

Order filed October 24,
2017. Modified upon
denial of rehearing
January 16, 2018.

2017 IL App (5th) 140289-U

NO. 5-14-0289

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Shelby County.
)	
v.)	No. 13-CF-144
)	
BRIAN EDWARDS,)	Honorable
)	Kimberly G. Koester,
Defendant-Appellant.)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Presiding Justice Barberis and Justice Goldenhersh concurred in the judgment.

ORDER

¶ 1 *Held:* The comments by the prosecutor that were error did not amount to plain error, thus defendant is not entitled to a new trial. The defendant also failed to establish that the trial court relied on improper factors during sentencing, and that his trial counsel was ineffective.

¶ 2 After a jury trial in the circuit court of Shelby County, the defendant, Brian Edwards, was convicted of aggravated driving under the influence (625 ILCS 5/11-501(a)(2) (West 2012)) and driving with a revoked license (625 ILCS 5/6-303(a) (West 2012)). The trial court sentenced the defendant to concurrent terms of 10 years and 5 years, respectively, in the Illinois Department of Corrections, and 3 years of mandatory supervised release. The defendant argues on appeal that he was denied a fair trial because

of certain comments made by the State during its opening statement, during the questioning of certain witnesses, and during closing argument. Specifically, the defendant claims that any comments or testimony related to his failure to undergo sobriety testing constituted error. The defendant next alleges that the State improperly shifted the burden of proof to the defendant when it argued to the jury that the defendant had the opportunity to prove he was not impaired. The defendant further contends he was denied a fair trial when the State improperly bolstered the credibility of its witnesses, and made impermissible comments on the defendant's post-arrest silence. The defendant also alleges that he received ineffective assistance of counsel because his defense attorney failed to properly preserve for appeal any of the alleged errors in a written posttrial motion. Finally, the defendant claims the court abused its discretion during sentencing because the court improperly considered the defendant's prior criminal history, and failed to consider factors in mitigation that were apparent from the record and argued by his counsel. We affirm.

¶ 3 On October 2, 2013, at approximately 11:30 p.m., Charles Banning was driving along the Tower Hill/Herrick Blacktop, a public highway in Shelby County, Illinois, when he saw a red pickup truck blocking a part of the road. He noticed that the driver's side door was open, a hat was on the ground, and a foot was hanging out of the door. Banning also observed that the drive shaft was hanging from the bottom of the truck. He stopped to see if he could offer any help. When he approached the vehicle, he discovered that the individual inside was not moving. Banning called out to this individual for

several minutes, but there was no response. Fearing that the individual was dead, Banning dialed 9-1-1 and asked for help.

¶ 4 Shelby County Sheriff's Deputy Quincy Wood responded to the scene. Deputy Wood attempted to awaken the individual in the truck, but was only able to do so after roughly one minute of shouting, while shining a flashlight on him. The individual inside the vehicle was the defendant. Upon being awakened by Deputy Wood, the defendant exclaimed: "Whoa, whoa, I don't want any problems." Deputy Wood testified he then observed that the defendant had bloodshot eyes, smelled of alcohol, and had enough trouble balancing that he had to lean on the truck for support. Deputy Wood also saw at least 16 empty beer cans strewn about the bed of the truck.

¶ 5 Deputy Wood then began questioning the defendant. When asked if he knew where he was, the defendant responded that he was located between Oconee and Pana, a place roughly six miles from their actual location. Deputy Wood asked the defendant where he was headed, and whether he had been drinking that evening. The defendant responded that he was "heading back to the farm by Oconee." He admitted to having consumed alcohol from 2:30 p.m. until 8 p.m. The defendant was able to produce an Illinois State identification card, but not a driver's license, or proof of insurance. After running the identification card, Deputy Wood learned that the defendant had a suspended driver's license. As Deputy Wood started back towards the truck, the defendant got out of his vehicle, and started walking towards the yellow line in the middle of the road. Deputy Wood ordered the defendant out of the road, but he ignored the command. Deputy Wood then grabbed the defendant by the arm, and again ordered him out of the road. The

defendant still refused to comply, and attempted to pull away from the officer. Deputy Wood then arrested the defendant, and drove him to the Shelby County Detention Center for booking.

¶ 6 After they arrived at the detention center, the defendant refused to perform a field sobriety test, stating: “No. You’ve already got me. I’m not doing nothing [sic].” The deputy advised the defendant that his license would be revoked for at least 12 months if he refused to take a breathalyzer test. The defendant again refused to take the test. Deputy Wood read the defendant his *Miranda* rights. The defendant agreed to speak with the deputy, who again began to question the defendant. Deputy Wood stated that throughout the questioning, the defendant’s speech was slurred, and difficult to understand. The defendant admitted that he was on the Herrick Blacktop highway that night. The defendant also admitted that he drank between two and six beers that evening, but he denied that he had been driving the truck. Deputy Wood never asked the defendant whether someone else had been driving the truck.

¶ 7 The defendant testified at trial. According to the defendant, on the evening of October 2, 2013, he was drinking with friends at a tavern in Nokomis. While there, he encountered a female acquaintance that he had not seen in years. As the evening wore on, she asked him if he had a vehicle there. He told her that his truck was at a farm south of Pana, and that a friend had driven him to the bar. The acquaintance called someone she knew to give them a ride to his truck. When they arrived at the farm, the defendant told his acquaintance that he could not drive. The acquaintance agreed to drive the defendant’s vehicle. As they cruised the country roads of Shelby County, the defendant

stated he lost track of where they were because he was falling in and out of sleep in the passenger seat. He stated that the truck suddenly broke down in the middle of the road. The defendant then got out of his truck, and saw that the drive shaft had become partially disconnected. As he tried to fix the truck, the acquaintance stated she had to go because it was late. She left alone on foot. The defendant stated he tried to call for help, but his phone would not work. He pushed the truck to the side of the road, and fell asleep in the driver's side seat. The defendant awoke to the shouting by Deputy Wood. He denied ever telling Officer Wood that he was driving the truck that evening.

¶ 8 The subject of the defendant's refusal to take a breathalyzer or field sobriety test arose during the opening statements, the direct examination of Deputy Wood, the cross-examination of the defendant, and closing argument. During opening statements, the prosecutor stated that Deputy Wood offered to let the defendant take both tests, and that the defendant refused. During the direct examination of Deputy Wood, the prosecutor asked Deputy Wood to describe field sobriety tests to the jury. Deputy Wood provided a brief description of the tests, and explained the purpose of each test. Deputy Wood also testified that the defendant refused to submit to any alcohol testing. When the defendant was cross-examined by the State, he testified that he refused the alcohol testing. During closing argument, the prosecutor stated that the defendant was offered the opportunity to show he was not impaired, but the defendant chose not to take that opportunity. Defense counsel did not object to any of the prosecutor's comments or questioning.

¶ 9 The jury convicted the defendant of aggravated driving under the influence and driving with a revoked license. At the sentencing hearing on February 7, 2014, the court

heard arguments in aggravation and mitigation. The defendant was eligible for a Class X sentencing range of 6 to 30 years' imprisonment on the charge of aggravated driving under the influence because this was his eighth conviction for driving under the influence. The State requested that the court impose a 12-year prison sentence. The State also requested that the court sentence the defendant to a concurrent term of five years in prison on the charge of driving with a revoked license, because this was the defendant's thirteenth conviction for driving on a revoked license. Defense counsel requested the minimum sentence of six years, arguing that the defendant's prior convictions should not be considered because they constituted an element of the offense. Additionally, defense counsel emphasized that no one was injured, and that the defendant had a lengthy work history. The court sentenced the defendant to concurrent terms of imprisonment of 10 years for aggravated driving under the influence, and 5 years for driving with a revoked license, followed by a 3-year term of mandatory supervised release. The defendant's *pro se* motion to reconsider the sentence was denied after a hearing. This timely appeal followed.

¶ 10 In his first point on appeal, the defendant contends that he was denied his right to a fair trial because of improper comments made by the State at various times during the trial. The defendant also claims the State made improper comments about the honesty of police officers when the defendant was asked, while on the witness stand, whether Deputy Wood was lying. Similarly, the defendant argues that it was improper for the State to imply that the defendant's testimony was less credible than that of Deputy Wood when the prosecutor stated, "Police officers have no interest in this case. *** They are

telling you straight up what happened.” Next, the defendant alleges that the State improperly shifted the burden of proof by commenting on the defendant’s refusal to take a breathalyzer and field sobriety tests. Finally, the defendant claims that the implication made by the prosecutor during closing argument regarding the defendant’s explanation that someone else was driving the vehicle that night was error in that it was an improper comment on the defendant’s post-arrest silence. We will consider each contention in turn.

¶ 11 Whether the prosecutor’s comments and actions during trial were so egregious as to deny the defendant a fair trial presents a question of law that we review *de novo*. *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007). To preserve claims of error related to statements made by a prosecutor, a defendant must object to those statements both at trial and in a written posttrial motion. *Wheeler*, 226 Ill. 2d at 122. In this case, the defendant acknowledges that his counsel failed to properly preserve the foregoing claims of error, and asks this court to review his contentions of error under the plain error doctrine. The plain error doctrine allows a reviewing court to review a forfeited error affecting substantial rights when: (1) a clear and obvious error occurred, and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against defendant; or (2) a clear and obvious error occurred, and the error was so fundamental and of such magnitude that it affected the fairness of the 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). In both instances, the defendant bears the burden of persuasion. *Piatkowski*, 225 Ill. 2d at 565. “The ultimate question of whether a forfeited claim is reviewable as plain error is a question of law that is reviewed *de novo*.” *People v.*

Johnson, 238 Ill. 2d 478, 485 (2010). Turning now to the defendant's contentions, we must first determine whether an error occurred. *Piatkowski*, 225 Ill. 2d at 556.

¶ 12 The defendant claims that the State improperly shifted the burden of proof by commenting on his refusal to take a breathalyzer test or submit to field sobriety testing. The record shows that during opening statement and closing argument, the prosecutor made comments regarding the defendant's refusal to submit to these tests. Additionally, the prosecutor elicited responses regarding these matters during the direct examination of Deputy Wood and during the cross-examination of the defendant. With the exception of the State's comment during closing argument, we find that none of the references to the defendant's refusal to submit to a breathalyzer test and field sobriety testing improperly shifted the burden of proof from the State to the defendant.

¶ 13 A defendant's refusal to take a test designed to determine his level of intoxication is admissible in evidence, and may be used to argue the defendant's consciousness of guilt. See *People v. Johnson*, 218 Ill. 2d 125, 140 (2005); 625 ILCS 5/11-501.2(c) (West 2016). Error occurs when a prosecutor implies that a defendant had the opportunity to prove his innocence by submitting to a sobriety test because this argument blurs the distinction between a defendant's state of mind and the State's burden of proof. *Johnson*, 218 Ill. 2d at 140-41. In this instance, the prosecutor's comments during opening statement, during the direct examination of Deputy Wood, and during the cross-examination of the defendant brought the defendant's refusal to submit to a breathalyzer test and field sobriety testing to the attention of the jury. Because this evidence is expressly allowed pursuant to section 11-501.2(c) of the Illinois Vehicle Code (625 ILCS

5/11-501.2(c) (West 2016)), we find there was no error occurred under the circumstances presented, as the remarks made by the prosecutor in opening statement, and the testimony proffered by the witnesses, did not shift the burden to the defendant to prove his innocence.

¶ 14 The State concedes, however, that the prosecutor committed error during closing argument when he stated that the defendant was “offered the opportunity to show that he is not impaired.” We agree with the State that this comment constituted error. This statement goes beyond merely informing the jury of the defendant’s refusal to perform the field sobriety tests. Instead, this statement impermissibly blurred the distinction between the defendant’s state of mind and the State’s burden of proof. It implied that the defendant could have proved his innocence had he accepted the offer to show that he was not impaired by taking the test. Having now determined that error occurred, we next consider whether the State’s comments rose to the level of plain error.

¶ 15 Comments made during closing argument must be considered as a whole, and a reviewing court will find reversible error only if the defendant can identify remarks of the prosecutor that were both improper and so prejudicial that “real justice” was denied or the verdict of the jury may have resulted from the error. *Johnson*, 218 Ill. 2d at 141. Considering the record as a whole, we find that the defendant has not carried his burden of persuasion that the error was so substantial that it undermined our confidence in the jury’s verdict. The evidence against the defendant was not closely balanced, and the error was not serious enough to have impacted the fairness of his trial or the integrity of the judicial process.

¶ 16 The defendant next argues he was denied a fair trial when the State improperly elicited comment on, and then personally vouched for, the credibility of one of its witnesses. Initially, the defendant contends that he was improperly questioned by the State regarding Deputy Wood's truthfulness. During the State's case-in-chief, Deputy Wood testified that the defendant admitted to driving the truck. Later, the State asked the defendant, on cross-examination, whether he had been driving the vehicle. The defendant denied this, stating: "I never once said that I was driving." The prosecutor replied: "Okay. You're saying the officer lied?" Defense counsel immediately objected, and the State withdrew the question. The trial court stated that it would make no ruling on the objection. Following closing arguments, the jury was directed, as part of the general instructions, to disregard questions that were withdrawn.

¶ 17 The defendant further contends that the State improperly vouched for the honesty and credibility of Deputy Wood. During rebuttal argument, the State claimed that the police had "no interest in this case," and that they were telling the jury "straight up what happened." Again, defense counsel immediately objected. The trial court did not rule on this objection, but instructed the jurors that closing arguments are not evidence, and that they alone determine the credibility of the witnesses. Following closing arguments, the court again instructed the jurors that they alone should judge the weight and credibility to be given to the witnesses; that they should consider any interest, bias, or prejudice the witnesses may have; and that the defendant's testimony must be judged in the same manner as any other witness.

¶ 18 It is well established that a prosecutor may not argue that a witness is more credible because of his status as a police officer. *People v. Fields*, 258 Ill. App. 3d 912, 921 (1994). In both instances where the prosecutor commented on Deputy Wood's credibility, defense counsel objected, and the trial court instructed the jury to disregard those comments. A jury is presumed to follow the instructions that are given to it by the trial court. *People v. Fields*, 135 Ill. 2d 18, 53 (1990). Thus, any prejudice that may have resulted from the prosecutor's improper conduct was cured by the trial court's instructions. See *People v. Coleman*, 158 Ill. 2d 319, 343 (1994). As such, the alleged claims of error are without merit.

¶ 19 The defendant next argues that his due process rights were violated when the State improperly argued in rebuttal that the defendant failed to tell police, prior to trial, that someone else was driving the vehicle. The defendant contends that the State's improper comments on his post-arrest silence were used to imply that his testimony was fabricated, and that the State's argument constituted a fundamentally unfair comment on his post-arrest silence under *Doyle v. Ohio*, 426 U.S. 610 (1976). The defendant argues that in the context of a plain error analysis, the State's comments on his post-arrest silence threatened to tip the scales on an element for which the evidence was closely balanced, and further, that the comments touched on the defendant's fifth amendment right to remain silent and not incriminate himself.

¶ 20 In *Doyle*, the United States Supreme Court held that the due process clause of the fourteenth amendment prohibits impeachment on the basis of a defendant's silence following *Miranda* warnings. *Doyle*, 426 U.S. 610. In that case, two defendants were

arrested for selling marijuana to an informant. Each defendant was given *Miranda* warnings upon arrest, and neither provided a post-arrest statement about his involvement in the crime. Each defendant took the stand at his trial and testified that the informant was the seller and that the informant framed him. During cross-examination, the prosecutor asked each defendant why he had not told the police that he had been framed. The Supreme Court concluded that this impeachment by the State was fundamentally unfair because *Miranda* warnings provide an implicit assurance that a person's silence will not be used against him. *Doyle*, 426 U.S. at 617-19.

¶ 21 The Supreme Court qualified its holding in *Doyle* a few years later in *Anderson v. Charles*, 447 U.S. 404 (1980), which included a prosecutor's reference on cross-examination to the defendant's pretrial silence and the prosecutor's impeachment of the defendant's trial testimony with inconsistent pretrial statements. *Anderson*, 447 U.S. at 408. In *Anderson*, the defendant voluntarily spoke with authorities after receiving *Miranda* warnings, and provided a version of events that proved to be inconsistent with his testimony at trial. During cross-examination at trial, the prosecutor asked the defendant why he had not told the police the same facts he had related to the jury. The Supreme Court concluded that *Doyle* did not apply to the cross-examination that inquired into a defendant's prior inconsistent statements. The Supreme Court reasoned that such questioning does not make unfair use of a defendant's post-arrest silence because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent. *Anderson*, 447 U.S. at 408. The Supreme Court found that the prosecutor's questions were not designed "to draw meaning from silence, but to elicit an

explanation for a prior inconsistent statement.” *Anderson*, 447 U.S. at 408-09. The Court concluded that although the defendant’s two inconsistent descriptions of events may have been said to involve “silence,” in that each version omitted facts included in the other version, *Doyle* did not require such a “formalistic” understanding of “silence,” as the defendant had not remained silent at all. *Anderson*, 447 U.S. at 408-09.

¶ 22 Our Illinois Supreme Court has also recognized a qualification of *Doyle*. See *People v. Frieberg*, 147 Ill. 2d 326, 353 (1992); *People v. Rehbein*, 74 Ill. 2d 435 (1978). In *Rehbein*, a case decided before *Anderson v. Charles*, the defendant claimed that during cross-examination the prosecutor improperly asked whether the defendant had told the police about the exculpatory version that he had testified to at trial. The defendant argued that the prosecutor’s questions constituted an improper comment on the defendant’s right to silence in that reference was made to the fact that the defendant had not previously told the police officers the story he told on the witness stand. *Rehbein*, 74 Ill. 2d at 442. The Illinois Supreme Court found that while the reference was, in some sense, a comment on silence, the prosecutor’s cross-examination and argument were made in an effort to impeach the defendant with prior inconsistent statements. The supreme court concluded that the prosecutor’s reference to silence in the context of proper impeachment by inconsistent statements was not a *Doyle* violation. *Rehbein*, 74 Ill. 2d at 443.

¶ 23 In *Frieberg*, the defendant appealed his convictions for possession of and trafficking in controlled substances. The defendant claimed that his right to due process was violated where he was impeached by impermissible commentary on his right to remain silent. Following his arrest, the defendant waived his *Miranda* rights and agreed

to talk with the police. In the initial interview, the defendant admitted that he accompanied codefendants on a business trip, but denied any knowledge about transporting cocaine. In a second interview, the defendant admitted knowledge of his codefendant's participation in transporting cocaine. During direct examination, the defendant provided a more detailed version of the events. He also acknowledged that he had lied to the police during the initial interview because he was scared of a codefendant, and he was afraid of being charged. During cross-examination, the prosecutor questioned the defendant about matters which he admitted to upon direct examination, but had not disclosed during the initial interview with police officers. Then, during the rebuttal portion of closing arguments, the prosecutor commented that the defendant's omissions and inconsistent statements indicated that his trial testimony was fabricated.

¶ 24 On appeal, the Illinois Supreme Court determined that no *Doyle* violation had occurred. The supreme court noted that following the defendant's arrest and the giving of *Miranda* warnings, the defendant did not remain silent. Instead, the defendant provided police officers with his version of certain events, but omitted significant details to which he later testified at trial. The supreme court found that the defendant's initial version was inconsistent with his subsequent trial testimony, as well as his theory of defense. The supreme court concluded that under *Anderson* and *Rehbein*, the prosecutor could properly cross-examine the defendant regarding the defendant's prior inconsistent statements. *Frieberg*, 147 Ill. 2d at 356.

¶ 25 In this case, the defendant did not invoke his right to remain silent. According to the record, after being given *Miranda* warnings, the defendant elected to talk with Deputy

Wood. The defendant described the events of the evening, but he never informed Deputy Wood that someone else was driving his vehicle. During trial, Deputy Wood testified that he did not ask the defendant whether someone else was driving the defendant's vehicle on the evening of October 2, 2013. Then, during direct examination by defense counsel, the defendant testified that a female acquaintance had been driving the vehicle when it broke down. On cross-examination, the prosecutor did not question the defendant about the differences between his trial testimony and his prior statements to Deputy Wood.

¶ 26 During closing argument, defense counsel reminded the jury several times that the State carried the burden of proving the defendant guilty beyond a reasonable doubt, and that the defendant was not required to prove his innocence. Defense counsel then argued the following:

“When you think about it, how would you prove that he wasn't driving? How does he prove all these things? *** That's not a reasonable thing to ask somebody, and that's why our constitution puts the burden on the State, not on the defendant.”

¶ 27 During rebuttal argument, the prosecutor stated the following, without objection from defense counsel:

“[The defendant] says an acquaintance is driving [the truck]. He didn't tell the officer that night. He was with the officer for over two hours, and that witness, that acquaintance, never came up. In fact, we don't even have a name of the so-called acquaintance. We don't have the story. He didn't tell the officer the story.”

¶ 28 In this case, the defendant did not invoke his right to silence. *Anderson*, 447 U.S. at 408. After receiving *Miranda* warnings, the defendant elected to speak to the police.

During the rebuttal portion of the State's closing argument, the prosecutor commented on the inconsistencies between the defendant's trial testimony and the defendant's statements during the interview with Deputy Wood. After reviewing the record, we find that the prosecutor's argument during rebuttal regarding the defendant's failure to tell the police that someone else had been driving his vehicle was a proper commentary on the defendant's credibility. It was not an impermissible reference to the defendant's silence. Accordingly, *Doyle* does not apply.

¶ 29 The defendant further argues that defense counsel provided ineffective assistance of counsel by failing to preserve for appeal the aforementioned errors. To prove a claim of ineffective assistance of counsel, a defendant must demonstrate: (1) defense counsel's representation fell below an objective standard of reasonableness; and (2) the defendant was prejudiced by the deficient representation. *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Albanese*, 104 Ill. 2d 504, 525-28 (1984). A court need not decide the first prong, whether counsel's representation was deficient, before analyzing the prejudice prong. *People v. Flores*, 153 Ill. 2d 264, 283-84 (1992). To prove prejudice occurred, a defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. We have thoroughly reviewed the contentions of error raised by the defendant, and for the reasons discussed herein, we have determined that the errors did not prejudice the defendant. Thus, the defendant's claims of ineffective assistance of counsel are without merit. *Coleman*, 158 Ill. 2d at 349-50.

¶ 30 Next, the defendant claims that it was improper for the trial court to consider the defendant's prior convictions as factors in aggravation because the prior convictions were elements of the charged offenses. The defendant also claims that the trial court ignored the defendant's work history and history of substance abuse when applying mitigating factors.

¶ 31 The imposition of a sentence is ordinarily within the discretion of the trial court, and its sentencing decisions are entitled to great deference and will be not disturbed absent an abuse of discretion. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). There is a strong presumption that the trial court based its sentencing determination on proper legal reasoning, and this presumption is overcome only by an affirmative showing that the sentence is at great variance with the spirit and the purpose of the law, or manifestly disproportionate to the nature of the offense. *Alexander*, 239 Ill. 2d at 212. The trial court is given deference because the trial judge has had the opportunity to observe the defendant and the proceedings, and is generally in a better position to consider factors such as the defendant's credibility, demeanor, general moral character, mentality, social environment, age and habits, than the reviewing court, which considers the "cold" record. *Alexander*, 239 Ill. 2d at 213. Nevertheless, the question of whether the trial court relied on an improper factor in imposing a sentence presents a question of law that is reviewed *de novo*. *People v. Phelps*, 211 Ill. 2d 1, 12 (2004).

¶ 32 Generally, the trial court may not consider a factor implicit in the offense on which the defendant has been convicted as an aggravating factor in imposing a sentence on that offense. *Phelps*, 211 Ill. 2d at 11. A single factor cannot be used both as an

element of the offense and as an aggravating factor supporting the imposition of a harsher sentence than might otherwise have been imposed. *People v. Gonzalez*, 151 Ill. 2d 79, 83-84 (1992). The prohibition against this dual use, often called a “double enhancement,” is based on the assumption that in determining the appropriate range of punishment for a criminal offense, the legislature necessarily considered the factors inherent in the offense. *Gonzalez*, 151 Ill. 2d at 83.

¶ 33 During the sentencing hearing, the State sought, at a minimum, a 12-year prison sentence on the charge of aggravated driving under the influence, and a concurrent prison sentence of 5 years on the charge of driving with a revoked license. The State noted that the presentence investigation report showed the defendant had 8 prior DUI convictions and 13 prior convictions for driving with a revoked license. The State also noted that the defendant had “gone over and above the requirements” for Class X sentencing eligibility. According to the report of the presentence investigation, the defendant had prior convictions for aggravated battery, attempted escape, burglary, possession of drug paraphernalia, resisting arrest, and theft, and he had been sentenced to the Department of Corrections six times. The State argued that the sentence was necessary based on the defendant’s prior criminal record, his lack of remorse, the danger he posed to society, and the need to deter others from similar conduct.

¶ 34 Defense counsel requested the minimum sentence of six years. In support, counsel noted that the report from the presentence investigation showed the defendant had a 20-year work history as an ironworker. Counsel argued that Class X sentences are normally reserved for cases which result in serious injury, and that no one was injured in this case.

Counsel further argued that any prison term would result in the loss of the defendant's job, savings, personal property, and real estate holdings. Finally, counsel argued that the defendant's prior convictions should not be considered because the convictions were "taken into account by the Class." Counsel closed his remarks by stating, "It is important that we realize and accept that the seriousness of the offense in this case was taken into account by the charge." The defendant made a statement in allocution in which he emphasized his extensive work history, career highlights, history of substance abuse, and desire to be rehabilitated.

¶ 35 Following the arguments of counsel, the trial court stated that it had considered all of the factors in aggravation and mitigation, the report of the presentence investigation, the financial impact statement submitted by the defendant, the defendant's allocution, and the arguments of counsel. As to the factors in aggravation, the court found that the sentence was necessary to deter others from similar conduct, and that the defendant was nonprobationable due to his substantial criminal history. As to the factors in mitigation, the court found that none applied. The court sentenced the defendant to concurrent prison terms of 10 years for aggravated driving under the influence, and 5 years for driving with a revoked license, followed by a 3-year term of mandatory supervised release.

¶ 36 On May 15, 2014, the defendant filed a motion to reconsider the sentence. At the hearing on the motion, both parties made substantially similar arguments to those made at the sentencing hearing. Defense counsel again argued that "all of his priors are in fact elements of this offense, meaning that it is not necessary to consider that as part of your decision in passing sentence," and that the prior convictions were "already taken into

account by the legislature making it a non-probationable Class X felony.” The trial court denied the motion to reconsider. The court stated that it “did consider that there was no injury to the defendant or other persons.” The court further stated that it considered the factors in aggravation and mitigation; and although the sentence was “mainly based on the record of the defendant, *** that decision was supported by all of the other factors that this court took into consideration.” The court concluded its remarks by describing the sentence as “appropriate in light of the history of the defendant, the facts surrounding the instant case, and all other factors taken into consideration.”

¶ 37 In this case, the defendant faced a potential sentencing range of 6 to 30 years’ imprisonment for the offense of aggravated driving under the influence. He also faced between two and five years’ imprisonment on the driving with a revoked license offense. Thus, the concurrent sentences of 10 and 5 years, respectively, fall within the applicable statutory ranges. In addition to the numerous convictions for non-traffic offenses, this was the defendant’s eighth conviction for driving under the influence, his thirteenth conviction for driving with a revoked license, and his seventh sentence to the Department of Corrections. The court specifically stated that it had considered the arguments made by the attorneys. Thus, the court was aware of the general prohibition against double enhancement. The defendant has conceded that the court could properly consider a sixth and seventh prior driving-under-the-influence conviction as a factor in aggravation without running afoul of the prohibition against double enhancement because those were not elements of the offense. The record demonstrates that the defendant had several prior convictions for several non-driving-related offenses. After reviewing the record as a

whole, we do not find that the defendant's sentences were based on the use of any factors that would constitute an impermissible double enhancement. The trial court properly considered the seriousness of the offenses, the nature and circumstances of the current offenses, the need for the protection of the public, and the defendant's criminal history, in determining the defendant's sentences.

¶ 38 Additionally, the record does not support the defendant's contention that the trial court ignored his work history and history of substance abuse when considering factors in mitigation. The record demonstrates that the court considered a broad range of factors, including the defendant's work history, and history of substance abuse, before imposing sentence. In fact, the court specifically stated that it considered defense counsel's argument and the defendant's statement, both of which focused on the defendant's extensive work history and history of substance abuse. Apparently, the court did not believe that the defendant's work history and substance abuse history were strong factors in mitigation in this case. After reviewing the record, we do not find that the trial court ignored pertinent factors in mitigation or improperly used factors as a basis for an improper double enhancement in sentencing the defendant. Nor do we find that the trial court abused its discretion in imposing concurrent sentences of 10 years for aggravated driving under the influence, and 5 years for driving with a revoked license. The sentences were proportionate to the seriousness of the offenses, and in line with the spirit and purpose of the law. Therefore, the defendant has failed to establish error, plain or otherwise.

¶ 39 The defendant's claim of ineffective assistance of counsel, based on counsel's failure to preserve these errors, fails for the same reasons. The defendant cannot establish a reasonable probability that but for counsel's performance, the sentence would have been different. Accordingly, we find no error or prejudice occurred to the defendant.

¶ 40 For the foregoing reasons, the defendant's convictions and sentences are affirmed.

¶ 41 Affirmed.