Criminal, 24-25.09X) where such instructions were not warranted in light of the evidence presented. Additionally, the trial court did not abuse its discretion where it merely mentioned, to clarify the record, certain past arrests and a prior acquittal, but otherwise in no way relied on these in fashioning defendant's sentence; trial court clearly weighed aggravating and mitigating factors to properly impose sentence under the circumstances presented.

¶ 1 Following a jury trial, defendant Anthony Dow (defendant) was convicted of second degree murder and sentenced to 20 years in prison. He appeals, contending that he did not receive a fair trial where the jury was not instructed that a person may use deadly force to resist a forcible felony and has no duty to retreat, and that the trial court abused its discretion in sentencing him by relying on certain past arrests and an acquittal which it should not have considered. He asks that we reverse his conviction and remand his cause for a new trial or, alternatively, that we vacate his sentence and remand for a new sentencing hearing. For the following reasons, we affirm.

¶ 2 BACKGROUND

¶ 3 The pertinent events took place on the afternoon of May 5, 2009, in a restaurant parking lot at 183rd and Halsted in East Hazel Crest where the victim, Kirk Wesley, was shot and died from a single gunshot wound to his back. At trial, defendant asserted self-defense.

¶ 4 Victoria Brown, the victim's sister, testified that on the morning of the day in question, the victim asked her if she knew anyone who wanted to purchase marijuana. She contacted a friend of hers, Henry Dondle, to see if he was interested. Dondle told her that he was not, but he knew of a potential buyer named "Shawn," who Victoria identified in court as defendant. Defendant then contacted Victoria, and the two arranged to meet in the parking lot of Athens Gyros. Victoria and her friend, Chanelle McFarland, drove to the meeting in McFarland's Ford Escape. Not long after, the victim arrived in a blue Audi. Victoria, McFarland and the victim talked for a bit and waited. Defendant then arrived to the parking lot in a burgundy Impala with someone else inside and parked in the spot next to the Audi. Upon his arrival, Victoria and

McFarland exited the Audi to return to the Escape, and defendant exited the Impala to enter the Audi; Victoria and defendant crossed paths, and defendant got into the front passenger seat of the Audi.

¶ 5 Victoria further testified that her other brother, Keith Brown,[1] arrived to the parking lot, approached the Audi with the victim and defendant inside and had a conversation with them. Brown then walked over to Victoria and McFarland in the Escape and asked if they could drive him to the victim's house; they did, and once there, Brown went inside and retrieved a black bag about the size of a brick. The three returned to the restaurant parking lot and parked next to the victim's Audi. Victoria noted that at this time, the victim was in the back seat, defendant was in the front passenger seat, and Brown got into the driver's seat. Soon after, Victoria saw the victim exit the Audi and run to its rear, while defendant moved toward the Impala. Victoria stated that when the victim and defendant were between these two cars, she saw defendant point something at the victim, heard a pop and saw a flash. Victoria testified that the victim said "I'm hit," and she saw defendant jump into the Impala and speed away.

¶ 6 Brown testified that earlier that day, he had spoken to his brother, the victim, who told him that he was going to be selling some marijuana in the restaurant parking lot and asked to meet him there. When Brown arrived, he did not see the victim at first; he did see Victoria and McFarland and spoke to them, who then pointed to where the victim was parked in the Audi. Brown began to walk over to the Audi when he received a cell phone call from the victim asking him to go to his (the victim's) house and to call when he got there. Brown asked Victoria and

[1]Keith Brown is also known as Victor Brown; he, Victoria and the victim were siblings.

McFarland to drive him, and the three went to the victim's house. Brown called the victim, who instructed him to retrieve a bag of marijuana and return to the parking lot. Upon their return, Brown went over to the Audi, entered it, sat in the front seat and gave the bag to the victim who, along with defendant, began to weigh the marijuana. Defendant pulled out some money, but told the victim and Brown that he was short and needed to go over to the Impala to get the rest.

¶ 7 Brown further testified that when defendant returned and entered the Audi, he immediately pointed a gun at them, grabbed the bag of marijuana and exited toward the Impala. Brown and the victim both got out of the Audi; Brown went towards the front of the car and the victim went towards the rear, where he began to tussle with defendant. Brown saw defendant point the gun at the victim, who jerked away and tried to run to the rear of the Audi. Brown heard a shot and saw smoke from the gun. Defendant then sped away in the Impala, so Brown attempted to follow him in the Audi but lost sight of him.

¶ 8 Officer Mitchell Drake of the East Hazel Crest Police Department testified that on the following day, while on duty, he saw a burgundy Impala matching the description of the car involved in the shooting; defendant was in the passenger seat and Nikesha Short, defendant's girlfriend and the car's owner, was driving. After curbing the car and noting that defendant had an outstanding warrant on a separate matter, officer Drake took him to the station where Short bonded him out. Nothing about the victim's murder was mentioned, and defendant eventually moved to another state.

¶ 9 Meanwhile, during the investigation into the instant crime and via photo array, Victoria and Brown identified defendant to police as the person who shot the victim, and McFarland

identified defendant as the person outside the burgundy Impala with the victim when she heard shooting. Police recovered three latent fingerprints from the rear passenger interior doorhandle of the Audi, which matched defendant. Once he was in custody, Victoria, Brown and McFarland each viewed lineups and identified defendant.

¶ 10 Defendant testified that he was running low on his marijuana inventory so, on the day in question, he called his cousin, Henry Dondle, to see if he knew where he could obtain more, and Dondle gave him Victoria's name. Defendant contacted Victoria using the name "Shawn," and agreed to meet with her in the restaurant parking lot that afternoon. Defendant borrowed his girlfriend's burgundy Impala and drove to the parking lot with her brother, Eric. Once there, defendant saw the blue Audi Victoria had described, parked next to it, exited his car and got into its passenger seat. He then began to negotiate with the victim inside the Audi, agreeing to buy 4 ounces of marijuana for $1,600. Defendant recounted that he only had $1,300 in his pocket, so he told the victim he needed to go borrow the rest from Eric, who was still in the Impala. He averred that as he exited the Audi, the victim said he was going to the back seat to weigh the marijuana.

¶ 11 Defendant further testified that when he returned to the Audi with the money, he saw a new man in the driver's seat, whom he identified as Brown. Defendant began to enter the front of the Audi, but Brown told him to get in the back, which he did. Defendant described that once he entered, he pulled out the money out of his pocket and the victim, who was unarmed, "snatched it" out of his hand, whereupon Brown pointed a gun at him. Defendant stated that he threw up his hands, and Brown told the victim to "search" him; defendant, knowing he had his

own firearm on him, told the victim and Brown that they could have his money and, as he feigned reaching for money, opened the car door and slid out. He further averred that the victim grabbed his shirt and followed him out of the car and, as defendant tried to get into the Impala, the victim stayed after him, holding onto his shirt. Defendant stated that he next saw Brown get out of the Audi and approach with his gun, so defendant pulled out his gun and fired one shot "to the side" while standing in between the cars. Defendant felt the victim let go of his shirt, so he was able to get into the Impala and drive away. Defendant averred that he did not know at that point whether he had shot anyone.

¶ 12 Defendant further testified that the next morning, police took him into custody on an unrelated warrant, but was bonded out and later moved to another state. Eventually, in March 2011, he met with police regarding the victim's murder, whereupon he initially lied about his name and denied any participation in the events because he was scared and "overwhelmed." He stated at trial that he never intended to shoot or rob anyone, that he did not know his shot hit someone, and that he fired his gun because he "feared for [his] life" as "these two guys w[ere] attacking [him] and one had a gun."

¶ 13 Following a jury instruction conference, during which no objections were raised, the parties and court agreed to instruct the jury on two types of first degree murder pursuant to the charges against defendant: "Type A," asserting that defendant killed the victim without lawful justification by intending to kill or do great bodily harm to him, or knowing that his acts would cause the victim's death, or knowing that his acts created a strong probability of death or great bodily harm; and "Type B" asserting that defendant performed the acts causing the victim's death

while committing an armed robbery. Defendant proposed two additional jury instructions, one describing a belief in justification as a mitigating factor and the other providing the definition of justifiable use of force. The trial court accepted both of defendant's instructions as he presented them and gave these to the jury as well.

¶ 14 At one point during deliberations, the jury sent the trial court a note asking for the "definition of lawful justification." Following a conference, the court and the parties agreed to respond by telling the jury it had all the instructions and to continue deliberating. Thereafter, when the jury was ready to render its verdict, it returned only two verdict forms: not guilty of first degree murder Type A (knowing and intentional murder), and guilty of second degree murder. The trial court instructed the jury to return to deliberations and reach a decision with respect to the first degree murder Type B (felony murder). The jury did so and returned a not guilty verdict on that type.

¶ 15 The cause then proceeded to sentencing. The court was presented with defendant's presentence investigation report (PSI), demonstrating his prior arrests, convictions and a 2008 acquittal for first degree murder. The court also heard impact statements from the victim's wife, sister and mother. In aggravation, the State noted for the court the nature of the offense, the fact that the victim was unarmed and shot in the back while trying to run away, defendant's prior arrests showing he was "not a stranger to the criminal justice system," and his several outstanding warrants. In mitigation, defendant presented written statements from his father, his minister and a friend, and noted for the court that he was a high school graduate and an athlete, he has a close-knit family, he has never been convicted of a felony, and he has never received

any punishment greater than supervision for his prior convictions. He also spoke directly to the court, expressing remorse and again stating that he did not intend to kill anyone.

¶ 16 In its colloquy, the trial court discussed the basis of its decision and several of its considerations when sentencing defendant. At the outset, the court stated that it reviewed defendant's PSI and was taking note of his young age (30 years old/26 years old at the time of the crime). It also mentioned that defendant was from a "stable" home, that he had both parents in his life, and that he was raised by a "loving supportive family that promoted education," of which he took advantage and became educated. The court noted, however, that defendant himself stated in his PSI that he had been a member of the Gangster Disciples street gang and described that his mix of friends includes current and former gang members. And, it took "particular note" of his criminal history, which included two arrests for possession of cannabis, an arrest for aggravated assault, and a misdemeanor case.

¶ 17 Then, the court described its two main considerations with respect to defendant's sentence. The first, which it stated it found to be "aggravating," was the correlation of defendant's prior arrest for first degree murder and the current cause. The court noted that defendant had been arrested for this in July 2003 and remained incarcerated the entire time until he was found not guilty in November 2008, over five years. However, in May 2009, only six months later, defendant was involved in the instant murder where, as the court described, he was "clearly buying drugs from a drug dealer" while he was "armed with a weapon." The second consideration the court discussed was its duty to fashion a sentence that deters others from committing the same crime. Pointing to Victoria in particular, the court noted that she was in

high school while she was setting up drug deals for the victim and defendant. While the court noted defendant was a young man with a potential to be rehabilitated, it concluded that he had "demonstrated to this Court that he can't do it." Accordingly, and based on the "aggravation" that only "six months after he has been released on a first degree murder he is arming himself with a loaded weapon and participating in drug dealing that results in death," as well as the consideration of deterrence, the trial court sentenced defendant to 20 years in prison.

¶ 18 ANALYSIS

¶ 19 Defendant presents two issues upon review. We address each separately.

¶ 20 I. Jury Instructions

¶ 21 Defendant's first contention is two-fold. First, he asserts that the trial court erred when it instructed the jury pursuant to Illinois Pattern Jury Instruction, Criminal, 24-25.06 (4th ed. 2000) (IPI 24-25.06), that a person is justified in the use of force when he reasonably believes it is necessary to defend himself, but did not include language stating that the use of deadly force is justified if he reasonably believes it is necessary to prevent the commission of a forcible felony, namely, armed robbery. Second, defendant asserts that the trial court erred in failing to instruct the jury pursuant to Illinois Pattern Jury Instruction, Criminal, 24-25.09X (4th ed. 2000) (IPI 24-25.09X), which states that a person does not have a duty to retreat before using force in self-defense if he was not the initial aggressor. He claims that both of these errors–the trial court's declaration of an incomplete instruction with respect to the former, and its failure to *sua sponte* give the latter–denied him a fair trial.

¶ 22 We begin by examining the record in light of the threshold matters of waiver and plain

error. As we noted earlier, during the jury instruction conference, the parties and the court agreed to instruct the jury on two types of first degree murder, pursuant to the charges against defendant. No objections were raised. Near the end of the conference, defendant proposed two additional jury instructions, including IPI 24-25.06, providing the definition of justifiable use of force.[2] The trial court accepted defendant's instruction and gave, both orally and in writing, IPI 24-25.06 to the jury exactly as defendant requested. Moreover, defendant did not ask for any other instructions, including 24-25.09X, and thus, that instruction was not given.

¶ 23 The State points out, and defendant concedes, that he has forfeited review of his instant contentions regarding these jury instructions because he failed to object at trial (during the instructions conference), and he failed to raise them in his motion for a new trial. See *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007); *People v. Herron*, 215 Ill. 2d 167, 175 (2005). However, he urges us to consider these issues as ones of plain error (arguing that the evidence against him was close and that these errors affected the integrity of his trial), or of ineffective assistance of counsel (arguing there was no conceivable strategy for agreeing to IPI 24-25.06 as given or for the failure of asking for IPI 24-25.09X). Briefly, with respect to plain error, we note that the burden under both prongs of that analysis is squarely upon defendant. See *Piatkowski*, 225 Ill. 2d at 565; *Herron*, 215 Ill. 2d at 186-87 (under first prong, he must prove there was plain error and the evidence was so closely balanced that this error alone severely threatened to tip the scales of justice against him; under second prong, he must prove there was plain error and the

[2]The other instruction defendant requested was Illinois Pattern Jury Instruction, Criminal, 7.05 (4th ed. 2000), describing a belief in justification as a mitigating factor. As with IPI 24-25.06, the trial court gave this instruction to the jury as defendant asked.

error was so serious that it affected the fairness of his trial and challenged the integrity of the judicial process). However, before a plain error analysis may be undertaken, the defendant must show that an error occurred, for, absent error, there can be no plain error. See *People v. McGee*, 398 Ill. App. 3d 789, 794 (2010), citing *Herron*, 215 Ill. 2d at 187; see also *Piatkowski*, 225 Ill. 2d 551, 565 (2007) ("the first step is to determine whether error occurred"). Similarly, with respect to ineffective assistance of counsel, the defendant again faces a two-prong burden, as he is required to establish both that counsel's performance fell below an objective standard of reasonableness, and a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. See *People v. Edwards*, 195 Ill. 2d 142, 162 (2001), and *People v. Simmons*, 342 Ill. App. 3d 185, 191 (2003) (the defendant must overcome the presumption that counsel's action was sound trial strategy and show probability sufficient to undermine confidence in the outcome of his trial). However, just as with plain error, if it is determined the defendant did not suffer prejudice, whether trial counsel's performance was constitutionally deficient need not be decided and our discussion ends there. See *People v. Brooks*, 187 Ill. 2d 91, 137 (1999) (in such instance, examination of performance prong is not warranted).

¶ 24 Because, as we explain below, there was no error in the instant cause in the trial court's instruction of the jury, we find no plain error here. Moreover, as the situation at hand does not amount to ineffective counsel resulting in prejudice to defendant, we likewise find no merit in preserving this issue for review under an ineffective assistance of counsel claim. Instead, because the evidence presented does not support defendant's arguments that he was entitled to

have the jury instructed as he now claims, *i.e.*, with the inclusion of a mention of armed robbery in IPI 24-25.06 and with an instruction on IPI 24-25.09X, his claims fail.

¶ 25 The purpose of jury instructions is to provide the jury with correct legal principles that apply to the evidence, thereby allowing it to reach the proper conclusion based on the applicable law and the evidence as presented. See *People v. Bannister*, 232 Ill. 2d 52, 81, (2008); *People v. Parker*, 223 Ill. 2d 494, 500 (2006); accord *People v. Hudson*, 222 Ill. 2d 392, 399 (2006). The State and defendant are both entitled to have a jury instructed on their theories of the case and, generally, an instruction is warranted if there is even slight evidence to support it. See *People v. Barnard*, 208 Ill. App. 3d 342, 349-50 (1991). At the same time, however, it is error to submit an instruction to the jury where there is no evidence to support it. See *People v. Mohr*, 228 Ill. 2d 53, 65-66 (2008) (record must contain some evidence to justify an instruction, and instructions not supported by evidence or law should not be given); *People v. Williams*, 168 Ill. App. 3d 896, 902 (1988). Moreover, a defendant is not entitled to an instruction based on the merest factual reference or witness's comment with respect to a certain theory. See *People v. Everette*, 141 Ill. 2d 147, 157 (1991). And, " '[g]enerally, a trial court is under no obligation to either give jury instructions not requested by counsel or to rewrite instructions tendered by counsel.' " *People v. Alexander*, 408 Ill. App. 3d 994, 1001 (2011), quoting *People v. Underwood*, 72 Ill. 2d 124, 129 (1978). Typically, we review issues concerning jury instructions for an abuse of discretion. See *Mohr*, 228 Ill. 2d at 65 (which issues are raised by evidence and whether instruction should be given are for trial court to determine); *People v. Gomez*, 402 Ill. App. 3d 945, 957 (2010). But, we review *de novo* whether jury instructions accurately conveyed

the applicable law, which, ultimately, directs us to examine whether the instructions given, when taken as a whole, fairly, fully and comprehensively apprised the jury of the relevant law. See *Parker*, 223 Ill. 2d at 501.

¶ 26 Again, based on the record before us, we find no error in the instructions given at defendant's trial.

¶ 27 IPI 24-25.06 states:

> "A person is justified in the use of force when and to the extent that he reasonably believes that such conduct is necessary to defend [(himself) (another)] against the imminent use of unlawful force.
>
> [However, a person is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent [(imminent death or great bodily harm to [(himself) (another)] (the commission of _____)].]" Illinois Pattern Jury Instruction, Criminal, 24-25.06 (4th ed. 2000).

It is the latter part of the second paragraph of this instruction–the "forcible felony" language–that is the focus of defendant's contention here. The Committee Note for IPI 24-25.06 states that the blank space should be filled in with the forcible felony involved, "[w]hen applicable." Illinois Pattern Jury Instruction, Criminal, 24-25.06 (4th ed. 2000), Committee Note. A forcible felony would include armed robbery, as involved in the instant cause. See 720 ILCS 5/2-8 (West 2009). At trial, however, when defendant proposed IPI 24-25.06, the version he provided to the trial court, which was exactly what the court gave to the jury, omitted mention of this "forcible

felony" language. His version of IPI 24-25.06, as given to the jury, stated:

> "A person is justified in the use of force when and to the extent that he reasonably believes that such conduct is necessary to defend himself against the imminent use of unlawful force.
>
> However, a person is justified in the use of force which is intended to likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself."

¶ 28 Defendant now argues that the jury should have been instructed that he was justified in the use of force intended or likely to cause death or great bodily harm if he reasonably believed such force was necessary to prevent a forcible felony, namely, armed robbery, which he asserts the victim and Brown committed against him when they stole his money at gunpoint in the Audi and which, according to defendant, continued when they all exited that car and he fired his gun before entering the Impala and speeding away. From this, he insists that the jury, had it been so instructed, would have found him not guilty.

¶ 29 Our court has reviewed this same contention before and has not found such an argument to be valid. In *People v. Chamness*, 129 Ill. App. 3d 871 (1984), the defendant was convicted of armed violence, aggravated battery and attempted murder. The trial court there, as here, gave a self defense instruction pursuant to IPI 24-25.06 stating that force likely to cause death or great bodily harm is justified to prevent the same injury to oneself, but did not include the "forcible felony" language of that instruction. See *Chamness*, 129 Ill. App. 3d at 875. On appeal, the defendant cited error, but the *Chamness* court wholly disagreed, reasoning that the jury had

inherently given its informed consideration on self defense in light of the defendant's claims. As the *Chamness* court stated,

> "When a jury determines whether a defendant acted to protect himself from great bodily harm or death, it necessarily considers the same evidence which would be involved in a determination of whether the defendant acted to prevent the commission of an attempted murder or aggravated battery upon himself. There is no logic in the suggestion that a jury which found that a defendant was not protecting himself from great bodily harm or death could find that defendant was trying to prevent an attempted murder or aggravated battery from being committed upon himself."

Chamness, 129 Ill. App. 3d at 876. Thus, the court determined that inclusion of the "forcible felony" language in the instruction was not warranted. See *Chamness*, 129 Ill. App. 3d at 876.

¶ 30 The holding of *Chamness* has been consistently reaffirmed by our courts in several similar cases, including *People v. Hanson*, 138 Ill. App. 3d 530 (1985), *People v. Renehan*, 226 Ill. App. 3d 453 (1992), and *People v. Wilburn*, 263 Ill. App. 3d 170 (1994). In each of these, the defendants cited the exact same claim of error on the part of the trial courts as defendant does herein, that is, that the courts' failure to include the "forcible felony" language resulted in an incomplete, and erroneous, instruction. And, in each of these, the reviewing courts found, relying on *Chamness*, no merit in these claims. See *Hanson*, 138 Ill. App. 3d at 539-40; *Renehan*, 226 Ill. App. 3d at 458-59; *Wilburn*, 263 Ill. App. 3d at 177-78. We find no reason to depart from this line of cases. In the instant cause, the trial court instructed the jury that

defendant could be justified in using force likely to cause death or great bodily harm to prevent similar injury to himself. When the jury determined whether defendant acted to protect himself from death or great bodily harm when he shot the victim, it necessarily considered the same evidence involved in a determination of whether, under the circumstances presented in the case by the parties, he acted to prevent the commission of a forcible felony of armed robbery upon himself. The jury determined that his actions were not justified when it found him guilty of second degree murder. See *Wilburn*, 263 Ill. App. 3d at 178 (where jury determined it was not reasonable for the defendant to believe that the force she used was necessary to prevent death or great bodily harm to herself, it could not have found that she reasonably believed such force was necessary to prevent a forcible felony from being committed upon her); accord *People v. Jackson*, 304 Ill. App. 3d 883, 892 (1999) (where jury rejected the defendant's self defense claim, it considered same evidence necessary to determine whether the defendant acted reasonably in defending himself against a forcible felony).

¶ 31 Relying on *People v. Milton*, 72 Ill. App. 3d 1042 (1979), defendant insists the "forcible felony" language was mandated because of his theory on the case, namely, that at the moment he shot the victim, he was acting to prevent an armed robbery by the victim and Brown upon himself. Not only is *Milton* inapplicable here, but his characterization of his theory on the case is wholly incorrect.

¶ 32 The theory on the case defendant presented at trial was simple and clear: he shot his gun because he was in fear for his life. The theory he now posits on appeal before us–that he shot his gun in an effort to prevent an armed robbery from being committed upon him by Brown and the

victim once they were outside the Audi and standing between the cars–was never once raised by him below. He is clearly switching his position, and the record completely belies his new assertion. For example, in his opening argument, defendant never presented such a scenario. He did ask the jury to keep in mind the question of "why" he had to "fear for his life" when they listened to the evidence, but he stressed that the answer to this would turn on the credibility of the witnesses, that is, Victoria and Brown on the one hand and him on the other. Moreover, when he presented his version of the incident, defendant's testimony made clear that the reason he shot his gun was because he was in fear, not because he was being robbed. As he described, he had to leave the Audi, and the drug deal with the victim, when he realized he was $300 short. He obtained the difference from Eric in the Impala and returned to the Audi, whereupon Brown, who had now arrived, told him to get into the back. Defendant got in, sat down, pulled the money out of his pocket and was about to flip the wad of bills open when the victim "snatched the money" out of his hand. Defendant looked up and Brown had a gun pointed at him. Defendant stated that, "knowing that [he, defendant] had a firearm on [him], [he] agreed to give them the money." It was at this moment, then, according to defendant, that the armed robbery took place.

¶ 33 Defendant further testified that, once the victim and Brown had taken his money, he was able to slide out of the car. As he left the Audi, the victim followed him outside. Defendant averred that he was standing between the Audi and his Impala and "tried to close the door" on the victim, but the victim was "continuously attacking" him. Defendant next saw Brown get out of the Audi, come around that car toward him, and point his gun at him. In response, defendant

shot once, got into the Impala and sped away. When specifically asked at trial why he fired his gun, the following exchange took place:

> "[Defense Counsel]: Why did you pull your firearm?
>
> [State]: Objection.
>
> THE COURT: Overruled.
>
> [Defendant]: I feared for my life.
>
> [Defense Counsel]: And you feared for your life based on what?
>
> A. That these two guys was attacking me and one had a gun [*sic*]."

Later, defendant repeatedly insisted in closing argument, in line with his theory on the case, that this fear was the reason why he shot his gun. In describing that he did not know if he had even hit anyone, his counsel stated for the jury that defendant:

> "shot to get away for his life. He shot to get away for his life because he had a guy trying to pull him back into a car where he was just robbed, and he saw the other guy who had the gun on him, still coming at him in the driver's seat. He shot because he feared for his life and that was the only thing he felt reasonable to be able to do to get away;"

and also that:

> "[Defendant is] trying to get to his car. He's got a guy 6'1" 245 pounds trying to pull him back in, and he's got his brother coming directly at him in his driver's seat. If he had not shot at that point in time, he would have been a sitting duck in that driver's seat [of the Impala] for the brother [Brown] just to come up there and

> pop both of them [defendant and Eric]. That's exactly what would have happened."

¶ 34 From all this, we conclude that never once did defendant intimate he was trying to stop, or prevent, the commission of an armed robbery upon himself at the moment he pulled out his gun and fired. This is precisely why, during the jury instruction conference, he tendered the version of IPI 24-25.06 to the trial court that he did–a version that did not include the "forcible felony" language, and a version that he now complains of on appeal. His own theory on the case did not warrant that language. As he himself argued, and simply put, he shot because he feared for his life. Whatever armed robbery occurred happened while defendant, Brown and the victim were in the Audi. Just as defendant explained, once the robbery was over, he slid out of the Audi and ran to his car. When he and the victim were between the cars, the victim was "attacking" him and he was trying to get into the Impala to drive away. Defendant then saw Brown exit the Audi and come towards him with a gun. It was at this point that defendant shot–not, as he himself testified, to thwart an armed robbery, which was already over, but because, in his own words, he "feared for [his] life" since "these two guys was attacking me and one had a gun [*sic*]."

¶ 35 Accordingly, the armed robbery occurred before defendant fired his gun, and was over before Brown stepped out of the Audi, which is what, in his own words, prompted defendant to draw his weapon. This evidence, from defendant himself, clearly did not support giving the "forcible felony" part of IPI 24-25.06 because defendant was not acting to prevent a forcible felony when he shot his gun. Based on his own theory, he knew at the time of trial that the

"forcible felony" language of the instruction was unwarranted and, therefore, of his own accord, he presented the trial court with a version of IPI 24-25.06 that did not contain this language. See, *e.g.*, *People v. Townsell*, 209 Ill. 2d 543, 547-48 (2004); *People v. Bowens*, 407 Ill. App. 3d 1094, 1101 (2011) (affirmative acquiescence to action taken by trial court bars a defendant from complaining about that action on appeal, even under plain error analysis). He cannot now complain of this, nor presume to change or extend his theory on the case to now raise an issue as to the cited language which was inapplicable to the clear theory he repeatedly presented below. See *Alexander*, 408 Ill. App. 3d at 1001, quoting *Underwood*, 72 Ill. 2d at 129 (" '[g]enerally, a trial court is under no obligation *** to rewrite instructions tendered by counsel' ").

¶ 36 Moreover, *Milton* is distinguishable and provides no viable support for defendant's contention here. In that case, the defendant testified that, as two men were trying to rob him of his dice winnings, he struggled with them and one of their guns went off, killing the robber. See *Milton*, 72 Ill. App. 3d at 1049. The trial court did not include the "forcible felony" language in instructing the jury pursuant to IPI 24-25.06, and defendant was found guilty of voluntary manslaughter. On appeal, the *Milton* court found that the trial court's failure to include this language was reversible error because the evidence presented clearly showed that the defendant was acting to prevent an armed robbery upon himself, and thus, the jury could have easily believed he was resisting that robbery when he used the deadly force at issue. See *Milton*, 72 Ill. App. 3d at 1049.

¶ 37 Unlike *Milton*, the evidence presented in the instant cause, including his own testimony, makes clear that, at the time defendant fired the shot that hit and killed the victim, he was not

involved in any sort of attempt to prevent an armed robbery against himself. Again, he stated that he drew and shot his gun precisely because he feared for his life. He was not resisting an armed robbery or trying to thwart one, which by this point was already over. Rather, he was being chased and attacked by two men, one with a gun who had just exited the Audi and was coming towards him, and this is why he shot his, hitting the unarmed victim in the back and killing him.

¶ 38 Based on all this, including defendant's own theory on the case as presented at trial, and in line with *Chamness* and its progeny, we find no error on the part of the trial court. Despite his attempt to switch positions at this point, the evidence here clearly did not support giving the "forcible felony" portion of IPI 24-25.06 because defendant was not acting to prevent a forcible felony when he shot and killed the victim. Ultimately, without error, defendant's claims of plain error and ineffective assistance of counsel with respect to the missing "forcible felony" language in IPI 24-25.06, as given to the jury pursuant to his own version of the instruction, fail.

¶ 39 The same is true with respect to defendant's contention that the trial court erred in failing to instruct the jury pursuant to IPI 24-25.09X. Again, this was an instruction that defendant did not ask for during the jury instruction conference at trial, nor did he object when it was, accordingly, not given. And, again, we find no error in this regard. This is because, just as with the "forcible felony" language of IPI 24-25.06, the evidence presented at trial, along with defendant's theory on the case at that time, do not support defendant's argument that he was entitled to have the trial court *sua sponte* instruct the jury with IPI 24-25.09X. See, *e.g.*, *Alexander*, 408 Ill. App. 3d at 1001, quoting *Underwood*, 72 Ill. 2d at 129 (" '[g]enerally, a trial

court is under no obligation to either give jury instructions not requested by counsel' ").

¶ 40 IPI 24-25.09X provides that "[a] person who has not initially provoked the use of force against himself has no duty to attempt to escape the danger before using force against the aggressor." Illinois Pattern Jury Instruction, Criminal, 24-25.09X (4th ed. 2000). Contrary to defendant's argument here, the plain language of this instruction clearly contemplates a mutual combat situation. As the instruction states, it should be given when a defendant uses force in response to "the use of force against himself." Illinois Pattern Jury Instruction, Criminal, 24-25.09X (4th ed. 2000). Thus, it is obvious that the instruction is to be given in a scenario where a defendant is using force in response to the receipt of force, *i.e.*, mutual combat.

¶ 41 In the instant cause, there was no error on the part of the trial court in not giving IPI 24-25.09X because, based on the evidence, that instruction was not warranted. Again, defendant's theory on the case was that he shot his gun, hitting the victim, because he was in fear for his life. The robbery, which occurred in the Audi, was already over, and defendant testified that the source of his fear which caused him to shoot was the victim and Brown chasing and attacking him, with Brown brandishing his gun. Accordingly, there was no mutual combat situation here, nor was defendant standing his ground against the victim or Brown, whom he states were the initial aggressors, when he fired his gun.

¶ 42 *People v. Alexander* proves exemplary here. In that case, as here, the defendant, who was convicted of first degree murder, argued on appeal that the trial court should have *sua sponte* instructed the jury pursuant to IPI 24-25.09X because, as he claimed, the jury's determination of whether he was the initial aggressor was an essential element of the crime. See

Alexander, 408 Ill. App. 3d at 1001. The *Alexander* court disagreed, finding that giving IPI 24-25.09X was not warranted because whether the defendant was the initial aggressor was irrelevant and not an essential element of his first degree murder charge or of his assertion of self defense. See *Alexander*, 408 Ill. App. 3d at 1002-03. Rather, the *Alexander* court noted that the key to his cause–his very claim of self defense–hinged on the reasonableness of his use of force, not on whether he had a duty to escape before inflicting that force. See *Alexander*, 408 Ill. App. 3d at 1003. Thus, IPI 24-25.09X was not warranted.

¶ 43 The same reasoning is applicable in the instant cause. Under the circumstances presented, a determination of whether defendant initially provoked the use of force was not an essential element of the charged crime or of his claim of self defense. The jury was instructed on the elements and burdens of proof of first degree murder, second degree murder and self defense. Pursuant to the evidence, defendant's claim of self defense hinged on the reasonableness of the use of force he exerted–shooting the unarmed victim in the back–not on whether he had a duty to retreat or escape before exerting that force. In other words, regardless of whether the jury believed that defendant was the initial aggressor or not, he testified that he responded to the situation–to having slid out of the Audi after the robbery and trying to get into his own car while the victim, whom he knew to be unarmed, followed him and began "attacking" him, and while seeing Brown, whom he knew to be armed, exit the Audi and come towards him–by shooting his gun. The critical question of defendant's self defense claim in relation to the charges against him was whether his use of force, within the circumstances presented and supported by the evidence as the jury viewed it, was reasonable. See, *e.g.*, *Alexander*, 408 Ill. App. 3d at 1003.

¶ 44 What is more, defendant simply cannot demonstrate prejudice with respect to any failure in this cause to instruct the jury that a non-initial aggressor has no duty to attempt to escape danger. This is because he argued at trial directly to the contrary. That is, there were, essentially, two different theories presented to the jury here. In the first, via the testimony of Victoria, McFarland and Brown, defendant arrived armed to the drug deal and, while in the Audi, drew his gun on the victim and Brown, grabbing the bag of marijuana and exiting toward the Impala, whereupon he tussled with the victim who was trying to retrieve the bag, defendant pointed his gun at him, and he shot him as the victim tried to run away back to the rear of the Audi, without any further provocation. In the second version, via the testimony of defendant, he arrived armed to the drug deal and, while in the Audi, was robbed at gunpoint by the victim and Brown, was then able to slide out of the Audi and attempted to get into his Impala to speed away when the victim followed and attacked him and Brown exited the Audi and approached him with his gun drawn, whereupon he shot in fear for his life. In defendant's version of events, he precisely *was* escaping from an alleged danger–the victim chasing him and Brown exiting the Audi and approaching with his gun, which caused him to fear for his life. This is what he argued throughout his trial. Although he now insists that an instruction pursuant to IPI 24-25.09X, describing that a non-initial aggressor has no duty to attempt to escape danger, was necessary to his defense, it would have had no effect on the verdict where it was entirely inconsistent with the version of event he presented to the jury, namely, that he was trying to escape in his Impala but could not do so as the victim was attacking him when Brown exited the Audi with his gun and caused him to fear for his life and, in turn, shoot his gun.

¶ 45 Under all these circumstances, we find no clear or obvious error where the trial court failed to *sua sponte* instruct the jury with a non-initial aggressor instruction, an instruction which would have been inconsistent with his very theory on the case. And, ultimately, just as with his contention regarding IPI 24-25.06, without error, defendant's claims of plain error and ineffective assistance of counsel with respect to the failure to give IPI 24-25.09X, which he did not even request at trial, also fail.

¶ 46 II. Sentencing

¶ 47 Defendant's second, and final, contention on appeal is that the trial court considered improper factors when it imposed the maximum term allowed pursuant to statute of 20 years in prison for second degree murder. See 730 ILCS 5/5-4.5-30(a) (West 2012) (sentencing range for second degree murder is 4 to 20 years). Specifically, he asserts that the trial court relied on "mere arrests" and a charge for which he had been acquitted when it fashioned his sentence, despite the fact that the State failed to introduce any evidence about these. In addition, he claims that the court's declaration that he had no rehabilitative potential and the fact that he received the maximum sentence despite his prior history of only one misdemeanor conviction further indicate that the court's determination was inappropriate and merits vacation and remand. We disagree.

¶ 48 Again, as a threshold matter, we note that we proceed via a plain error analysis. Defendant concedes that he did not properly preserve this issue, but insists that our review is warranted under both prongs of this doctrine because, in his view, the evidence at his sentencing hearing was closely balanced since he was "a youthful offender with almost no criminal history," and because his sentencing hearing was fundamentally unfair as the trial court had no evidentiary

support for its determination. Again, defendant is correct that these are the two prongs involved in a plain error analysis and, again, we must first determine whether there was error in order to reach plain error. See *People v. Hillier*, 237 Ill. 2d 539, 545 (2010) (in context of sentencing hearing); accord *Piatkowski*, 225 Ill. 2d at 565; see also *People v. Ahlers*, 402 Ill. App. 3d 726, 734 (2010) (the defendant has the burden under plain error review to demonstrate the applicability of the two prongs to his sentencing hearing). However, because, based on our thorough review of the record before us, we do not find any error here, we, in turn, cannot find any plain error and defendant's claim fails. See *People v. Walker*, 232 Ill. 2d 113, 124 (2009) (plain error rule does not apply if a clear and obvious error did not occur); *McGee*, 398 Ill. App. 3d at 794 (absent error, there can be no plain error).

¶ 49 Turning to the merits of defendant's arguments, we begin by noting several general principles, as the law regarding sentencing is well established. The trial court has broad discretionary powers to determine a defendant's sentence. See *People v. Stacey*, 193 Ill. 2d 203, 209 (2000); *People v. Fern*, 189 Ill. 2d 48, 53 (1999). Its decision merits great deference because the trial judge is in the best position to make a reasoned judgment, weighing factors such as its direct observations of the defendant and his character. See *Fern*, 189 Ill. 2d at 53; see also *People v. Kelley*, 2013 IL App (4th) 110874, ¶ 46, quoting *People v. Price*, 2011 IL App (4th) 100311, ¶ 36 (trial court's sentence must be based on the particular circumstances of each case, including the defendant's credibility, age, demeanor, moral character, mentality, social environment and habits). A reviewing court must not substitute its judgment with respect to sentencing for that of the trial court merely because it would have weighed factors differently or

desires to invoke clemency. See *Fern*, 189 Ill. 2d at 53 (reviewing court "must proceed with great caution" in deciding whether to modify sentence); *People v. Hayes*, 159 Ill. App. 3d 1048, 1052 (1987); accord *People v. Coleman*, 166 Ill. 2d 247, 258 (1995) (trial court's decision with respect to sentencing "is entitled to great deference"). Nor is a reviewing court to focus on a few words or comments from the sentencing court but, rather, must consider the record as a whole and the sentencing court's decision within that context. See *People v. Andrews*, 2013 IL App (1st) 121623, ¶ 15. Ultimately, a sentence imposed by the trial court will not be altered absent an abuse of discretion. See *Stacey*, 193 Ill. 2d at 209-10; accord *Kelley*, 2013 IL App (4th) 110874, ¶ 46, quoting *Price*, 2011 IL App (4th) 100311, ¶ 36.

¶ 50 Defendant takes issue first with what he interprets as improper considerations taken by the trial court in fashioning his sentence, namely, his prior arrests and a prior acquittal. According to the record, defendant had a 2001 arrest for possession of cannabis, which was stricken on leave; a 2002 arrest for aggravated assault, for which he was sentenced to one year supervision and which was terminated unsatisfactorily; a 2003 arrest for possession of cannabis, which was stricken on leave; and a 2003 first degree murder arrest and vehicular invasion arrest, of which he was found not guilty. Citing some passing comments during its colloquy, defendant insists that the court considered these "mere arrests" and his acquittal in sentencing him, which was improper because no underlying facts or evidence regarding them were ever presented.

¶ 51 The record does reflect that defendant's prior arrests and acquittal were mentioned during his sentencing hearing. In fact, at the outset of that hearing, the trial court and the parties actually read these into the record. However, this was because defendant's PSI report was

incorrect in that it failed to include any of his arrests. Accordingly, the references to these that defendant now cites on appeal came at the outset of the hearing when the parties and the court were attempting to clarify the record to ensure that it was complete. They were not, as defendant insists, clear examples of the trial court "relying" on his prior arrests or acquittal while sentencing him.

¶ 52 Further support for this conclusion comes from our reading of the trial court's colloquy as a whole. Its colloquy was very structured and reasoned. First, the court clarified the PSI. It was at this point that his prior arrests and acquittal were detailed. From there, it listened to victim impact statements, character witnesses on defendant's behalf, defendant's own statement and argument by the parties. Then, it issued its colloquy by considering defendant's age, mitigating factors and aggravating factors. In addressing those aggravating factors, the court stated that it was "tak[ing] particular note" of his criminal history, including the two drug arrests, the aggravated assault arrest, and his misdemeanor case. However, that was all the court did–take note of his history. In the same sentence as its notation of these prior arrests, the court made clear that these were not the focal point of its determination, and it did not mention them again. Immediately after briefly noting their existence, the court declared:

> " *** but what I find aggravating is that the defendant was arrested for the charge of first degree murder on July 9th of 2003, was incarcerated for that entire period of time, and was found not guilty on November 3rd, of 2008. Six months later in May of 2009 he is involved in this incident where he is clearly buying drugs form a drug dealer. I get that. He is armed with a weapon. He is travelling from the

> City of Chicago out to the suburbs knowing full well after spending five years incarcerated, six months later he is right back at it."

From our review of this statement by the trial court, along with our reading of its colloquy as a whole, it is clear to us that the court was not "relying" on defendant's pasts arrests and acquittal in fashioning its sentence. Rather, what it found "aggravating," or of more, and significant, importance, and what it continuously referred to thereafter, was defendant's conduct and behavior *after* his prior run-ins with law enforcement and the legal system. The crux of the trial court's entire colloquy was its central focus on this conduct and behavior, which it found alarming because it demonstrated that defendant was making the same mistakes and involving himself repeatedly in criminal situations, even after the most intense brushes with the law–sitting in a prison cell for five years awaiting an eventual acquittal.

¶ 53 Contrary to defendant's assertion, nowhere did the court state it was considering defendant's prior arrests or acquittal as aggravating factors in rendering its sentence. Rather, the court did nothing more than comment on the existence of these to, first, clarify the PSI, and, second, to simply make note of them for the record which was incomplete. Instead, it was defendant's conduct and behavior following these prior arrests and leading up to the instant crime that was the foundation for the trial court's sentencing determination. After being involved with police due to those arrests, as well as with the legal system involving his long process to acquittal, defendant, who was young, well educated and came from a stable, loving home, chose not to learn from those brushes with the law and instead sought out and organized a drug deal and armed himself with a gun while attending it. It was the circumstances of the instant crime

when examined in light of the fact that defendant had already crossed paths with law enforcement in the most extreme of ways–and not the details of his prior arrests or acquittal specifically–upon which the trial court relied in sentencing him. This, the court had the right to do. Precisely as it explained, and regardless of the details of his prior arrests or acquittal, defendant's background makes it undeniable that he has chosen illegal acts as his lifestyle, and the instant situation demonstrated that, as the trial court stated, he was "right back at it"–only six months after having been incarcerated for five years. The court's mention of his prior arrests and acquittal was not the underlying factor for its sentencing determination; rather, these were general factors that provided a background with respect to the instant crime that the trial court could not, nor should not, ignore.

¶ 54 In addition to defendant's behavior and conduct leading up to the crime at hand, the trial court made clear that it was basing his sentence on one other factor of critical importance: deterrence. As the court stated, "one of the factors that [it] must consider in aggravation is that the sentence is necessary to deter others from committing the same crime." At this point, it focused its attention on Victoria–the victim's little sister who was in high school at the time defendant contacted her to fulfill his need for a bigger drug supply. That defendant (and the victim) involved her in setting up the deal in the restaurant parking lot in the first place was something that the court found "very, very, very troubling," and the court declared that it, along with defendant's conduct, was the other impetus for its sentencing determination. The court stated that there "has to be a deterrent" and that "[a]t some point somebody's got to take responsibility for it, that we have to change this behavior, and punishment is one of those

things." Accordingly, the court made clear before announcing defendant's sentence that it was based on two primary considerations: defendant's behavior and conduct of only "[s]ix months after he has been released after being found not guilty on a first degree murder, he is arming himself with a loaded weapon and participating in drug dealing that results in death," and the court's finding that the length of the sentence must be one that would necessarily "deter others from this crime." It was these two considerations that the court concluded to be "aggravating," surpassing the factors it had, itself, already considered mitigating, and validating the sentence it imposed: the maximum of 20 years in prison.

¶ 55 Defendant's reliance on *People v. Thomas*, 111 Ill. App. 3d 451 (1983), is wholly misplaced. Indeed, *Thomas* reaffirmed that "mere arrests, standing alone, without further proof of the conduct alleged, are inadmissible in the [trial court's] sentencing determination." *Thomas*, 111 Ill. App. 3d at 454 (citing *People v. La Pointe*, 88 Ill. 2d 482 (1981)). However, in vacating and remanding that defendant's sentence, the *Thomas* court stated that "the record clearly demonstrates" that the trial court in that matter considered mere arrests in fashioning its sentence. *Thomas*, 111 Ill. App. 3d at 454. As that record revealed, not only did the trial court have files related to the crime involved that were never disclosed to the defendant (thereby never affording him the opportunity to rebut them), but it also examined his prior arrests and used the substance of these, without any evidence of their validity, in considering the length of his sentence and its terms and conditions. See *Thomas*, 111 Ill. App. 3d at 452-54. In direct contradistinction, the trial court in the instant cause never stated, or even intimated, that it would be relying on defendant's prior arrests or acquittal in imposing a sentence. Rather, and again, it

clearly stated that it was examining his behavior following these and leading up to the instant crime, as well as the critical factor of deterrence, which it found played a significant role here considering all who were involved. Putting aside his prior arrests and acquittal, the fact remains that defendant had prior, serious brushes with the law and, instead of learning from them, chose to arrange a drug deal and attend it while armed, resulting in the victim's death. Unlike *Thomas*, this record supports the trial court's finding that these considerations were appropriate in determining his sentence, and we find that defendant has not shown that the court "relied" on his mere prior arrests and acquittal as improper factors in aggravation. See, *e.g.*, *People v. Williams*, 272 Ill. App. 3d 868, 879 (1995) (trial court can properly conclude that a defendant has a history of violence without consideration of mere arrests).[3]

¶ 56 Defendant further asserts that the court's declaration that he had no rehabilitative potential and the fact that he received the maximum sentence despite his prior history of only one misdemeanor conviction additionally indicate that the court's sentence was inappropriate here. He is, again, wholly incorrect. First, and most significant, the trial court never stated that defendant had no rehabilitative potential. Rather, he severely misconstrues the record in his assertion. Upon our reading of the entire hearing, not only do we find no statement to this effect, but we do not find even a slight intimation anywhere in the court's colloquy that this is what it

[3]Defendant's reliance on *People v. Johnson*, 347 Ill. App. 3d 570 (2004), is similarly misplaced, as that case is also entirely distinguishable from the instant matter. Like *Thomas*, the trial court in *Johnson* specifically stated it was relying on an out-of-state arrest in sentencing that defendant. See *Johnson*, 347 Ill. App. 3d at 576. Again, in the instant cause, we find that the trial court did not rely on defendant's prior arrests and acquittal but, rather, on his conduct and deterrence, in sentencing him.

believed in any respect. Directly to the contrary, the court stated that defendant "does have the potential to be rehabilitated." In fact, the court discussed this at several points during its colloquy, acknowledging his youth; his stable, supportive and loving family life; and their stress on education, of which defendant availed himself, attending college after high school and participating in athletics there. However, while recognizing his rehabilitative potential, the court determined that defendant "has demonstrated *** that he can't do it." Again, this was because, with all the opportunities defendant had in his past (via that supportive family and education, and via his brushes with the law), he continued to pursue a life of crime. Thus, the trial court never stated defendant was unable to be rehabilitated; rather, it acknowledged that he could have been, but he himself demonstrated, by once again involving himself in crime–this time, while armed and resulting in the victim's death–he was continuously unwilling to pursue that avenue.

¶ 57 Equally unavailing is defendant's assertion that his sentence is inherently improper because the trial court sentenced him to the statutory maximum even though his criminal history included only one misdemeanor conviction. While this technically may be the case, it does not, alone, indicate any abuse of discretion on the part of the trial court. See *People v. Ruiz*, 312 Ill. App. 3d 49, 59-60 (2000) (trial court did not abuse discretion in imposing maximum statutorily permissible sentences, especially when it gave sufficient consideration to mitigating factors, primary among them that the defendant had no prior convictions, and determined that aggravating factors outweighed them). This is particularly true in light of the fact that, again, the trial court here was explicit in enumerating the reasons for the sentence it imposed: the "aggravating" factor of defendant's conduct, namely, his arrangement and participation in a drug

deal while armed and which resulted in the victim's death only six months after he had just spent some five years in prison before being acquitted, and the "necessary" factor of deterrence in light of those involved in this crime. The trial court mentioned repeatedly that these were the two concerns forming the basis for its reasoned decision and that these concerns outweighed all the factors defendant presented in mitigation.

¶ 58 Ultimately, we note that in determining an appropriate sentence for a defendant, the sentencing court must weigh both aggravating and mitigating factors. See 730 ILCS 5/5-5-3.1, 3.2 (West 2008). When such factors have been presented to the court, it is presumed that they have been considered, absent some contrary indication. See *People v. Sutherland*, 317 Ill. App. 3d 1117, 1131 (2000); see also *People v. Cord*, 239 Ill. App. 3d 960, 969 (1993) (when mitigating factors have been presented, it is presumed court considered them in fashioning sentence and burden rests with the defendant to prove that court failed to do so). The sentencing court is not required to recite or assign a value to each factor in mitigation or aggravation that forms part of the record. See *People v. Daniel*, 2014 IL App (1st) 121171, ¶ 14; *People v. Hindson*, 301 Ill. App. 3d 466, 476 (1998). And, "[t]he weight that the trial judge accords each factor in aggravation and mitigation, and the resulting balance that is struck among them, depends on the circumstances of the case." *Sutherland*, 317 Ill. App. 3d at 1131. For example, while it is true that a sentencing court is to keep in mind the "objective of restoring the offender to useful citizenship" (Ill. Const. 1097, art. 1, § 11), it is not required to give that more weight than the seriousness of the crime, protection of the public, punishment and deterrence. See *People v. Harris*, 294 Ill. App. 3d 561, 569 (1998). Nor is it required to do this with a

defendant's youth (see *People v. Hoskins*, 237 Ill. App. 3d 897, 900 (1992)), his rehabilitative potential (see *Wilburn*, 263 Ill. App. 3d at 185), his lack of a criminal history (see *People v. Tijerina*, 381 Ill. App. 3d 1024, 1041 (2008)), the nonviolent nature of his prior offenses (see *People v. Hill*, 408 Ill. App. 3d 23, 29-30 (2011)), or the fact that he received sentences for prior convictions that were comparatively lenient (see *Kelley*, 2013 IL App (4th) 110874, ¶¶ 45-47)). And, critically, a sentence within the prescribed statutory range is presumed to be appropriate and will not be deemed excessive unless the defendant affirmatively shows that his sentence varies greatly from the purpose and spirit of the law or is manifestly disproportionate to the nature of the offense. See *Fern*, 189 Ill. 2d at 54; accord *Stacey*, 193 Ill. 2d at 210.

¶ 59 The trial court's colloquy in the instant cause clearly demonstrates that the sentence it rendered was thoroughly contemplated, appropriate, fair and based on a balance of all the aggravating and mitigating factors presented at defendant's sentencing hearing. We have already discussed them at length herein and, thus, need not repeat them again. What is undeniably clear is that the court conducted an intensive analysis of all the factors presented; it was quick to note many mitigating factors and praised defendant for them, but it could not overlook the factors it found to be in aggravation.

¶ 60 From all this, we find no excessiveness or disproportionality. A variety of factors were presented to and discussed by the trial court in fashioning its sentence for defendant. Undeniably, these included those he now points to appeal, including his youth, family, education, and sole misdemeanor conviction. While the court acknowledged these and spent a good portion of its colloquy discussing defendant's rehabilitative potential, it found more

weighty the fact that despite all this, defendant has not yet seemed to learn his lesson and this time it resulted in the victim's death, and that deterrence was critical under the circumstances since defendant had involved a minor in his crime. The court's attempt at balancing these competing interests is obvious in the record and, that its decision was not one favorable to defendant, alone, cannot support the conclusion that the sentence it rendered was excessive. Indisputably, while it was the statutory maximum, it was within the appropriate sentencing range for his instant conviction and, thus, presumptively proper. See 730 ILCS 5/5-4.5-30(a) (West 2012); see, *e.g.*, *Ruiz*, 312 Ill. App. 3d at 59-60. Moreover, the fact remains that defendant, having used the services of a high school girl to set up a hefty drug deal to replenish his supply of illegal drugs, attended that drug deal while armed and shot the victim in the back, killing him, and then fled the scene. Therefore, based on all this, we reject defendant's arguments regarding the court's alleged reliance on his prior arrests and acquittal, declaration that he had no rehabilitative potential, and its imposition of an inappropriately lengthy sentence and find, instead, that his sentence, which was properly within the applicable sentencing range for the crime of which he was convicted, was, contrary to his contention, not excessive in light of the circumstances presented. Simply put, the trial court here did not abuse its discretion in sentencing defendant to the maximum statutory term of 20 years in prison.

¶ 61 CONCLUSION

¶ 62 For all the foregoing reasons, we affirm the judgment of the trial court.

¶ 63 Affirmed.