2018 IL App (2d) 151217-U
No. 2-15-1217
Order filed December 21, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JAMES D. ANDERSON, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Winnebago County. No. 12-CF-1443 Honorable Joseph G. McGraw, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices McLaren and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant showed no plain error in the trial court's failure to find in mitigation that he murdered the victim under a strong provocation, as the court did not abuse its discretion in deeming the essentially typical "road rage" incident insufficient to rise to the level of a strong provocation.

¶ 2 Defendant, James D. Anderson, appeals his sentence of 60 years' incarceration for first-degree murder (720 ILCS 5/9-1(a)(1) (West 2010)). He contends that the trial court erred by failing to find in mitigation that he was acting under a strong provocation (730 ILCS 5/5-5-3.1(a)(3) (West 2010)), that there were substantial grounds tending to excuse or justify his conduct (*id.* § 5-5-3.1(a)(4)), or that his conduct was induced or facilitated by another (*id.* § 5-5-

3.1(a)(5)). The State contends that defendant forfeited the matter and that plain error does not apply. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged with first-degree murder in that, with the intent to kill, he personally discharged a firearm and killed Paul Ezop. In July 2015, a jury trial was held.

¶ 5 Evidence at trial was that defendant shot Ezop near an auto parts store. A witness testified that she had seen a car that looked like an Oldsmobile speed up and cut in front of a maroon SUV. The driver of the Oldsmobile was driving erratically, was angry, was making hand gestures, and shouted profanity. Another witness, who lived near the auto parts store, saw an Oldsmobile follow a dark-colored SUV at a high rate of speed. The vehicles stopped, and the witness saw one man walk up to the other and then heard three shots. He saw one man fall, and the SUV then quickly fled.

¶ 6 A witness who worked at the auto parts store testified that he heard four gunshots and went outside. He saw a car blocking an entryway to the store and a man lying on the ground a few feet in front of the car. He saw an SUV driving nearby but was unable to state its color because he was color blind. Yet another witness heard gunshots and saw an SUV flee north. The witness followed the SUV and later saw it parked at a condo, but was unable to get a license plate number. The condo was later connected with defendant via his landlord.

¶ 7 Ezop sustained two gunshot wounds to his left shoulder and the left side of his chest. Bullet fragments were recovered from his back. He died from the gunshot to his chest and had a blood-alcohol level of 0.138, which was over the legal limit.

¶ 8 Police later learned that defendant was in jail on an unrelated matter. After monitoring phone calls defendant made from the jail, the police searched a garage, impounded a maroon

SUV, and learned that its owner previously authorized defendant to use it. They also recovered a Glock firearm and ammunition. An expert testified that bullets recovered from Ezop were fired by a Glock. Defendant's nephew testified that defendant was at a party at the time of the shooting.

¶ 9 The jury found defendant guilty, and his motion for a new trial was denied. At sentencing, defendant presented a witness who testified that defendant was not a killer and did not kill Ezop. Defendant also made a statement in which he maintained his innocence. Defense counsel argued that defendant did not commit the crime. In discussing statutory factors in mitigation, the trial court stated:

> "You did not act under strong provocation. That is one of the truly regrettable aspects of this case, that it was some sort of road rage altercation where I don't know if words were exchanged and hand gestures were exchanged; but the provocation, to the extent there was any provocation, is no greater and no lesser than the provocation or aggravation experienced by any one of us on any given day out and about on the streets of Rockford, or any other urban environment, where someone cuts us off or flips us off or gestures or yells at us.
>
> And in civilized society, where people conform their conduct to the requirements of the law, we ignore it and we drive on. We don't engage in hunting them down and shooting them dead for any offense on the roadway.
>
> There were not substantial grounds tending to excuse or justify your criminal conduct. Your criminal conduct was not induced or facilitated by someone else."

Referring to defendant's criminal history, which included two felony drug offenses, the court found that defendant's "character and attitudes" indicated that he was likely to commit additional

crimes. The court sentenced defendant to 60 years' incarceration,[1] and defendant moved to reconsider, alleging that the sentence was excessive. He did not argue that the court failed to consider mitigating evidence. The motion was denied, and he appeals.

¶ 10 II. ANALYSIS

¶ 11 In his initial brief, defendant contended that the trial court erred by failing to find in mitigation that he was acting under a strong provocation, that there were substantial grounds tending to excuse or justify his conduct, or that his conduct was induced or facilitated by another. He did not acknowledge that he failed to make such an argument to the trial court, and thus he did not argue that plain error applies. In its response brief, the State contended that the matter was forfeited, and defendant then raised plain error for the first time in his reply brief.

¶ 12 "It is well settled that, to preserve a claim of sentencing error, both a contemporaneous objection and a written postsentencing motion raising the issue are required." *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). When a defendant fails to preserve a claim of sentencing error, we may review the claim only if the defendant establishes plain error. *Id.* at 545. "The plain-error doctrine is a narrow and limited exception." *Id.* "To obtain relief under this rule, a defendant must first show that a clear or obvious error occurred." *Id.* "In the sentencing context, a defendant must then show either that (1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing." *Id.* "Under both prongs of the plain-error doctrine, the defendant has the burden of persuasion." *Id.* "If the defendant fails to meet his burden, the procedural default will be honored." *Id.*

[1] Because defendant was found to have personally discharged the firearm, the sentencing range was 45 years to life. See 730 ILCS 5/5-4.5-20(a), 5-8-1(a)(1)(d)(iii) (West 2010).

¶ 13 "A defendant who fails to argue for plain-error review obviously cannot meet his burden of persuasion." *Id.* "[W]hen a defendant fails to present an argument on how either of the two prongs of the plain-error doctrine is satisfied, he forfeits plain-error review." *Id.* at 545-46. Under Illinois Supreme Court Rule 341(h)(7) (eff. May 25, 2018), points not argued in the appellant's initial brief are forfeited and shall not be raised in the reply brief.

¶ 14 However, in *People v. Williams*, 193 Ill. 2d 306, 347 (2000), our supreme court held that a defendant's failure to argue plain error in his or her initial brief does not preclude him or her from raising it in his reply brief. The court noted that the rules of forfeiture apply to the State as well as the defendant and that the State can forfeit an argument that the defendant forfeited an issue. See *id.* at 347-48. Thus, in his or her initial brief, the defendant need not preemptively address a forfeiture argument. To obtain review of a forfeiture argument, the State must raise that matter in its response brief. If it does, the defendant may then raise plain error in his or her reply brief. *Id.* at 348.

¶ 15 Here, in the trial court, defendant never claimed that the court failed to consider mitigating evidence. Instead he maintained his innocence. In his initial brief on appeal, he raised the issue of mitigation but did not argue plain error. However, after the State argued that he forfeited his claim, he addressed plain error in his reply brief. Under *Williams*, this was proper, and we will consider defendant's claim of plain error.

¶ 16 Defendant primarily contends that the trial court plainly erred when it failed to find that he was strongly provoked. "The weight to be accorded each factor in aggravation and mitigation depends on the circumstances of each case." *People v. Dominguez*, 255 Ill. App. 3d 995, 1004 (1994). "As long as the court does not consider incompetent evidence, improper aggravating factors, or ignore pertinent mitigating factors, it has wide latitude in sentencing a defendant to

any term within the statutory range prescribed for the offense." *Id.* The balance of the aggravating and mitigating factors is a matter of judicial discretion, which should not be disturbed on review absent an abuse of that discretion. *Id.*

¶ 17 Section 5-5-3.1(a) of the Unified Code of Corrections (Code) (730 ILCS 5/5-5-3.1(a) (West 2010)) lists a number of factors that "shall be accorded weight in favor of withholding or minimizing a sentence of imprisonment." Since this language is mandatory and not directory, a sentencing court " 'may not refuse to consider relevant evidence presented in mitigation.' " *People v. Calhoun*, 404 Ill. App. 3d 362, 386 (2010) (quoting *People v. Heinz*, 391 Ill. App. 3d 854, 865 (2009)). However, "[t]he trial court has no obligation to recite and assign value to each factor presented at a sentencing hearing." *People v. Hill*, 408 Ill. App. 3d 23, 30 (2011).

¶ 18 In sentencing a defendant, the court must consider in mitigation whether "[t]he defendant acted under a strong provocation." 730 ILCS 5/5-5-3.1(a)(3) (West 2010). "While 'strong provocation' is not defined in the [Code], the similar term 'serious provocation' has a well-established meaning when considering whether an individual acted under serious provocation sufficient to reduce the offense of first degree murder to second degree murder, and is limited to the categories of substantial physical injury or assault, mutual quarrel or combat, illegal arrest, and spousal adultery." *People v. Powell*, 2013 IL App (1st) 111654, ¶ 36 (quoting *People v. Merritte*, 242 Ill. App. 3d 485, 492 (1993)). Mere words, no matter how insulting, are insufficient. *Id.*; see also *People v. Garcia*, 165 Ill. 2d 409, 429-30 (1995) ("[w]ords, in and of themselves, no matter how vile, can never constitute serious provocation" and "must be accompanied by mutual combat so serious that it mitigates against finding the defendant guilty" of the greater offense). "While strong provocation as a mitigating factor at sentencing encompasses a wider range of conduct than serious provocation for the purposes of second

degree murder (*Merritte*, 242 Ill. App. 3d at 493), the provocation must nonetheless be direct and immediate (*People v. Adamcyk*, 259 Ill. App. 3d 670, 680 (1994))." *Powell*, 2013 IL App (1st) 111654, ¶ 36.

¶ 19 Here, defendant asserts that Ezop's conduct constituted a "strong provocation." He notes that, as they were driving, Ezop "was drunk, driving erratically, and intimidating [defendant] both verbally and physically." Ezop then followed defendant to the auto parts store, where "Ezop continued in his rage by turning off the engine to his car and thereafter walking toward the red SUV" while he was "very angry and quite possibly armed." However, as the trial court pointed out, the altercation was essentially a fairly typical incident of "road rage." Although Ezop might have escalated it, by following defendant and approaching him on foot, we cannot say that the trial court abused its discretion by deeming the facts simply too common to rise to the level of a "strong provocation."

¶ 20 Certainly defendant cites no case that compels the opposite result. He relies only on *Calhoun*, which is not only distinguishable but arguably *sui generis*. There, the defendant had reason to believe that the victim had sexually assaulted the defendant's infant daughter. The defendant killed the victim in an act of "vigilante justice." *Calhoun*, 404 Ill. App. 3d at 387. The appellate court held that the trial court had erred by failing to consider in mitigation that the murder "was neither casual nor random but rather committed in response to provocation that objectively would be as extreme as any mother of any child could sustain." *Id.* at 388. Obviously, Ezop's "provocation" of defendant was not that "extreme." Indeed, as the trial court noted, it was not even particularly unusual—and in any event it was insufficient to mitigate defendant's murderous reaction.

¶ 21 We thus hold that the trial court did not abuse its discretion by finding that the "strong provocation" factor did not apply. Although defendant also purports to invoke the additional factors that there were substantial grounds tending to excuse or justify his conduct and that his conduct was induced or facilitated by another, he cites no case to support any specific claim that either of those factors applies. We thus do not address any such specific claim. See Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018).

¶ 22 Finally, we observe that, more generally, defendant asserts that the trial court simply "disregarded" the facts, erroneously finding that it was defendant who had "hunt[ed] down" Ezop when in fact it was Ezop who had followed defendant. Although the trial court's language might have been unduly colorful and perhaps hyperbolic, it does not defeat the presumption that the court was aware of the evidence. See *People v. Hill*, 408 Ill. App. 3d 23, 30 (2011); see also *People v. Dal Collo*, 294 Ill. App. 3d 893, 896-97 (1998) (in reviewing a sentence, we consider the record as a whole and do not focus "on a few words or statements of the trial judge"). The court was entitled to find that, despite Ezop's role in the altercation, defendant's was a "truly senseless crime, totally unnecessary." And thus, after considering defendant's criminal history, his "character and attitudes," the court was entitled to impose a sentence substantially above the minimum. We find no clear or obvious error, and thus we find no plain error.

¶ 23 III. CONCLUSION

¶ 24 The judgment of the circuit court of Winnebago County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 25 Affirmed.