2018 IL App (2d) 160391-U
No. 2-16-0391
Order filed August 1, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MELVIN MOORE, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Winnebago County. No. 15-CF-45 Honorable Rosemary Collins, Judge, Presiding.

PRESIDING JUSTICE HUDSON delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant showed no plain error in the trial court's 10-year sentence (on a 6-to-30 range) for arson: although there were significant mitigating factors, there were also significant aggravating factors that supported a sentence above the minimum.

¶ 2 Defendant, Melvin Moore, appeals from his sentence of 10 years' imprisonment for arson (720 ILCS 5/20-1(a)(1) (West 2014)), for which he was sentenced as if for a Class X felony based on his prior convictions of two Class 2 felonies (730 ILCS 5/5-4.5-95(b) (West 2014)). Defendant originally asserted that the sentence was an abuse of discretion because the court gave insufficient weight to the mitigating factors of his service as a Marine in Vietnam and his

service-related mental health problems. After the State suggested that defendant had forfeited this claim by failing to file a postsentencing motion, defendant replied that the abuse of discretion amounted to first-prong plain error. We affirm, holding that defendant did not meet his burden of persuasion to show that, to the extent that the court gave insufficient weight to mitigating factors, that misweighing amounted to plain error.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged with a single count of arson based on an incident in which he set fire to a minivan belonging to Dwan Montgomery. The indictment stated that defendant would be subject to Class X sentencing based on his having two prior Class 2 felony convictions. Defendant's counsel sought a fitness evaluation of defendant; after the evaluation, the court deemed defendant fit. Defendant gave notice of his intention to rely on an insanity defense. He had a jury trial.

¶ 5 The evidence at trial showed that, on the evening of January 6, 2015, Montgomery's mother heard a noise outside the house in which she lived with Montgomery. Looking out a window, she saw that Montgomery's minivan was on fire. The house had a security system with a camera, and a review of the security recording showed someone walking up to the vehicle and pouring something on the hood near the windshield. The person ran down the driveway as fire appeared on the vehicle. The vehicle burned until extinguished by firefighters. A fire investigator testified that the arsonist had used an accelerant to get the vehicle to burn. Investigators found a discarded bottle that had contained the accelerant and a bag that held the bottle.

¶ 6 Montgomery worked for a trucking company owned by her brother. Defendant had worked as a driver for the company, but, as of January 6, 2015, had not driven for it for weeks because of a financial dispute.

¶ 7 The police arrested defendant, who, after hearing his *Miranda* rights, gave a statement. He said that the trucking company had refused to reimburse him for fuel; he called Montgomery about the problem, but she did not reimburse him. This angered him and made him feel stressed. Eventually, he filled a bottle with gasoline, poured it on Montgomery's vehicle, and lit a match.

¶ 8 Defendant testified. He was 62 years old and had served with the Marine Corps in Vietnam from 1971 to 1973. The Marine Corps discharged him five months early because of a "mental problem": "I went in the military 18 years old [*sic*]. And *** being a Christian, they trained me to become a machine—I'm a sniper—and now I'm killing people I don't know a thing about; and *** therefore, I went off in the head." Physical effects of his service included ringing in his ears and a burning sensation in his head:

> "I have five ringing in my head [*sic*]; three on one side, two in the other constantly. I didn't know they were that bad until I got locked up. I mean, it's loud. Never stop.
>
> ***
>
> I burn up here all the time. (Indicating.)
>
> [Defense counsel] Q. Burning in your head?
>
> [Defendant] A. In my head.
>
> ***
>
> A. That's why I take BC Powder [(aspirin and caffeine)]. *** There was a drug, BC Powder. I take them every night when I was out before I go to bed; otherwise, I wake up with a headache so bad I can't hold my head up."

¶ 9 Defendant worked for the trucking company for six weeks. The business paid him in cash; he never saw any tax-withholding forms. Defendant agreed to drive a truck from Rockford to the Mexican border for the company, but the company refused to reimburse him for the gas he used. He talked with Montgomery and her brother about the money; it was "something [that] happened over a period of six weeks that built up in [his] mind." He "couldn't take it." "It kept building up. Man, I just—on the last run is what did it. Something came over me." He had not slept for two or three days as of January 6, 2015.

¶ 10 Defendant agreed that the security recording from Montgomery's house probably showed him, but said that he "didn't understand what [he] was doing." He did remember being arrested. However, he did not remember making his written statement, and he said that the signature on the statement did not look like his signature.

¶ 11 The court did not allow the jury to consider an insanity defense, and the jury found defendant guilty. He moved for a new trial on multiple grounds; the court denied the motion.

¶ 12 At the sentencing hearing, the State supplied evidence that defendant had been convicted in 1990 and 1992 of possession of stolen vehicles and possession of burglary tools. Defendant's presentencing report showed that he also had a conviction of unspecified "IVC [(Illinois Vehicle Code)] Felonies" in 1976 and had received a year of probation. The report stated that defendant demonstrated an "antisocial attitude" in "that he had problems dealing with people, particularly his 'own kind.' " Although defendant's primary social contact was with his wife, he also reported friendships with two elders at the church he attended every week and had taught adult Bible study for 15 years. He reported spending most of his leisure time reading the Bible. Defendant stated that he had grown up in an extremely poor household; he was one of 16

children, his house had no utilities, and he had dropped out of high school because his family needed more money. He was subject to severe physical discipline.

¶ 13 In testimony, defendant gave a rambling statement to the court, suggesting that his offense was the result of Satan trying to take his family.

¶ 14 At defendant's request, the court admitted the report submitted by psychologist Terrance G. Lichtenwald concerning defendant's fitness to stand trial. The report stated that defendant understood the fundamentals of how the legal system functions, and so was fit to stand trial. Lichtenwald confirmed defendant's military service, although not in all details. He suggested that defendant had post-traumatic stress disorder, possibly as a consequence of his being the victim of two armed robberies when he was a cab driver in Chicago. One of those robberies might have left defendant with a head injury. Defendant had also received treatment for depression. Lichtenwald noted to defendant that he had obvious memory deficits, something that defendant confirmed. He also noted that defendant was extremely hard of hearing. Defendant told Lichtenwald that he had been seen for neurological concerns at a Veteran's Administration (VA) medical center; defendant's account was not clear—he talked about both brain cancer and brain injury and mentioned a referral to an oncologist, but this was possibly for prostate cancer. Defendant reported being uncomfortable around others and that he found that driving kept his mind helpfully occupied. According to Lichtenwald, the "BC Powder" that defendant used to control his headaches was an over-the-counter mixture of aspirin and a large dose of caffeine. Defendant said that his felony convictions came about from a scheme involving the illegal scrapping of vehicles that appeared to be abandoned on the street.

¶ 15 The State argued that the present offense was particularly serious because defendant had intended the arson to intimidate Montgomery. It also argued that "defendant *** demonstrated a

very antisocial orientation [in that] he indicated that he does not deal well with others" and that the arson was "the epitome of that." It asked the court to impose a sentence of 15 years' imprisonment.

¶ 16 Defendant argued that he had been law-abiding for 22 years, so that the provisions that made him eligible for Class X sentencing based on his old convictions made even the minimum sentence harsh under the circumstances. He also argued that he was in an atypical state of mind when he committed the offense. He therefore asked the court to impose the minimum sentence of six years.

¶ 17 The court recessed for about 10 minutes to review Lichtenwald's report. On returning, it stated that it did "consider all the factors in aggravation and mitigation and the information contained in the addendum and the presentence report." Defendant made a statement in allocution. He apologized to his family—but not Montgomery—and stated, "It's like when Judas betrayed Jesus, he said Satan got into him when he betrayed him. When he find out he wept."

¶ 18 The court largely discounted any mitigation based on an altered state of mind:

> "And I know you mentioned about how something just came over you. But if you look at how deliberate your actions were, it's hard to imagine that you acted under any kind of passion or duress other than the fact that you were angry."

It stated that a vehicle fire inherently poses a large risk to others, suggesting that if the vehicle had exploded while firefighters were on the scene, they could have been injured. It deemed that defendant had not recognized the seriousness of his offense, noted that the reports showed that defendant had often failed to follow through after seeking medical attention, and suggested that prison might prevent that from happening. Further, it stated that defendant's criminal history

was a significant factor in its decision. It imposed a sentence of 10 years' imprisonment. After imposing sentence, it commented, "Now, even though I have talked about the facts and circumstances of this offense, I've not aggravated your sentence because of the information contained in the facts and circumstances but rather I just considered them in determining what an appropriate sentence would be." Defendant filed a notice of appeal without ever having filed a postsentencing motion.

¶ 19 II. ANALYSIS

¶ 20 On appeal, defendant argues that his "sentence, which is almost double the minimum sentence he faced, is excessive where the trial court failed to give sufficient weight to several mitigating factors including [his] relatively minor and remote criminal history, his employment history, [his] dedication to his family, and his distinguished military service as a Marine during the Vietnam War[,] where his combat service had a lasting effect on his mental well-being."

¶ 21 The State argues that defendant forfeited his claim by failing to raise it in a postsentencing motion and further that, because the trial court did not abuse its discretion, no plain error occurred. It asserts that defendant has failed to overcome the presumption that the court considered all mitigating factors; thus, for instance, it argues that the fact that the court did not mention defendant's military service cannot be taken as an indication that the court did not consider that factor. Pointing to defendant's inability to understand why he set fire to the vehicle, his "trouble being around people," and his belief that "he had been wronged by Dwan Montgomery and her brother," the State also argues that the mere fact that a defendant suffers from a mental disorder is not necessarily mitigating. It suggests that the chronic nature of defendant's mental health problems suggests that his rehabilitative potential is likely to be low.

¶ 22 As defendant concedes, he forfeited his claim by failing to raise it in a postsentencing motion. See *People v. Hillier*, 237 Ill. 2d 539, 544 (2010) ("[T]o preserve a claim of sentencing error, both a contemporaneous objection and a written postsentencing motion raising the issue are required."). Although defendant did not suggest plain error in his initial brief, we may nevertheless consider it: a defendant may raise plain error in his reply brief in response to the State's forfeiture argument. See *People v. Ramsey*, 239 Ill. 2d 342, 412 (2010).

> "To obtain relief under this rule, a defendant must first show that a clear or obvious error occurred. [Citation.] 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. [Citation.] Under both prongs of the plain-error doctrine, the defendant has the burden of persuasion. [Citations.] If the defendant fails to meet his burden, the procedural default will be honored. [Citation.]" *Hillier*, 237 Ill. 2d at 545.

Defendant here has failed at the step of showing that clear or obvious error occurred.

¶ 23 Even when a defendant properly preserves a claim of sentencing error, we may not reduce a sentence that is within the statutory range "unless it is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense" (*People v. Horta*, 2016 IL App (2d) 140714, ¶ 40), and we must not alter a sentence absent an abuse of discretion by the trial court (*People v. Alexander*, 239 Ill. 2d 205, 212 (2010)). Within the applicable sentencing range, a trial court has great latitude in sentencing a defendant, but it may neither ignore relevant mitigating factors nor consider improper factors in aggravation. *People v. Roberts*, 338 Ill. App. 3d 245, 251 (2003). However, a "reviewing court must not substitute its

judgment for that of a sentencing court merely because it would have weighed the factors differently." *People v. Streit*, 142 Ill. 2d 13, 19 (1991).

¶ 24 Here, defendant claims not that the court ignored proper factors in mitigation, but only that it failed to give them sufficient weight. There was no clear error in the court's weighing. Defendant received a sentence in the lower part of the 6-to-30-year Class X range. 730 ILCS 5/5-4.5-25(a) (West 2014). The proper sentence for this offense was not obvious as there were both significant aggravating factors and significant mitigating factors. The most salient aggravating factor was that this offense, unlike many arson offenses, was clearly directed at another individual and was thus a crime with a distinct element of interpersonal violence. Salient mitigating factors included defendant's more than two decades of law-abiding behavior and his military service. However, because the only evidence relevant to defendant's mental health came from the fitness report, which contained relatively little clinical detail, it is not actually clear how mitigating the conditions the report mentioned are. As the State correctly notes, the existence of a diagnosed mental illness is neither inherently mitigating nor inherently aggravating; where a mental illness makes a defendant more likely to reoffend, a court need not treat it as mitigating. *People v. Ballard*, 206 Ill. 2d 151, 190 (2002). Given this mix of factors, we cannot say that a sentence in the lower part of the range, but not at the bottom of the range, was clear error.

¶ 25 III. CONCLUSION

¶ 26 For the reasons stated, we affirm defendant's sentence. 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).

¶ 27 Affirmed.