2017 IL App (1st) 143182-U

FIFTH DIVISION
April 28, 2017

No. 1-14-3182

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County
Plaintiff-Appellee,	)	
v.	)	No. 13 CR 1445501
BLAIR AIKENS,	)	
Defendant-Appellant.	)	Honorable Marguerite A. Quinn, Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Justice Lampkin concurred in the judgment.
Presiding Justice Gordon specially concurred in the judgment.

ORDER

¶ 1 *Held*: Affirming the judgment of the circuit court of Cook County where (1) the evidence was sufficient to find defendant guilty of the offenses charged, (2) no error was committed in allowing certain testimony at trial, (3) the prosecutor's comments during closing argument did not prejudice defendant or constitute error, and (4) the trial court did not abuse its discretion when sentencing defendant.

¶ 2 Following a jury trial, defendant Blair Aikens was found guilty of two counts of unlawful

use of a weapon by a felon (UUWF) (720 ILCS 5/24-1.1(a) (West 2014)) and one count of armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2014)) and sentenced to three concurrent 12-year terms of imprisonment in the Illinois Department of Corrections. On appeal, defendant contends: (1) the State failed to prove him guilty beyond a reasonable doubt of UUWF and armed habitual criminal where the only evidence of defendant's possession of the handgun was a police officer's testimony that he observed the defendant throw "an object"; (2) certain testimony at defendant's trial regarding the circumstances of another individual's arrest was substantially prejudicial and should not have been admitted; (3) prosecutorial misconduct during rebuttal closing arguments deprived defendant of a fair trial; and (4) the matter must be remanded for resentencing where the trial court allowed the State to present improper evidence. In addition, the State requests the mittimus be corrected to reflect the proper counts under which defendant was convicted. For the following reasons, we affirm and correct the mittimus.

¶ 3 BACKGROUND

¶ 4 Defendant was charged by indictment with various offenses totaling 15 counts based on his being in possession of a firearm on July 16, 2013.[1] Those offenses were as follows, unlawful use of a weapon, unlawful use of a weapon by a felon, aggravated unlawful use of a weapon, unlawful possession of a firearm by a street gang member, and armed habitual criminal. The matter proceeded to a jury trial on count one (armed habitual criminal), count 19 (unlawful possession of weapon by a felon based on defendant's possession of a firearm), and count 20 (unlawful possession of a weapon by a felon based on defendant's possession of firearm ammunition).

[1] The record demonstrates that charges against both defendant and Antoine Hill were simultaneously brought before a grand jury. Accordingly, there were 27 total counts for this particular indictment, but only 15 of those counts pertain to defendant.

¶ 5 The following facts were adduced at trial. At 4:30 p.m. on July 16, 2013, Evanston police officer Kyle Wideman and his partner Detective Corey McCray were traveling southbound in the 1800 block of Hovland Court when they observed two individuals walking eastbound through a vacant lot. Immediately upon viewing the officers, the two individuals gave chase. Wideman and McCray later identified the two individuals as defendant and Antoine Hill. Wideman quickly exited the police vehicle and pursued defendant on foot through the vacant lot. Before giving chase as well, McCray called for assistance over the police radio. As defendant was running, Wideman was approximately 15 feet behind him when he observed defendant toss an object over a fence and into the yard of the residence located at 1811 Hovland Court. Wideman continued his pursuit of defendant and was able to apprehend him in a yard which was across the alley behind Hovland Court. Defendant was then placed in custody. Wideman testified he knew defendant and was aware that there was an outstanding warrant for defendant's arrest. McCray, who had followed closely behind Wideman during his pursuit of defendant, observed Wideman place defendant in custody, but did not observe defendant discard anything during the chase.

¶ 6 While defendant was being placed in custody, McCray observed some slight movement near a fence. Detective James Pillars, arrived at the scene as defendant was being placed in custody, testified he also observed an individual on the other side of the same fence and ordered him to stay still. The individual, later identified by Pillars as Hill, disobeyed Pillars and as a result Pillars gave chase. With Pillars in pursuit, Hill attempted to scale a fence and was "flailing his arms and kicking his legs" and, according to Pillars, was resisting arrest. While both Pillars and Hill were struggling on the fence, the fence collapsed injuring Pillars. Hill was then taken into custody. At no point during the pursuit were any other individuals in the area where

Wideman observed defendant discard the object.

¶ 7 Wideman and McCray testified that shortly after defendant was detained they retraced defendant's steps to locate any discarded items. They gained access to the backyard of 1811 Hovland Court and there, on the northeast side of the yard approximately 10 feet away from the edge of the fence, discovered a "black and chrome Ruger SR9 .9 mm" handgun with a chambered round. The northeast side of the yard was adjacent to the vacant lot through which defendant fled. An hour later, Officer Anthony Sosa, a canine handler with the Evanston police department, arrived with his canine partner, Rony. After a search of the backyard at 1811 Hovland Court, Rony alerted Sosa of possible evidence in a pile of yard debris. A search of the pile led to the recovery of a Beretta pistol. The two handguns were discovered approximately five feet away from each other in the same yard located at 1811 Hovland Court. No other evidence was discovered.

¶ 8 The weapons were collected and inventoried by Officer Chris Seebacher of the Evanston police department. Officer Larry Miller, an expert in fingerprint analysis, testified that there were no suitable fingerprints sufficient for comparison found on the Ruger. He further opined that this could be because of excess moisture on the handgun and because there were overlapping fingerprints. As for the Beretta, Miller testified that a latent fingerprint belonging to Hill was found on the weapon.

¶ 9 Prior to resting, the State and defense stipulated that defendant had previously been convicted twice of delivery of a controlled substance, a felony. The defense presented no evidence.

¶ 10 After hearing closing arguments and being instructed, the jury deliberated and ultimately found defendant guilty of count one (armed habitual criminal), count 19 (unlawful possession of

weapon by a felon based on defendant's possession of a firearm), and count 20 (unlawful possession of a weapon by a felon based on defendant's possession of firearm ammunition). Thereafter, defendant filed a posttrial motion, which the trial court denied.

¶ 11 The matter then immediately proceeded to a sentencing hearing where the State presented the testimony of Detective Michael Endre (Endre) in aggravation. After considering the testimony in aggravation and mitigation, defendant's PSI, and the statutory factors, the trial court sentenced defendant as a Class X offender to 12 years' imprisonment on each of the counts to be served concurrently. This appeal followed.

¶ 12 ANALYSIS

¶ 13 On appeal, defendant contends: (1) the State failed to prove him guilty beyond a reasonable doubt of UUWF and armed habitual criminal where the only evidence of defendant's possession of the handgun was a police officer's testimony that he observed the defendant throw "an object"; (2) certain testimony regarding the circumstances of another individual's arrest was substantially prejudicial and should not have been admitted at defendant's trial; (3) prosecutorial misconduct during rebuttal closing arguments deprived defendant of a fair trial; and (4) the matter must be remanded for resentencing where the trial court allowed the State to present improper evidence. We address each argument in turn.

¶ 14 Sufficiency of the Evidence

¶ 15 Defendant first challenges the sufficiency of the evidence, arguing that the State did not establish beyond a reasonable doubt that he possessed the firearm.

¶ 16 When reviewing the sufficiency of the evidence in a criminal case, we must determine whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v.*

Virginia, 443 U.S. 307, 319 (1979); *People v. Smith*, 185 Ill. 2d 532, 541 (1999). We will not reverse a criminal conviction unless the evidence is so unreasonable, improbable or unsatisfactory as to create a reasonable doubt of the defendant's guilt. *People v. Ortiz*, 2012 IL App (2d) 101261, ¶ 9. A reviewing court does not retry the defendant or substitute its judgment for that of the trier of fact with regard to the credibility of witnesses or the weight to be given to each witness' testimony. *People v. Jackson*, 232 Ill. 2d 246, 280-81 (2009); *People v. Boykin*, 2013 IL App (1st) 112696, ¶ 6. Rather, we "carefully examine the evidence while bearing in mind that the trier of fact is in the best position to judge the credibility of witnesses, and due consideration must be given to the fact that the fact finder saw and heard the witnesses." *People v. Herman*, 407 Ill. App. 3d 688, 704 (2011); see *People v. Rivas*, 302 Ill. App. 3d 421, 430 (1998). Moreover, circumstantial evidence is sufficient in itself to support a conviction, as long as the elements of the crime have been proven beyond a reasonable doubt. *People v. Milka*, 211 Ill. 2d 150, 178 (2004).

¶ 17 To sustain a conviction of armed habitual criminal, the State must prove, beyond a reasonable doubt, that defendant possessed a firearm after having being convicted of two or more qualifying felonies. 720 ILCS 5/24-1.7(a) (West 2014). For the unlawful possession offense, the State needed to establish that the defendant offender knowingly possessed a firearm after having been convicted of a prior felony. See 720 ILCS 5/24-1.1(a) (West 2014).

¶ 18 Defendant does not dispute the proof of his two prior qualifying felony convictions, but maintains that there was insufficient proof that he possessed a firearm where Wideman testified only that he observed an object being thrown and did not provide a description of the object.

¶ 19 In order for the State to establish defendant was guilty of the armed habitual criminal and UUWF statutes, it must establish he possessed the firearm. 720 ILCS 5/24-1.7(a) (West 2014);

720 ILCS 5/24-1.1(a) (West 2014). The element of possession may be satisfied by either actual or constructive possession of the weapon. *People v. Ingram*, 389 Ill. App. 3d 897, 899 (2009). Actual possession, which is at issue in this case, is "the exercise by the defendant of present personal dominion over the illicit material and exists when a person exercises immediate and exclusive dominion or control over the illicit material, but does not require present personal touching of the illicit material." *People v. Givens*, 237 Ill. 2d 311, 335 (2010). The State may prove actual possession with testimony demonstrating "some form of dominion over the unlawful [item], such as trying to conceal it or throwing it away." *People v. Love*, 404 Ill. App. 3d 784, 788 (2010). Once possession has been established, the trier of fact may draw an inference of guilty knowledge from the surrounding facts and circumstances. *People v. Schmalz*, 194 Ill. 2d 75, 82 (2000).

¶ 20 Although defendant emphasizes that his fingerprints were not found on the firearm and that none of the witnesses actually observed him in physical possession of the weapon, Wideman's testimony establishes that defendant had actual possession by exercising dominion over the firearm by trying to throw it away. See *Love*, 404 Ill. App. 3d at 788. The evidence in this case, when viewed in the light most favorable to the prosecution, demonstrates that immediately after Wideman made eye contact with defendant, Hill and defendant ran. See *People v. Harris*, 52 Ill. 2d 558, 561 (1972) (flight was admissible as a circumstance that tended to show consciousness of guilt). Wideman further testified that while engaged in the foot pursuit of defendant, he observed defendant throw an object over the fence at 1811 Hovland Court. Thereafter, defendant continued to disobey Wideman's orders to stop and was ultimately apprehended in the yard of a residence across the alley. During the immediate search of the yard, the Ruger handgun was discovered 10 feet from the fence at 1811 Hovland Court.

¶ 21 Furthermore, "[b]ecause possession is often difficult to prove directly, proving possession frequently rests upon circumstantial evidence. *Love*, 404 Ill. App. 3d at 788. It is not necessary that the jury be satisfied beyond a reasonable doubt as to each link in the chain of circumstances. It is sufficient if all the evidence taken together satisfies the jury beyond a reasonable doubt of the accused's guilt. *People v. Jones*, 105 Ill. 2d 342, 350 (1985). The circumstantial evidence in this case provided further indication of defendant's guilt. Not only did defendant and Hill flee from the officers in the same direction through the vacant lot adjacent to 1811 Hovland Court, but both individuals were ultimately detained and two handguns were found in the fenced yard of 1811 Hovland Court. See *People v. Lewis*, 2015 IL App (1st) 122411, ¶ 77 (flight is circumstantial evidence of guilt); *People v. Lobb*, 17 Ill. 2d 287, 295 (1959) (it is well settled that the fact finder may consider evidence of flight, in connection with all the other evidence in the case, as tending to prove guilt). Additionally, the Ruger was discovered 10 feet away from the fence while the Beretta was recovered from a pile of yard debris five feet away from the Ruger. It would be reasonable for a jury to conclude that two men fleeing from police would each discard contraband in such a manner. In addition, Miller testified that Hill's fingerprint was on the Beretta; however, he was unable to find a suitable fingerprint for comparison with defendant's fingerprint on the Ruger. According to Miller, a suitable fingerprint might not be available on a handgun depending on the amount of moisture on the weapon. The State's evidence indicated that this incident occurred in July and defendant was running away from officers, thus it would be reasonable for the jury to conclude that defendant's fingerprints would not likely be found on the weapon. Additionally, any lack of fingerprint evidence only affected the weight of Wideman's testimony, and that determination was for the jury to make. See *People v. Abrams*, 21 Ill. App. 3d 734, 743 (1974). In sum, the inference that the Ruger handgun

was discarded by defendant flowed normally from the evidence presented to the trier of fact (*People v. Martin*, 401 Ill. App. 3d 315, 323-24 (2010)), which was not required to search out all possible explanations consistent with innocence and raise them to the level of a reasonable doubt (*People v. Moore*, 394 Ill. App. 3d 361, 364-65 (2009)). Furthermore, it is well-settled that the testimony of a single witness, if positive and credible, is sufficient to convict. *People v. Dunskus*, 282 Ill. App. 3d 912, 918-19 (1996).

¶ 22 Viewing the evidence in the light most favorable to the State, we conclude that the trier of fact could find that defendant was in possession of a firearm (*People v. Pintos*, 133 Ill. 2d 286, 292 (1989)), and, with the evidence of his prior convictions, that he was found guilty of the charged offenses of armed habitual criminal and UUWF beyond a reasonable doubt. 720 ILCS 5/24-1.7(a) (West 2014); 720 ILCS 5/24-1.1(a) (West 2014).

¶ 23 In reaching this conclusion, we find *People v. Wright*, 2013 IL App (1st) 111803, cited by defendant, distinguishable from the case at bar. In *Wright*, officers were executing a search warrant inside a residence when the defendant ran down the basement steps away from the officers, fell over another individual, and landed at the bottom of the stairs on his stomach. *Id.* ¶ 7. It was then that officers observed a handgun protruding from underneath the defendant's torso. *Id.* ¶ 10. No testimony was elicited from the officers that they observed the defendant "make any motion that would indicate or suggest that defendant discarded a weapon." *Id.* ¶¶ 9, 12. The defendant testified that he did not have a firearm. *Id.* ¶ 14. Despite this evidence, the trial court found defendant guilty of aggravated unlawful use of a weapon. *Id.* ¶ 18.

¶ 24 On appeal, the defendant maintained that the State failed to prove that he constructively possessed a firearm. *Id.* ¶¶ 20, 25. The reviewing court agreed, noting that of the State's three witnesses, none testified that they observed a weapon in the defendant's hands or "noticed him

make any actions that would indicate that he was discarding a gun." *Id.* ¶ 26. The reviewing court further acknowledged that there was no testimony that defendant "made any movements to indicate knowledge of a weapon." *Id.* In support of its holding, the reviewing court concluded that, "The 'mere presence' of a weapon is not sufficient to prove defendant had knowledge of the weapon." *Id.* (quoting *People v. Bailey*, 333 Ill. App. 3d 888, 891 (2002)). The *Wright* court went on to find that even if the State could prove that the defendant had knowledge of the presence of the weapon, it would have been unable to prove that the defendant exercised immediate and exclusive control over the basement area where the weapon was discovered. *Id.*

¶ 25 Unlike *Wright*, this case does not involve defendant's mere presence near the weapon as he argues. Rather, Wideman, while engaged in a foot chase with defendant, observed defendant throw an object over a fence. Shortly thereafter defendant was detained and the Ruger was recovered in the yard where Wideman observed defendant throw the object. In addition, *Wright* is further distinguishable where that case involved issues of constructive possession, whereas here the State has alleged and proven defendant had actual possession of the weapon.

¶ 26 We also observe that defendant contends that the police did not have ample opportunity to witness any wrongdoing. However, there was sufficient time where Wideman testified that once defendant commenced running, he immediately exited his vehicle in pursuit and ran into the vacant lot next to 1811 Hovland Court. Once in the vacant lot, Wideman was 15 feet away from defendant when he observed him throw an object in to the backyard of 1811 Hovland Court. Accordingly, there was sufficient evidence to allow the jury to find that defendant possessed a firearm and was in turn guilty of armed habitual criminal and UUWF beyond a reasonable doubt. 720 ILCS 5/24-1.7(a) (West 2014); 720 ILCS 5/24-1.1(a) (West 2014).

¶ 27 Prejudicial Testimony

¶ 28 Defendant next argues that Pillars' testimony, particularly with regards to his pursuit of Hill, was irrelevant and substantially prejudicial. Defendant maintains that this testimony should not have been admitted at the trial. Defendant acknowledges that he failed to preserve this issue for our review and requests that we consider his contention under the plain-error doctrine. In the alternative, defendant asserts that his trial counsel was ineffective for failing to object to this testimony.

¶ 29 To preserve an issue for review, defendant must object both at trial and in a written posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Failure to do so operates as a forfeiture as to that issue on appeal. *People v. McCarty*, 223 Ill. 2d 109, 122 (2006). This court can, however, consider unpreserved issues under the plain-error doctrine. See Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). The plain-error doctrine "allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). The plain-error rule, however, "is not 'a general savings clause preserving for review all errors affecting substantial rights whether or not they have been brought to the attention of the trial court.' " *People v. Herron*, 215 Ill. 2d 167, 177 (2005) (quoting *People v. Precup*, 73 Ill. 2d 7, 16 (1978)). Rather, our supreme court has held that the plain-error rule is a narrow and limited exception to the general rules of forfeiture. *Id.* It is the defendant who carries the burden of persuasion under both prongs of the plain-error doctrine. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009). This court must first consider whether any error occurred. *People v.*

Boston, 2016 IL App (1st) 133497, ¶ 56 (citing *Herron*, 215 Ill. 2d at 181-82).

¶ 30 Only relevant evidence may be admitted at trial, that is, evidence having a tendency to prove or disprove a fact that is of consequence to the determination of the action. *People v. Harvey*, 211 Ill. 2d 368, 392 (2004). "Relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ill. R. Evid. 401 (eff. Jan. 1, 2011). Even relevant evidence, however, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Ill. R. Evid. 403 (eff. Jan. 1, 2011). The admissibility of evidence rests within the discretion of the trial court, and its decision will not be disturbed absent an abuse of that discretion. *People v. Becker*, 239 Ill. 2d 215, 234 (2010).

¶ 31 The State maintains that Pillars' testimony is relevant to defendant's trial in that two handguns were discovered near each other in the backyard. According to the State, Pillars' testimony is relevant because it establishes that Hill was also arrested for possessing a weapon at the same time as defendant and supports the State's theory of the case that one weapon, the Beretta, belonged to Hill while the other weapon, the Ruger, belonged to defendant. We agree with the State and conclude that Pillars' testimony about Hill's arrest has a tendency to prove a fact that is of consequence to the determination of the action.

¶ 32 Moreover, we disagree with defendant's assertion that the prejudicial effect of Pillars' testimony substantially outweighed its probative value. In fact, we disagree that Pillars' testimony was prejudicial towards defendant at all. Defendant contends on appeal that Pillars' testimony established Hill's conduct during the arrest was "violent" and that the jury would assume that defendant was also a violent person because he was associated with Hill. As recited

above, the testimony at trial actually demonstrated that as Hill was attempting to climb over a fence he struggled with Pillars and the fence collapsed. The testimony that Hill was "flailing his arms and kicking his legs" does not conjure up images of violence, but instead merely demonstrates a man attempting to scale a fence while being pursued by an officer. Although Pillars testified that Hill was resisting arrest at this time, there was no testimony elicited from Pillars that Hill specifically hit or kicked him. Furthermore, the prosecutor did not mention any of these details during closing argument. See *People v. Orr*, 149 Ill. App. 3d 348, 365 (1986). While Pillars did testify that he suffered an injury from the fence collapsing, the photographs defendant contends prejudiced him were not included in the record on appeal. It is well established that the appellant bears the burden of providing a reviewing court with a complete record sufficient to support his claims of error, and any doubts that arise from the incompleteness of the record will be resolved against the appellant. *People v. Lopez*, 229 Ill. 2d 322, 344 (2008) (citing *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984)). Accordingly, without the photograph we cannot determine whether the photograph of the injury Pillars sustained was in and of itself sufficiently prejudicial to warrant a new trial.

¶ 33 Defendant relies on two cases, *People v. Hoerer*, 375 Ill. App. 3d 148 (2007) and *People v. Lopez*, 2014 IL App (1st) 102938-B, to support his argument that Pillars' testimony was irrelevant. Both cases are distinguishable from the matter at bar. In *Hoerer*, the reviewing court found that, "The evidence of [co-defendant] Boand's sexual assault on the witness was graphic and would tend to color a juror's view of defendant, thereby arousing 'prejudice and hostility on the part of the jury.' " *Hoerer*, 375 Ill. App. 3d at 158. Here, as previously discussed, Pillars' testimony was hardly "graphic" in a way that would color the jurors' views of defendant. In *Lopez*, the issue was whether a prior crime in which the defendant was not a participant was

admissible at the defendant's trial where there was no evidence demonstrating a connection between the two incidents. *Lopez*, 2014 IL App (1st) 102938-B, ¶¶ 22, 24. The reviewing court concluded that such evidence was irrelevant and prejudicial to the defendant and reversed the defendant's conviction and remanded for a new trial. *Id.* ¶¶ 29, 30. Here, however, Pillars' testimony is relevant where two handguns were recovered from the area where defendant threw an object. Thus, Pillars' testimony assists the State in establishing, via circumstantial evidence, that defendant was not the only individual arrested for possession of a weapon and that the Ruger which was recovered belonged to defendant. For these reasons, we conclude Pillars' testimony was relevant and nonprejudicial and, thus, find the trial court did not abuse its discretion when it allowed this testimony. Accordingly, there is no support for defendant's claim of plain error.

¶ 34 In the alternative, defendant maintains that his counsel was ineffective for failing to object to Pillars' testimony. As we have concluded that the admission of Pillars' testimony was not error, it follows that defense counsel cannot be ineffective as defendant alleges. Thus, defendant's claim fails. See *People v. White*, 2011 IL App (1st) 092852, ¶ 63.

¶ 35 Prosecutorial Misconduct

¶ 36 Defendant next contends that the prosecutor's repeated acts of misconduct denied him of his right to a fair and impartial trial. Defendant specifically notes that the prosecutor improperly (1) bolstered Wideman's credibility; (2) left the jury with the impression that his fingerprint was on the Ruger handgun; and (3) inflamed the jury's passions through repeated hypotheticals involving children.

¶ 37 Prior to turning to the merits of defendant's specific arguments, we acknowledge that out of the numerous statements defendant challenges, defense counsel only objected to one and did not raise this issue in his posttrial motion. As previously discussed, this court can consider

unpreserved issues under the plain-error doctrine. See Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). However, in applying a plain-error analysis this court must first consider whether any error occurred. *Boston*, 2016 IL App (1st) 133497, ¶ 56 (citing *Herron*, 215 Ill. 2d at 181-82).

¶ 38 Initially, the parties disagree about the proper standard of review. Defendant asserts the proper standard of review in this instance is *de novo*. See *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007) (utilizing *de novo* standard of review to determine whether claimed improper arguments were so egregious as to warrant a new trial). The State, on the other hand, asserts the standard of review is abuse of discretion. See *People v. Caffey*, 205 Ill. 2d 52, 128 (2001). We observe that while it is not clear if a prosecutor's comments during closing arguments are reviewed *de novo* or for an abuse of discretion (see *People v. Daniel*, 2014 IL App (1st) 121171, ¶ 32; *People v. Maldonado*, 402 Ill. App. 3d 411, 421 (2010); *People v. Johnson*, 385 Ill. App. 3d 585, 603 (2008)), we do not need to resolve the issue of the appropriate standard of review at this time, because our holding in this matter would be the same under either standard.

¶ 39 The State is afforded wide latitude in making closing arguments. *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). A prosecutor may comment on the evidence presented at trial, as well as any fair, reasonable inferences therefrom, even if such inferences reflect negatively on the defendant. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005). Comments made during closing argument are not improper if they were invited by the defense and comments made during closing arguments must be viewed in the context of the entire arguments of both parties. *People v. Giraud*, 2011 IL App (1st) 091261, ¶ 43. "The standard of review applied to arguments by counsel is similar to the standard used in deciding whether a plain error was made: comments constitute reversible error only when they engender substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilt resulted from those comments."

People v. Fountain, 2016 IL App (1st) 131474, ¶ 82. Thus, reversal is warranted only if the prosecutor's remarks created "substantial prejudice." *Wheeler*, 226 Ill. 2d at 123; *People v. Johnson*, 208 Ill. 2d 53, 64 (2003); *People v. Easley*, 148 Ill. 2d 281, 332 (1992) ("The remarks by the prosecutor, while improper, do not amount to substantial prejudice.").

¶ 40 The first alleged improper remarks occurred when the assistant State's attorney stated the following during closing argument:

> "When you are considering the evidence, it is your job to judge the credibility of each witness. So think back to Officer Wideman's testimony. Did you find him credible? His testimony was straight forward and to the point. He got up there, and he testified about everything that happened that day, and he was straight forward. He was forthcoming and he was to the point.
>
> * * *
>
> He was credible during his testimony. He was never impeached; and if you believe the testimony that you heard from Officer Wideman, then you have everything you need to find Blair Aikens guilty.
>
> But other than his testimony, you have other evidence to prove that Officer Wideman was telling you the truth and that object that he saw the defendant throw over that fence was a gun."

In rebuttal, the prosecutor argued:

> "[Wideman] told you he saw an object leave the defendant's hand towards that fenced-in yard. He didn't tell you anything that wasn't true. He wasn't asked a question that he couldn't answer. He didn't say it was a gun. He said I saw an object. He was honest. He told you the truth."

¶ 41 Defendant maintains that this line of argument primarily consisted of the prosecutor vouching for the Wideman's credibility. According to defendant, the prosecutor's statements were not based on the record, but instead on her personal opinions. Defendant contends that these repeated references to Wideman's truthfulness and the lack of impeachment were improper and highly prejudicial to the defense. We disagree.

¶ 42 Generally, it is improper to vouch for the credibility of a witness or to express a personal opinion on a case. *People v. Johnson*, 114 Ill. 2d 170, 198 (1986). A prosecutor may, however, comment on a witness' credibility (*People v. Pope*, 284 Ill. App. 3d 695, 706 (1996)), and comments on the strength of the evidence are permitted (*People v. Yates*, 98 Ill. 2d 502, 532 (1983)). "In order for a prosecutor's comments regarding a witness's credibility to be improper, 'he must *explicitly* state that he is asserting his personal views.' " (Emphasis in original.) *People v. Deramus*, 2014 IL App (1st) 130995, ¶ 51 (quoting *Pope*, 284 Ill. App. 3d at 707).

¶ 43 We first observe that the prosecutor refrained in argument from using sentences beginning with "I believe" or "I think," but acknowledge that even if she had, it would not have amounted to error. See *Pope*, 284 Ill. App. 3d at 706-07. "Appellate courts are unwilling to infer that a prosecutor is injecting his [or her] personal opinion into an argument where the record does not unambiguously say so." *People v. Jackson*, 391 Ill. App. 3d 11, 43 (2009). In the present case, the prosecutor did not personally vouch for the credibility of Wideman as she did not expressly state that it was her opinion that his testimony was credible. Accordingly, the prosecutor did not commit error here. See *People v. Emerson*, 122 Ill. 2d 411, 434 (1987) (finding the prosecutor's remarks regarding a witness' credibility to be either a fair comment on the evidence or finding they did not amount to personal opinions).

¶ 44 Defendant next argues that the prosecutor's theme of "two guys, two guns" left the jury

with the unsupported inference that defendant's fingerprint was found on the recovered gun. Our review of the record reveals otherwise.

¶ 45 Defendant points to the following specific comments made by the prosecutor:

> "Let's talk about the print on the second gun that was found on the Beretta. You can consider that print, Hill's print, on that gun as circumstantial evidence against this defendant Blair Aikens. Two guys, two guns. If only Antoine Hill had a gun, then why were two guns found? It's an awful big coincidence that these two guys out together running together in that same area that low and behold when they find this gun, there is [*sic*] two guns and one of them has Hill's print on it.
>
> The fact that there are partial prints on the Ruger, on the first gun that's found, is also helpful testimony. It tells us a couple things. One, it tells us that when Officer Miller was testifying that he was credible and that he had integrity in his field of expertise. He did not reach to make a match on that gun. He testified that there were partial prints on the Ruger, but that none of them were suitable for comparison. He did not stretch. He did not reach to make a match.
>
> Secondly, he testified that there are all kinds of reasons why prints that are left might not stay or might not be left in a way that's suitable to compare. One of the reasons he gave you was too much moisture. I think it's a reasonable inference for you to make that Blair Aikens is running with a gun in his hand, that he had sweaty palms on that hot day in July."

¶ 46 Defendant further asserts the prosecutor compounded this error in rebuttal when she stated that the fingerprints on the gun were defendant's:

> "Guilty people do guilty things. They run and they hide evidence. He was in control of

what he had in his possession. He took control of that gun that he was holding and he whipped it over that fence. That is a heavy, heavy item. When it lands, it lands hard, and it can hit things and they can fly up and land, okay.

The other firearm which is also heavy which we know came from that day because of Blair Aikens' fingerprint also lands, and it lands in that pile of yard waste, and when you look at the pictures, ladies and gentlemen—

THE COURT: I'm sorry. Excuse me. It was not Blair Aikens' fingerprint. The evidence has indicated it was Antoine Hill's.

[THE STATE]: I apologize.

THE COURT: That's all right. Go ahead. A slip of the tongue.

[THE STATE]: When you look at the gun in the back that had Antoine Hill's fingerprint on it, gee, it's not pristine. It's not that there was nothing on top of it because it's heavy, and when heavy things land, they can move other things in the area ***."

¶ 47 Neither of these comments support defendant's assertion that the prosecutor was improperly inferring that the evidence demonstrated defendant's fingerprints were on the Ruger. Regarding the latter comment, we observe that (1) from the context, it is apparent that the prosecutor was referencing Hill and not defendant and (2) the trial court immediately corrected the prosecutor's error, which the State acknowledged. As to the former comment, we find that the prosecutor made a reasonable inference based on the evidence that defendant's fingerprints could have been on the handgun, but correctly recounted Miller's testimony that there were no suitable fingerprints on the weapon for comparison. See *People v. Perry*, 224 Ill. 2d 312, 347 (2007) (prosecutors may comment on the evidence and any fair and reasonable inference the evidence yields). Consequently, we do not find these comments constitute error.

¶ 48 Lastly, defendant maintains that the prosecutor inflamed the passions of the jury by making continual references to children recovering the Ruger. Defendant asserts that the prosecutor was aware that the jury was made up of parents, including one individual who had a newborn baby, and based on this knowledge made a calculated decision to appeal to the jury's sympathies. Defendant first points to the prosecutor's use of a hypothetical regarding circumstantial evidence as an example of the prosecutor's attempt to inflame the passions of the jury. The prosecutor's hypothetical was as follows:

> "Take a mother at home with her two children. She decides to make some chocolate chip cookies. She makes them, takes them out of the oven, puts them on the cooling rack to cool. She goes upstairs to do a few errands leaving her children downstairs sitting in the kitchen watching TV in the family room. She comes downstairs and she sees that the tray is missing two cookies, and she sees one quickly throw something behind the couch and the other one has crumbs and chocolate all over their fingers. Did she see them take those cookies? Did she see them eat those cookies?
>
> When she goes back behind the couch and she finds a cookie still warm, she doesn't know. She didn't see what the object was that was thrown, but she knows what it was. She knows what happened. She did not have to see every aspect of it with her own eyes to know that these kids took the cookies. That is circumstantial evidence, and it is good evidence that you should consider. That is what the law tells you."

¶ 49 Defendant also points to a comment made by the prosecutor during rebuttal argument and maintains that it "served no other purpose than to inflame the passions of the jury against" defendant, particularly where there was no evidence that children were near the scene:

> "Ladies and gentlemen, the front of 1811 Hovland, the little kid, gee, low and

behold, there's a toy. Do you really think that the handgun that was tossed over the fence wasn't put there by him? That's ludicrous. There is a baby toy out there. And there's a gun. Oh, you know, that's common when there's four-year-olds running around."[2]

¶ 50 We do not consider the cookie jar hypothetical to be so egregious that it would inflame the passions of the jury. Regarding the latter comment, however, we observe that the record on appeal does not disclose that the State introduced evidence that children were at or near the location where the handgun was recovered. The evidence did demonstrate, however, that the weapon was discarded in a residential neighborhood inside a fence which was accessible to the family that resided therein.

¶ 51 Regardless of whether or not this comment constitutes error, the verdict will not be disturbed unless the remark caused defendant substantial prejudice. *People v. Williams*, 192 Ill. 2d 548, 573 (2000). Defendant maintains that the cumulative effect of the prosecutor's remarks, as discussed above, resulted in prejudice against him. After reviewing each of these comments in their proper context, we cannot agree with defendant's contention that the prosecutor engaged in prejudicial misconduct such that defendant was so prejudiced that he was deprived of a fair trial. Any alleged errors were mitigated when the trial court both advised the jury that comments made during closing arguments are not evidence. See *People v. Hampton*, 387 Ill. App. 3d 206, 222-23 (2008). Since the trial court instructed the jury that the closing arguments are not evidence, and in light of the evidence presented, we do not believe that the jury would have reached a different verdict had these comments not been made. See *id.*

¶ 52 Sentencing

¶ 53 Defendant next contends that his 12-year sentence is disproportionate to the nature of the

[2] We note that this was the only comment to which defense counsel objected, however, his objection was overruled by the trial court.

crime and disregards his rehabilitative potential where the trial court (1) did not consider he lacked a violent criminal record and had strong family support; (2) allowed the State "to inject inflammatory and irrelevant evidence during sentencing without allowing the defense to question that evidence"; and (3) generally considered improper evidence during sentencing.

¶ 54 We initially observe that "[i]t is well-settled that a trial judge's sentencing decisions are entitled to great deference and will not be altered on appeal absent an abuse of discretion." *People v. Jackson*, 375 Ill. App. 3d 796, 800 (2007); *People v. Snyder*, 2011 IL 111382, ¶ 36. "A sentence which falls within the statutory range is not an abuse of discretion unless it is manifestly disproportionate to the nature of the offense." *Jackson*, 375 Ill. App. 3d at 800. Here, defendant, a Class X offender, received three consecutive 12-year sentences for two counts of UUWF and one count of armed habitual criminal. The sentencing range for UUWF is 3 to 14 years. 720 ILCS 5/24-1.1(a), (e) (West 2014). The sentencing range for armed habitual criminal is between six and 30 years. 720 ILCS 5/24-1.7(a) (West 2014); 730 ILCS 5/5-4.5-25 (West 2014). Thus, defendant's three consecutive 12-year sentences fall within the statutory range and will not be reversed unless defendant can establish the trial court abused its discretion.

¶ 55 While defendant generally asserts that his sentence is excessive, his sole argument on appeal is that the trial court abused its discretion in sentencing him when it relied on unreliable hearsay evidence from Endre. Specifically, defendant maintains that this testimonial evidence was not tested for reliability or relevance, and because the evidence was "secondhand information that came from a confidential informant," it could not be scrutinized during cross-examination. Accordingly, defendant requests his sentence be vacated and the matter remanded to the trial court for resentencing.

¶ 56 In response, the State maintains that defendant forfeited this argument on appeal, as it

was not raised in a posttrial motion before the trial court and defendant failed to request plain-error review in his opening brief. In reply, defendant asserts that he did not forfeit the issue where it was raised in his postsentencing motion and he so argued before the trial court. Defendant further maintains that even if we were to consider the issue forfeited, that we review the matter for plain error.

¶ 57 Regardless of whether or not defendant properly raised this issue in the trial court, as previously discussed, the first step in a plain-error analysis is to determine whether any error occurred. See *Boston*, 2016 IL App (1st) 133497, ¶ 56 (citing *Herron*, 215 Ill. 2d at 181-82). For the reasons that follow, because we conclude no error occurred in sentencing defendant, it follows that there can be no plain error. *Id.*

¶ 58 It is well settled that the ordinary rules of evidence which govern at trial are relaxed at the sentencing hearing. *People v. Varghese*, 391 Ill. App. 3d 866, 873 (2009); *People v. Jett*, 294 Ill. App. 3d 822, 830 (1998). Instead, a sentencing court is given broad discretionary power to consider various sources and types of information so that it can make a sentencing determination within the parameters outlined by the legislature. *People v. Williams*, 149 Ill. 2d 467, 490 (1992). The court may search anywhere within reasonable bounds for other facts which may serve to aggravate or mitigate the offense. *People v. Moore*, 250 Ill. App. 3d 906, 919 (1993). It may inquire into a defendant's general moral character, habits, social environment, abnormal tendencies, age, natural inclination or aversion to commit crime, and stimuli motivating his conduct, in addition to his family life, occupation, and criminal record. *Id.*; see *Varghese*, 391 Ill. App. 3d at 873 (evidence admissible is essentially without limits). Thus, criminal conduct not resulting in prosecution or conviction may be considered. *People v. Hudson*, 157 Ill. 2d 401, 452 (1993); see *People v. Robinson*, 286 Ill. App. 3d 903, 910 (1997) (even conduct for which

defendant has been acquitted may be considered); *People v. Kliner*, 185 Ill. 2d 81, 171-172 (1998) (holding that a sentencing court may consider even uncharged conduct contained in a rap sheet).

¶ 59 The only requirement for admission of evidence in a sentencing hearing is that the evidence must be reliable and relevant as determined by the trial court within its sound discretion. *Jett*, 294 Ill. App. 3d at 830. Thus the mere fact that the testimony presented contains hearsay does not make it *per se* inadmissible nor does it deny the defendant his right to confront witnesses. *Varghese*, 391 Ill. App. 3d at 873; *People v. Perez*, 108 Ill. 2d 70, 86 (1985). A hearsay objection affects the weight rather than the admissibility of the evidence. *Jett*, 294 Ill. App. 3d at 830. Hearsay evidence may be found to be relevant, reliable, and admissible when it is corroborated by other evidence. *Id*. A sentencing court, however, must exercise care to insure the accuracy of information considered and to shield itself from what might be the prejudicial effect of improper materials. *Williams*, 149 Ill. 2d at 490. If it is shown that the defendant has been prejudiced by the procedure adopted or by the material considered by the trial court in conducting its inquiry, the resultant penalty will not be allowed to stand. *People v. Harris*, 375 Ill. App. 3d 398, 408-09 (2007).

¶ 60 The following testimonial evidence was presented by the State at sentencing. Detective Michael Endre of the Evanston police department testified that defendant and Hill were part of a feud between two families, the Gresham/Bambergs and the Davis/Hills. The feud began when one of the Gresham/Bambergs was murdered and, in retaliation, there have been multiple homicides and shootings between the families since 2005. Initially, defendant was on the side of the Gresham/Bambergs, but, according to a "confidential source," was ousted by that family when he failed to accept blame or be arrested during a traffic stop that resulted in the arrest of

two Gresham/Bamberg family members. According to Endre, defendant then joined up with the Davis/Hill family, of which Antoine Hill was a part.

¶ 61 Endre further testified that a confidential source informed him that, at the time of defendant's arrest, defendant and Hill were "in the process of approaching the Bamberg residence at 18[**] Brown to shoot at David Bramberg." According to Endre, Officer Giese, who had spoken with a separate confidential source, provided him with the same information. Endre also testified that Pillars, Detective Tortorello, and Wideman informed him the same day that defendant was arrested that they had observed David Bamberg, as well as some other Bamberg associates, in front of the Brown Avenue residence "within minutes and within hours prior to the arrest" of defendant and Hill. Endre additionally testified that the Bamberg residence was within 200 yards of the location where defendant was arrested.

¶ 62 We are not persuaded by defendant's challenge to the evidence relied on at his sentencing hearing. Endre's hearsay testimony regarding the statements of the confidential informant was both reliable and relevant. First, Endre testified that the confidential informant informed him that at the time of defendant's arrest in this case he was on his way to 1818 Brown Avenue where members of the Gresham/Bamberg family were known to congregate in order to shoot one of those individuals. This information was corroborated by Wideman and McCray's testimonies that defendant was arrested for possessing a handgun, with a bullet loaded in its chamber, only a few hundred yards away from 1818 Brown Avenue. Second, this statement from the confidential informant is relevant to defendant's sentencing where it goes towards defendant's general moral character, natural inclination to commit crime, and motivations for possessing the weapon. See *Moore*, 250 Ill. App. 3d at 919. In addition, Endre's testimony was subject to cross examination and under these circumstances the trial judge was well within her discretion in determining that

the evidence was reliable. See *Hudson*, 157 Ill. 2d at 448-453.

¶ 63 Furthermore, it is clear from the trial judge's comments at sentencing that she did not place undue weight upon Endre's hearsay testimony. The trial judge made it apparent on the record that she was aware of defendant's family support, but also that defendant had four prior felony convitions. The trial judge indicated that despite his criminal background and the warrant that was out for his arrest, defendant thought it was a "smart idea" to walk around Evanston with a loaded handgun. It is apparent from the record that the trial court relied on Endre's testimony as evidence of defendant's character and motivations. Accordingly, the record demonstrates that defendant was not unduly prejudiced by Endre's testimony. See *Williams*, 149 Ill. 2d at 490.

¶ 64 Defendant also maintains that Endre's testimony that defendant was arrested with others who were convicted of possession of a weapon is not admissible here. In support of his contention, defendant relies on certain cases for the proposition that "mere arrests" are not admissible during sentencing hearings in aggravation as they serve no other purpose than to subject the defendant to punishment for crimes of which he is not guilty. See *People v. Gaines*, 21 Ill. App. 3d 839, 847 (1974); *People v. Lemke*, 33 Ill. App. 3d 795, 797-98 (1975); *People v. Johnson*, 347 Ill. App. 3d 570, 575 (2004); *People v. Wallace*, 145 Ill. App. 3d 247, 255 (1986). The flaw with defendant's argument, however, is that Endre did not testify that defendant was arrested. In fact, Endre's testimony was that defendant was "not arrested, or charged, or convicted" for this incident and that was the basis for his falling out with the Gresham/Bamberg family.

¶ 65 For these reasons, we conclude that the trial court did not abuse its discretion when it imposed defendant's sentence.

¶ 66 Correct the Mittimus

¶ 67 Finally, the State requests this court correct defendant's mittimus to reflect that he was convicted of counts 19 and 20, not counts 13 and 14 as the mittimus currently states. Defendant agrees. Whether the mittimus should be amended is a legal issue, which we review *de novo.* *People v. Harris*, 2012 IL App (1st) 092251, ¶ 34. Here, our review of the mittimus reveals that it does so incorrectly state that defendant was convicted of counts 13 and 14 and therefore correct the mittimus to reflect defendant was convicted of counts 19 and 20. *People v. Doolan*, 2016 IL App (1st) 141780, ¶ 54 (quoting *People v. Pryor*, 372 Ill. App. 3d 422, 438 (2007) ("where defendant's mittimus 'incorrectly reflects the jury's verdict,' this court may 'amend the order to conform to the judgment entered by the court' ")). We further acknowledge that remand is unnecessary, as we may directly order the clerk of the court to correct the mittimus pursuant to our authority under Illinois Supreme Court Rule 615(b)(1) (eff. Jan. 1, 1967). *People v. McGee*, 2015 IL App (1st) 130367, ¶ 82. Accordingly, we order the mittimus corrected to reflect defendant's convictions for counts 19 and 20.

¶ 68 CONCLUSION

¶ 69 For the reasons stated above, we affirm the judgment of the circuit court of Cook County. We further direct the clerk of the circuit court to correct defendant's mittimus by striking the language "C13" and "C14" and replacing it with "C19" and "C20."

¶ 70 Affirmed, mittimus corrected.

¶ 71 PRESIDING JUSTICE GORDON, specially concurring.

¶ 72 I concur with the majority order affirming the judgment of the circuit court of Cook County, but I must write separately. The majority finds that the object defendant threw over the fence was the Ruger, when actually a Beretta pistol was also found in the area. I do not believe that any court can determine whether the defendant threw the Ruger, the Beretta, or both guns

over the fence. However, it certainly can be reasonably inferred that at least one of those guns was the object that the defendant threw over the fence. Hill's fingerprints on the Beretta are evidence that Hill may have discarded his weapon in the same yard. In viewing the evidence in the light most favorable to the State, I find that any rational trier of fact could have found the essential elements of the crime of unlawful use of a weapon by a felon beyond a reasonable doubt. *People v. Smith*, 185 Ill. 2d 532, 541 (1999).