

NOTICE

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2019 IL App (4th) 170481-U

NO. 4-17-0481

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

September 4, 2019
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
v.)	Vermilion County
RAPHAEL CROSS,)	No. 14CF44
Defendant-Appellant.)	
)	Honorable
)	Thomas M. O’Shaughnessy,
)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Presiding Justice Holder White and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed the trial court’s judgment because the evidence was sufficient and affirmed the trial court’s sentence because the trial court properly considered the factors before it.

¶ 2 In January 2014, the State charged defendant, Raphael Cross, with three counts of unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2012)) after police searched his home in Danville, Illinois, pursuant to a warrant. During the search, officers discovered three firearms and indicia of residence. After a bench trial, the trial court convicted defendant.

¶ 3 At sentencing, the trial court considered a number of factors, including that the actions of defendant threatened serious harm. The court sentenced defendant to three concurrent terms of seven years in prison.

¶ 4 Defendant appeals, arguing that (1) the State failed to prove defendant guilty

beyond a reasonable doubt and (2) the trial court at sentencing improperly considered conduct inherent in the offense of unlawful possession of a weapon by a felon to be an aggravating factor.

We disagree and affirm.

¶ 5 I. BACKGROUND

¶ 6 A. The Bench Trial

¶ 7 In April 2017, defendant's case proceeded to a bench trial. The State presented one witness, Danville police officer Ben Stringer, who testified that he, along with other officers, executed a search warrant at 108 Porter Street in Danville on January 23, 2014. Stringer testified that no one was present when the search was conducted.

¶ 8 Stringer stated that he determined defendant lived at 108 Porter Street because Stringer discovered indicia of defendant's residence inside the house and in the trash can outside the house. In the trash can, Stringer found an unaddressed envelope with defendant's name written on the back along with other names. Stringer also found in the trash can a manila tag that had defendant's name on it. Stringer did not determine where the manila tag came from.

¶ 9 Stringer also found in the trash can a "repair tag" for Heath Automotive that said "Navigator" and "99" on it. Stringer did not follow up with Heath Automotive to learn further information about the tag. Stringer testified that prior to executing the search warrant, he surveilled the property but never saw defendant at or near the property.

¶ 10 Stringer also testified that the house contained two bedrooms. One bedroom contained children's items, and the other contained male clothing and shoes in the bedroom's closet. Inside the latter bedroom, he found three loaded firearms. One of the firearms was a pistol that Stringer found between the mattress and the box spring, approximately one foot away from a letter written by an attorney that was addressed to defendant at 108 Porter Street. This letter was

also between the mattress and the box spring.

¶ 11 In the closet of that same bedroom, Stringer found the other two firearms along with men's clothing and a dry cleaning receipt with defendant's name on it, dated January 17, 2014. The receipt was attached to a hanger with some men's clothing on it.

¶ 12 Stringer testified that he found traffic tickets containing defendant's name and the address 108 Porter Street in the bedroom, but he did not seize them. Stringer found a photograph of defendant and others in the living room and found ammunition throughout the residence.

¶ 13 Stringer stated that he never recovered a driver's license or other identification from defendant. After Stringer testified, the State introduced a certified driver's license printout containing defendant's name, photograph, and the address of 108 Porter Street in Danville.

¶ 14 Stringer testified that he never recovered keys to 108 Porter Street from defendant, nor did he contact the landlord or owner of the residence. Stringer never checked who was on the lease for the residence. Stringer never checked who paid the utilities for the residence.

¶ 15 When defendant was arrested, he was inside a 1999 blue Lincoln Navigator. Stringer had seen the Navigator in the driveway at 108 Porter in the past, but did not testify the vehicle was there when he searched the residence. Stringer did not know if defendant was the driver or the passenger in the Navigator when defendant was arrested because Stringer was not involved in that arrest. Stringer never saw defendant operating the Navigator.

¶ 16 The State presented evidence of defendant's prior felony conviction through a certified copy of a conviction and rested. Defendant did not present any evidence.

¶ 17 The trial court found defendant guilty of all three counts of unlawful possession of a weapon by a felon.

¶ 18 C. The Sentencing Hearing

¶ 19 In June 2017, the trial court conducted a sentencing hearing at which the State argued “firearms are inherently dangerous to the public safety. They pose a risk of serious harm to the public safety.”

¶ 20 Later, when imposing the sentence, the trial court stated the following:
“I find the following factors accord weight in favor of imposing a more severe sentence[: (1)] that the defendant’s conduct threatened serious harm, [(2)]that the defendant has a history of prior delinquency and criminal activity, and [(3)]that a sentence is necessary to deter others from committing the same offense.”

¶ 21 The trial court sentenced defendant to three concurrent terms of seven years in prison for the three offenses.

¶ 22 This appeal followed.

¶ 23 **II. ANALYSIS**

¶ 24 Defendant appeals, arguing that (1) the State failed to prove defendant guilty beyond a reasonable doubt and (2) the trial court at sentencing improperly considered conduct inherent in the offense of unlawful possession of a weapon by a felon to be an aggravating factor. We disagree and affirm.

¶ 25 **A. Sufficiency of the Evidence**

¶ 26 Defendant first argues that because the State failed to present sufficient evidence to prove him guilty beyond a reasonable doubt, his convictions should be reversed. The State responds that based on the evidence presented, a rational trier of fact could find defendant guilty beyond a reasonable doubt. We agree with the State.

¶ 27 **1. *The Applicable Law***

¶ 28 When considering a claim of insufficient evidence, a reviewing court determines

whether, 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 to be proved beyond a reasonable doubt. *People v. Gray*, 2017 IL 120958, ¶ 35, 91 N.E.3d 876. It is the responsibility of the trier of fact to weigh, resolve conflicts in, and draw reasonable inferences from the testimony and other evidence, and it is better equipped than this court to do so because it heard the evidence. *Id.*; see also *In re Jonathon C.B.*, 2011 IL 107750, ¶ 59, 958 N.E. 2d 227. A court of review does not retry a defendant, nor does it substitute its judgment for that of the trier of fact regarding witness credibility or the weight of evidence. *Gray*, 2017 IL 120958, ¶ 35.

¶ 29 To prove the charge of unlawful possession of a weapon by a felon, the State must prove beyond a reasonable doubt that defendant knowingly possessed a firearm and had previously been convicted of a felony. 720 ILCS 5/24-1.1(a) (West 2012). In a case like this, in which the State proceeds under a theory of constructive possession, the State must prove that defendant (1) had knowledge of the contraband and (2) exercised immediate and exclusive control over the area where the contraband was found. *People v. Maldonado*, 2015 IL App (1st) 131874, ¶ 23, 35 N.E.3d 1218. Constructive possession can be proved entirely through circumstantial evidence. *People v. McCarter*, 339 Ill. App. 3d 876, 879, 791 N.E.2d 1278, 1280 (2003).

¶ 30 *2. This Case*

¶ 31 The State prevails in this case only because of the high standard which must be met before a conviction will be overturned due to insufficiency of the evidence.

¶ 32 The State did not present evidence that defendant was observed in or around the residence containing the firearms, and defendant never made any admission that this was his residence. However, the State presented sufficient evidence showing that defendant did live at 108 Porter Street in Danville. Of particular note are (1) the proximity between a letter addressed to defendant from an attorney and a pistol that were both found under a mattress and (2) the dry

cleaning receipt found in the same closet as the other firearms. Further, defendant's driver's license printout listed 108 Porter Street as his address. The totality of the State's evidence provided a foundation upon which a rational trier of fact could conclude that the State had met its burden of proof.

¶ 33 We earlier referred to evidence not presented and inquiries not made and need not repeat those references.

¶ 34 B. Double Enhancement

¶ 35 Defendant next argues that his sentence should be vacated because the trial court erred by considering as an aggravating factor conduct that was inherent in the offense, resulting in a "double enhancement." Defendant notes that at the sentencing hearing, the court found defendant's conduct threatened serious harm. Defendant contends that because this was a fact already taken into consideration by the legislature when it fashioned the sentencing range for this offense, the court's considering the factor again in favor of imposing a more severe sentence qualifies as double enhancement.

¶ 36 The State responds that because the firearms were loaded, defendant's conduct was more than the minimum required to commit the offense. Accordingly, the State argues defendant's conduct was properly considered as an aggravating factor. We agree with the State.

¶ 37 1. *The Applicable Law*

¶ 38 "The trial court has broad discretionary powers when selecting an appropriate sentence." *People v. Garcia*, 2018 IL App (4th) 170339, ¶ 37, 99 N.E.3d 571. The trial court's sentence must be based upon the particular circumstances of the case, including (1) the defendant's history, character, and rehabilitative potential; (2) the seriousness of the offense; (3) the need to protect society; and (4) the need for punishment and deterrence. *Id.*

¶ 39 The Unified Code of Corrections (Unified Code) (730 ILCS 5/5-5-3.1, 5-5-3.2 (West 2014)) sets forth mitigating and aggravating factors that the trial court must consider when determining an appropriate sentence. *People v. Brunner*, 2012 IL App (4th) 100708, ¶¶ 43-45, 976 N.E.2d 27. The defendant bears the burden to affirmatively establish that the sentence was based on an improper factor. *People v. Williams*, 2018 IL App (4th) 150759, ¶ 18, 99 N.E.3d 590. The appellate court will not reverse a sentence unless it is evident that the trial court relied upon an improper factor. *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 49, 38 N.E.3d 98.

¶ 40 “A double enhancement occurs when (1) a single factor is used both as an element of an offense and as a basis for imposing a harsher sentence *** or (2) the same factor is used twice to elevate the severity of the offense itself.” *Garcia*, 2018 IL App (4th) 170339, ¶ 29.

¶ 41 A trial court may consider a defendant’s conduct to constitute an aggravating factor if that “conduct caused or threatened serious harm.” 730 ILCS 5/5-5-3.2(a)(1) (West 2014). When considering if the defendant “threatened serious harm,” the sentencing court compares the conduct in the case before it against the minimum conduct necessary to commit the offense. See *People v. Hibbler*, 2019 IL App (4th) 160897 ¶ 67; *People v. Davis*, 252 Ill. App. 3d 812, 814, 624 N.E.2d 396, 398 (1993); *People v. Ellis*, 401 Ill. App. 3d 727, 731, 929 N.E.2d 1245, 1248-49 (2010). A trial court must examine “the nature and circumstances of the offense, including the nature and extent of each element of the offense as committed by the defendant [citations].” (Internal quotation marks omitted.) *People v. Saldivar*, 113 Ill. 2d 256, 268-69, 497 N.E.2d 1138, 1143 (1986). “[T]he commission of any offense, regardless of whether the offense itself deals with harm, can have varying degrees of harm or threatened harm.” *Id.* at 269.

¶ 42 Whether the trial court relied upon an improper factor at sentencing is a question of law that is normally reviewed *de novo*. *People v. Arbuckle*, 2016 IL App (3d) 121014-B, ¶ 39,

60 N.E.3d 185. In the present case, however, as defendant concedes, defendant forfeited this issue. Therefore, this court instead analyzes whether consideration of this factor amounts to plain error. *People v. Herron*, 215 Ill. 2d 167, 186, 830 N.E.2d 467, 479 (2005). The plain-error doctrine allows a reviewing court to consider an unpreserved error when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence. *Id.* at 187. In the first instance, the defendant must prove “prejudicial error” which means the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him. *Id.* In the second instance, the defendant must prove that the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *Id.*

¶ 43

2. *This Case*

¶ 44 Here, the trial court did not commit any error when it found defendant's conduct was an aggravating factor based on the threat of harm. The State argues that the presence of ammunition in the firearms makes this case more dangerous than it would be if defendant had simply possessed three firearms with no ammunition. We agree with the State.

¶ 45 The bare minimum to be guilty of the offense of which defendant was convicted is that a person is (1) a felon and (2) in possession of a firearm. 720 ILCS 5/24-1.1(a) (West 2012). When the legislature wrote that statute, it determined that a felon in possession of a firearm poses a special danger. However, as dangerous as the combination of felons and firearms is, the danger increases dramatically when a firearm is loaded, as in this case.

¶ 46 The weapon's being loaded is not required as an inherent part of the offense of which defendant was convicted. That is, as this court explained in *Hibbler*, the firearm's being loaded in this case exceeded the minimum conduct necessary to commit the offense. *Hibbler*,

¶ 67. The fact that the firearms in this case were loaded dramatically increased the threat of harm. The trial court recognized that additional threat and was correct to do so.

¶ 47

III. CONCLUSION

¶ 48 For the reasons stated, we affirm the trial court. The State requested a \$50 statutory assessment against defendant as costs of this appeal. Because the law which supports that assessment was repealed as of July 1, 2019, we decline to impose that assessment. See Pub. Act 100-987, § 905-43 (eff. July 1, 2019) (repealing 55 ILCS 5/4-2002).

¶ 49 Affirmed.