APPENDIX C

SUPREME COURT OF ILLINOIS

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January 24, 2024

In re: People State of Illinois, respondent, v. Odell Calvin, etc., petitioner. Leave to appeal, Appellate Court, First District. 130148

The Supreme Court today DENIED the Petition for Leave to Appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on 02/28/2024.

Very truly yours,

Cynthia A. Grant

Clerk of the Supreme Court

"APPENDIX C"

APPENDIX A

Document: People v. Calvin, 2024 Ill. LEXIS 140

A People v. Calvin, 2024 Ill. LEXIS 140

Supreme Court of Illinois

January 24, 2024, Decided

130148

Reporter

2024 Ill. LEXIS 140 * | 226 N.E.3d 25 | 470 Ill. Dec. 25 | 2024 WL 335516

People State of Illinois, respondent, v. Odell Calvin, etc., petitioner.

Notice: DECISION WITHOUT PUBLISHED OPINION

Prior History: **[*1]** Leave to appeal, Appellate Court, First District. 1-21-0989.

People v. Calvin, 2023 IL App (1st) 210989-U, 2023 Ill. App. Unpub. LEXIS 1624 (Sept. 29, 2023)

Opinion

Petition for Leave to Appeal Denied.

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APPENDIX A (1)

Document: People v. Calvin, 2023 IL App (1st) 210989-U

A People v. Calvin, 2023 IL App (1st) 210989-U

Appellate Court of Illinois, First District, First Division

September 29, 2023, Decided

No. 1-21-0989

Reporter

2023 IL App (1st) 210989-U * | 2023 Ill. App. Unpub. LEXIS 1624 **

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ODELL CALVIN a/k/a JULIUS JONES, Defendant-Appellant.

Notice: THIS ORDER WAS FILED UNDER SUPREME COURT RULE 23 AND MAY NOT BE CITED AS PRECEDENT BY ANY PARTY EXCEPT IN THE LIMITED CIRCUMSTANCES ALLOWED UNDER RULE 23(e)(1).

Subsequent History: Appeal denied by **People v. Calvin**, 2024 Ill. LEXIS 140, 226 N.E.3d 25 (Ill., Jan. 24, 2024)

Prior History: [**1] Appeal from the Circuit Court of Cook County. No. 15 CR 06342. The Honorable William Raines, Judge Presiding.

Core Terms

sentence, gun, trial court, second trial judge, pro se, sentencing hearing, identification, closing argument, proceedings, courtroom, original trial, arrest, right to counsel, admonishments, circumstances, imprisonment, pre-trial, comments, offender, video, posttrial, weapon, revolver, factors, plain error, balanced, tattoo, post trial motion, prior to

Appendix B

trial, aggravation

Judges: JUSTICE Pucinski delivered the judgment of the court. Presiding Justice Fitzgerald Smith and Justice Lavin concurred in the judgment.

Opinion by: Pucinski

Opinion

ORDER

[*P1] *Held:* Judgment affirmed over defendant's challenge to his constitutional right to a public trial where the partial closure was narrowly tailored, no broader than necessary, the court considered reasonable alternatives, and made adequate findings. The trial court exercised appropriate discretion in allowing the State to present evidence that he "groped" one of the victims, in allowing the State to present evidence as to his flight from the police at the time of his arrest, in allowing the State to show the manner in which the victims were permitted to identify the gun, and in refusing to instruct the jury as to Illinois Pattern Jury Instruction, Civil, No. 5.01. Moreover, the State did not misrepresent the evidence during its proffer to the trial court regarding the identification of the gun, and the State did not violate the rules of discovery or *Brady* when there was no evidence to find that the State failed to disclose written documentation of the meeting in which the victims were [**2] shown the gun. As to the propriety of his 57-year sentence of imprisonment, defendant is not entitled to a new sentencing hearing because the record shows that he validly waived his right to counsel during the hearing on his motion to reconsider sentence, where the trial court did not improperly consider a void prior conviction, and his sentence was not excessive.

[*P2] Defendant, Julius Jones, was charged by information with two counts of armed robbery while armed with a firearm (720 ILCS 5/18-2(a)(2) (West 2010)), and two counts of aggravated vehicular hijacking while armed with a firearm (AVH) (720 ILCS 5/18-4(a)(4) (West 2010)). After a jury trial, defendant was found guilty of both offenses, and was sentenced to 57 years' imprisonment. Defendant appeals, asserting: (1) his constitutional right to a public trial was violated; (2) the trial court abused its discretion in allowing the State to introduce evidence that he "groped" one of the victims; (3) he was prejudiced when the State presented too much detail as to his flight from police at the time of his arrest; (4) he was prejudiced when the State introduced evidence showing the unduly suggestive manner in which the victims identified the gun; (5) the State made a misrepresentation [**3] during its proffer to the trial court regarding the identification of the gun; (6) the State violated the rules of discovery and *Brady* when it failed to disclose written documentation during the meeting in which the victims were shown the gun; (7) that the State made improper comments during opening statements and closing arguments; (8) the trial court erred in failing to conduct a *Krankel* hearing; (9) the trial court erred in refusing to instruct the jury as to Illinois Pattern Jury Instruction, Civil, No. 5.01; (10) he is entitled to a new sentencing hearing where he did not validly waive his right to counsel before proceeding *pro se*; (11) he is entitled to a new sentencing hearing where the trial court improperly considered a void prior conviction; and (12) his 57-year sentence was excessive.[1] For the foregoing reasons, we affirm defendant's conviction and sentence.

[*P3] BACKGROUND

"Appendix B"

[*P4] Rafael Ceja (Ceja) and Jessica Chevel (Chevel) testified at trial that on September 30, 2014, they were dating and living together on the south side of Chicago. Chevel was 8 months pregnant with their first child, and Ceja was working at a downtown restaurant. Chevel picked up Ceja from work around 1:20 a.m. in her 1999 beige four-door Saturn. On the way home, [**4] Ceja, who was driving, wanted to purchase some cigarettes at a store near 63rd and Artesian Streets. He parked along a side street on the left-hand side of the street. Ceja walked to the store by himself and purchased some loose cigarettes. He walked back to the car and sat down in the driver's seat.

[*P5] As soon as Ceja sat down, he saw a person, whom he identified as defendant, standing outside the car holding a black revolver. Defendant then grabbed him by the shirt, put the gun to the side of his head, and told Ceja to give him everything he had. Ceja threw $20 out the window and told defendant that he did not have any more money. While still pointing the gun at Ceja, defendant then opened the door and had Ceja turn towards the rear of the car in the driver's seat. Defendant sat down in the driver's seat next to Ceja and started to pat down Ceja. He pointed the gun at Ceja's back and told him to not look behind him.

[*P6] At that point, Ceja saw another person approach the car, open the rear car door and grab Chevel's purse, located behind the passenger seat. Meanwhile, defendant was hitting him in the back of his head with the gun and telling him not to look back. Then, defendant told Ceja [**5] and Chevel to get out of the car and that he did not "give a f***" if you see my face, just get the f*** out of the car and go before I kill you." While defendant was making that threat, he was pointing the gun at Ceja, and Ceja was looking directly at defendant's face. Ceja testified that he had a clear view of defendant. Ceja exited the car, followed by Chevel, and ran towards the nearby store. The keys to the car were still in the ignition. He saw defendant jump into the driver's seat of the car, and the other male, who took Chevel's purse, jump into the front passenger seat, and they drove away. Ceja testified that he had left his cell phone in the car.

[*P7] Jessica Chevel testified that while Ceja was out of the car, she was looking at her cellphone and still holding it in her hand when Ceja returned to the car from the store. As Ceja sat down in the driver's seat, she saw defendant approach from the front of the car and along the sidewalk. Defendant sat next to him, put a black gun to Ceja's head, and told him to give him everything that he had. Chevel said that Ceja told defendant that he only had $20 and gave the money to him. Defendant searched Ceja and made Ceja sit backwards [**6] on his knees with the gun pointed to Ceja's head. Chevel testified that she was "staring at his face the whole time" and held her cellphone on her right side. Defendant said, "what the f***, what are you doing..." and took her cellphone. Defendant continued to point the gun at Ceja and poked him in the head with it. She also testified that she told defendant that she was pregnant, and defendant told her that he did not care. Defendant "started pretending to search me, but that's not what he was doing. He groped my breasts and he felt my vagina" over her clothing, and told Ceja not to look. She saw someone else walk around the rear of the car and grab her purse that was in the rear passenger side seat. Defendant then told them to "get the f*** out of the car and run and don't look back and he didn't give a f*** that we saw his face." As she was running away, she heard defendant tell his friend to get in the car, and she heard the car drive away.

[*P8] After Ceja and Chevel ran to the nearby grocery store, they asked an employee to call 911, but Ceja was able to flag down a police squad car that had driven by the store. Detective John Sullivan testified that he was working as a beat officer [**7] that night, along with his partner, Officer Michael Powell, when he was stopped by Ceja and Chevel. They told him that they had just parked their vehicle and were approached by two males that robbed them at gunpoint and took their vehicle. They described the offender with the gun as a male black wearing a gray hooded sweatshirt and camouflage pants, approximately five foot eight inches tall and weighing 160 pounds. They also said that this offender had tattoos on the right side of his face and described the tattoo as a circle with some sort of circle design on his right cheek and another tattoo over his left eyebrow. They described the other offender as a black male and dressed in all black clothing, approximately six feet tall and weighing 150 pounds. Detective Sullivan and his partner transported Ceja and Chevel to the 8th District Police Station to speak with them further about the incident.

[*P9] The victims' car was recovered on October 4, 2014. Sergeant Lynn Meuris, who was working as a beat officer in the 6th District with Officer James Cabay, regularly checked the

parking lot of an apartment building at 6458 South Lowe, Chicago, for cars illegally parking in handicapped parking spots. [**8] In the early evening of October 4, 2014, Sergeant Meuris and Officer Cabay drove by this parking lot and saw a beige Saturn; a car that they had never previously seen in that lot. When they ran the license plates, it came back as stolen. She called for an evidence technician, and Officer Joseph Scumaci arrived at the scene. Sergeant Meuris testified that it was raining at this time. When Officer Scumaci arrived, the exterior of the car was wet, which prevented him from obtaining any fingerprints from that portion of the car. He also attempted to locate fingerprints from the interior of the car but determined that it was unsuitable to obtain fingerprints because it was too dirty.

[*P10] While waiting for the car to be towed, Sergeant Meuris brought up the 911 call reporting the car stolen and saw that it contained a description of one of the offenders. That description included a male with facial tattoos. Being familiar with the occupants of that apartment building, Sergeant Meuris knew that one of the occupants had very distinctive facial tattoos and further matched the physical description of the offender. The sergeant had written a contact card when he previously encountered defendant across [**9] the street from this apartment building on June 4, 2014.

[*P11] Sergeant Meuris and Officer Cabay noticed that the parking lot had surveillance cameras but when they went to the security office, they were told that the persons working there could not help them access the security videos. The officers went back to the security office the next day and viewed the videotaped footage. They rewound the videotape to the point in time when they saw someone exit the car on the driver's side. Sergeant Meuris described that person as a black male, with a facial tattoo on his right cheek, shorter in stature, dark hair, and camouflage pants. The officer attempted to retrieve a copy of the videotape but the person assisting them in the security office did not know how to download it.

[*P12] Chicago Police Detective Erik Chopp was assigned to this case. After the victims' car was recovered, Detective Chopp spoke with Chevel over the telephone call. Chevel told him that the offender with a gun was a black male, 28 to 32 years old, five foot five to five foot six inches tall, 170-180 pounds. The offender had one tattoo above his right eye with a word in cursive, another large tattoo covering his right cheek which [**10] she described as being "Aztec" and green colored. He was dressed in a fake gray leather jacket, and gray and white camouflage pants. She described the other offender as a black male with longer dreadlocks in a ponytail.

[*P13] Detective Chopp put together a photo array for Chevel and Ceja to view at the station. The detective input defendant's photo and information into the police computer database and it generated approximately 200 different photos for him to review to compose the photo array. All the people of the chosen photos had facial tattoos. Ceja and Chevel viewed the photo array separately. Chevel signed a photo advisory form, viewed the photo array, and identified defendant. She signed the photo of defendant and wrote on the bottom of the photo "this is the man who put a gun to my fiancé's head, took my car and also violated me." She testified that she was "100 percent certain" that defendant was the offender. Ceja also viewed the photo array and identified defendant's photo. He signed the photo and wrote on the bottom of the photo "[T]his is the guy that robbed us with the gun." Ceja testified that, when he was shown the photos, he recognized defendant's face and his tattoo and [**11] was sure because "I remember it like if it [sic] was yesterday" and immediately identified him.

[*P14] Five months later, defendant was arrested during a traffic stop on March 31, 2015, at 9:15 p.m. Chicago Police Officer Andrew Braun, and his partner, Officer Arturo Fonseca, were on patrol along 75th Street in an unmarked police car when they saw a white Audi driving with no headlights. They attempted to curb this vehicle and activated their emergency lights, but the car accelerated. They followed the car as it disobeyed traffic lights and stop signs. At one point, the driver of that car jumped out of the car as it was still moving. Officer Braun chased after the driver and saw him throw a black revolver into a nearby backyard. Officer Braun arrested the driver and identified defendant in court as the driver of that vehicle. The officers recovered the black revolver that defendant had thrown and determined that it was loaded with three live rounds and one spent shell casing inside the cylinder.

[*P15] This gun and ammunition were inventoried and sent to the Forensic Services Division of the Chicago Police Department where Officer Daniel Vasquez tested it. He

described the gun as a Taurus revolver. [**12] He determined that the gun functioned properly, and test-fired it with the inventoried spent shell casing. He determined that the test-fired bullet matched the inventoried spent shell casing. To his knowledge, the gun was not sent to another unit for fingerprint testing.

[*P16] Ceja also testified that sometime in 2016, when preparing for testimony in a pre-trial proceeding, he and Chevel met with assistant State's Attorneys as well as some other unidentified people. During the meeting, they were shown a gun. On direct examination, Ceja testified the assistant state's attorneys did not indicate what they thought this weapon was, and he identified it as the .38 caliber revolver he had seen defendant point to his head. He was asked "[h]ow sure are you?" and he responded, "[b]ecause I remember it." On cross-examination, he testified that they asked him if this was defendant's gun. He also testified that "[i]f I see that I got robbed with that gun, of course I'm going to remember that, what -- what they used to rob me." On redirect examination, he testified that he would have told the assistant state's attorneys if that was not the gun used in this offense.

[*P17] Cheval was also asked questions about [**13] this meeting. She testified that, during this meeting, Ceja identified it as the .38 caliber revolver he had seen defendant point at his head. Chevel testified that when she was asked if she recognized the gun, she told them that she did not. She explained that she did not know much about guns, and just remembered that a black gun was used during the offense. She recalled that Ceja said, "that's the gun, that's what I saw."

[*P18] The jury found defendant guilty of all counts. Defendant retained private counsel to represent him during posttrial proceedings. On January 6, 2020, the second trial judge held a hearing on defendant's motion for a new trial filed by his posttrial counsel. That day, the second trial judge denied the motion, and immediately proceeded to begin the sentencing hearing. The second trial judge commenced and continued the sentencing hearing until January 24, 2020. In the meantime, on January 16, 2020, defendant filed a *pro se* motion for new trial. When the case was recalled for the continuation of the sentencing hearing, the second trial judge allowed defendant to state the basis of his motion, and he advised the court that he "just wish[ed] it to be a part of the record..." [**14] The second trial judge stated that he would include this motion in the record and, because defendant was represented by counsel, "I will note that you filed this..."

[*P19] During the sentencing hearing, the State presented the victim impact statement of Rafael Ceja who stated that he still suffered from nightmares, flashbacks, and anxiety attacks from defendant's actions. He was scared that he would see defendant again or that defendant might kill him. He also stated that it has affected his relationships with his family because he was not "good enough to defend my family." He suffered financially because he had to miss work due to not having a car, and he had to ask for loans from family and friends to "get back on his feet."

[*P20] At the sentencing hearing, the State also presented the testimony of Chicago Police Detective Fred Hasenfang. He testified to the circumstances surrounding defendant's prior conviction for AVH, which occurred on September 12, 2003. On that date, he and his partner were stopped in their squad car near Marquette Park when he heard gunshots. He looked in the direction of the gunshots and saw defendant hanging out of a car window firing a gun at two people who were 15-20 [**15] feet away from defendant. The officers pursued defendant, and, during the chase, defendant discarded the gun out the car window. Defendant was arrested a short time later following a foot chase. The two persons defendant shot at said that defendant had just robbed them and took their car from them at gunpoint.

[*P21] In mitigation, defendant presented the testimony of Andrea Heath, his fiancée. She testified that she had known him for four years and, even though he had been incarcerated, he had "been there" for her, for her son and for his own children. He helped the children with their homework and called almost nightly. She also testified that he had been "a little bit angrier" but now he reads the Bible and is "truly calm." She testified that, upon his release from prison, they wanted to travel, and defendant wanted to mentor youth so they would not make the same mistakes that he did.

[*P22] In allocution, defendant testified that his birth mother left him for dead, but he was adopted by a woman who subsequently was paralyzed by a stroke when he was eight years old. He described his childhood as not normal and stated that he molested by a cousin. When

his mother passed away a few years later, [**16] "I just didn't care. I didn't have a reason to care." He also stated that "So I have made a lot of mistakes in life, Your Honor, but I can honestly say, Your Honor, that this was not one of them, Your Honor..."

[*P23] The second trial judge considered, in aggravation, that defendant's conduct caused or threatened serious harm in that he held a gun to the head of a pregnant woman and this man and had made "some contact with her breasts and her vagina." The judge also considered, in aggravation, his criminal history. The judge noted that defendant was 38 years old, his criminal history covered 23 years, and he spent most of his adult life in the penitentiary. He had a prior misdemeanor conviction for criminal trespass to vehicle, a misdemeanor conviction for aggravated domestic battery, a felony conviction for UUWF for which he was sentenced to five years' imprisonment, a felony conviction for possession of a controlled substance for which he was sentenced to 27 months' imprisonment, a felony conviction for delivery of a controlled substance for which he was sentenced to four years' imprisonment, and another felony conviction for delivery of a controlled substance for which he was originally [**17] sentenced to probation, but that probation was revoked and he was re-sentenced to one year' imprisonment. The judge also considered, in aggravation, that the sentence is necessary to deter others from committing the same crime. The judge also stated that he considered, in mitigation, that Andrea Heath's testimony was "heartfelt" but found that defendant did not establish that his criminal conduct was a result of circumstances unlikely to reoccur based upon his extensive criminal history.

[*P24] The second trial judge subsequently sentenced defendant to 57 years' imprisonment for armed robbery and merged the remaining counts. After the judge announced the sentence, posttrial counsel asked the judge to reconsider the sentence and to sentence him to 40 years' imprisonment in light of defendant's difficult childhood and to provide "some hope" to defendant's children that they could see their father again. The judge responded, "...When I heard the defendant's allocution, what I heard was excuses. And I am not saying we don't all have them. It makes us who we are. He said that today, it makes us who we are. But one of the things he did say...he's got no regrets. Even in regards to this case, he [**18] has no regrets. He's got no regrets regarding his prior criminal history because it made him the man he is today...." The judge pointed out defendant's extensive criminal history, the fact that some of those cases involved the use of a weapon and found that this sentence was necessary to deter others from committing this offense. Posttrial counsel disagreed with the judge's interpretation, suggested that defendant did not regret his actions because he wanted to use it to help prevent others from following the same path, and asked the judge to consider "split[ting] the difference and do 45 years?" The judge stated that he would not negotiate with posttrial counsel.

[*P25] ANALYSIS

[*P26] I. Right to a Public Trial

[*P27] Defendant argues that his constitutional right to a public trial was violated when the second trial judge barred Andrea Heath, his fiancée, during trial. In turn, the State argues that the judge exercised appropriate discretion in barring Heath based upon security concerns related to defendant and Heath passing notes to each other during trial. We find that the second trial judge did not abuse its discretion in partially closing the courtroom to Heath where it was narrowly tailored to the [**19] judge's overriding interest for courtroom security, no broader than necessary, the court considered reasonable alternatives, and made adequate findings to support his decision.

[*P28] The sixth amendment to the United States Constitution guarantees a defendant the right to a public trial. U.S. Const., amend. VI. This guarantee is for the benefit of the accused and "'is a safeguard against any attempt to employ the courts as instruments of persecution.'" *People v. Cooper*, 365 Ill.App.3d 278, 281, 849 N.E.2d 142, 302 Ill. Dec. 527 (4th Dist. 2006) (quoting *People v. Seyler*, 144 Ill.App.3d 250, 252, 494 N.E.2d 267, 98 Ill. Dec. 340 (5th Dist. 1986); see also *Waller v. Georgia*, 467 U.S. 39, 46, 104 S. Ct. 2210, 81 L.

Ed. 2d 31 (1984). A public trial "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 508, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984). "It is well recognized, however, that the interest of a defendant in having ordinary spectators present during trial is not an absolute right but must be balanced against other interests that might justify excluding them." *Seyler*, 144 Ill.App.3d at 252. There are some circumstances when closure or partial closure is essential when narrowly tailored by the trial court. *Press-Enterprise Co. v. Superior Court of California, Riverside County*, 464 U.S. 501, 510, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984).

[*P29] Thus, a party seeking to partially or fully close proceedings to the public "'must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, [**20] and it must make findings adequate to support the closure.'" *Cooper*, 365 Ill.App.3d at 282 (quoting *Waller*, 467 U.S. at 48). This standard has been applied to the issue here involving the exclusion of two spectators for security concerns. *Id.* A violation of the right to a public trial falls into the limited category of "structural errors," which require automatic reversal and a defendant need not prove specific prejudice. *People v. Evans*, 2016 IL App (1st) 142190, 410 Ill. Dec. 97, 69 N.E.3d 322 (citing *People v. Thompson*, 238 Ill.2d 598, 608-09, 939 N.E.2d 403, 345 Ill. Dec. 560 (2010)); see also *People v. Taylor*, 244 Ill.App.3d 460, 464, 612 N.E.2d 543, 183 Ill. Dec. 891 (2nd Dist. 1993). "'The standard to be applied in determining whether there is a sufficient record to support the exclusion of spectators from a courtroom is whether there has been an abuse of discretion.'" *Id.* (quoting *Seyler*, 144 Ill.App.3d at 252). A trial court abuses its discretion only where its rulings are "arbitrary, fanciful or unreasonable" or "where no reasonable man would take the view adopted by the trial court." *People v. Ramsey*, 239 Ill.2d 342, 429, 942 N.E.2d 1168, 347 Ill. Dec. 588 (2010) (citing *People v. Donoho*, 204 Ill.2d 159, 182, 788 N.E.2d 707, 273 Ill. Dec. 116 (2003)). The question of whether a partial closure resulted from an abuse of discretion requires a fact-intensive inquiry based on the totality of the circumstances. *People v. Evans*, 2016 IL App (1st) 142190, ¶ 9, 410 Ill. Dec. 97, 69 N.E.3d 322.

[*P30] During the middle of the State's case-in-chief, the second trial judge informed defense counsel:

> "I was watching [the defense law clerk] yesterday, and she was having some conversation with your client, notes were being passed between them, and I believe [**21] that woman sitting out there, which is his girlfriend, I'm going to have a discussion about holding her in contempt of court, I'm not going to do it but she needs to know that if I do that, she'll never be admitted to any bar in this country. That is unacceptable. That violates the rules. She should know better having that type of conversation, and I'm going to put her on the record."

[*P31] Defense counsel responded, "Okay" to the judge's announcement. The judge further explained that "I was watching and they were going back and forth and passing notes. The sheriff, Jim was there, and there was [sic] notes being passed back and forth to the...his girlfriend...or wife whatever she is." [2] The judge informed defense counsel that "I will most likely remove her from this court room of the rest of the trial." Defense counsel responded, "Okay."

[*P32] The judge then inquired from the law clerk what happened, and she admitted that defendant asked her to give a note to Heath, she agreed to hand a note from defendant to Heath and a note from Heath to defendant. The judge warned her that he could hold her in contempt of court, but she was "no longer allowed in this courtroom for the pendency of the trial based [**22] on that..." The judge then stated that Heath would also be barred from the courtroom and instructed the sheriff to remove her. At that point, defense counsel stated that, in the note that was passed, defendant was expressing his desire to proceed *pro se*.

[*P33] The first time that defendant expressed concern about that the second trial judge's decision to bar Heath was when, in preparing for the sentencing hearing, defendant's new counsel asked the trial court to reconsider his decision to bar Heath from the courtroom. In doing so, counsel argued that passing notes did not provide grounds to ban Heath. The State responded that a person passing notes to a defendant constitutes a "security issue" especially for a defendant who is in custody. The judge reiterated his concern that the passing of notes

between defendant and another person amounted to a security risk, and when defense counsel questioned this concern, the judge stated that the note could have contained information such as, "Get everybody ready, we're breaking them out, we're going to cause a disturbance. Any number of conceivable reasons there should be no contact during the middle of a jury trial between anybody in the audience [**23] and anybody in this courtroom. That's it." The judge, however, then allowed defendant to present the testimony of Heath during the sentencing hearing but prohibited her from being a spectator.

[*P34] Defense counsel raised this issue in his oral argument for his motion for a new trial, and the judge reiterated his decision to bar Heath was for "security reasons" and that, in doing so, he considered the nature of the pending charges in this case and defendant's other pending cases, which included offenses for his conduct while in the lockup and in the jail itself. The judge also pointed out that defendant and his wife had opportunities to communicate with each other during the breaks in the courtroom proceedings alleviating the need for them to pass notes.

[*P35] As an initial matter, defendant failed to object to the exclusion of Heath from the courtroom at the time that the judge made the decision and waited until posttrial proceedings to raise any claim. However, on appeal, the State failed to raise the issue of defendant's forfeiture on appeal. Because the doctrine of forfeiture applies to the State as well as to defendant, the State has forfeited this argument on appeal. See *People v. Sophanavong*, 2020 IL 124337, ¶ 21, 450 Ill. Dec. 154, 181 N.E.3d 154 (citing *People v. Artis*, 232 Ill.2d 156, 177-78, 902 N.E.2d 677, 327 Ill. Dec. 556 (2009) (finding [**24] that the forfeiture rules in criminal proceedings are applicable to the State).

[*P36] Substantively, we find that the judge properly exercised discretion in excluding Heath from the courtroom based upon security concerns. Defendant suggests that there was no overriding interest for banning Heath for security reasons because the note concerned defendant's desire to go *pro se*. Defendant's argument ignores the trial court's overriding interest to maintain decorum and security in the courtroom. "[A] trial judge has a duty to maintain order and decorum in the courtroom." *People v. Bell*, 276 Ill.App.3d 939, 948-49, 658 N.E.2d 1372, 213 Ill. Dec. 351 (2d Dist. 1995) (citing *People v. Dixon*, 36 Ill.App.3d 247, 252, 343 N.E.2d 583 (1st Dist. 1976) ("A trial judge has wide discretion in maintaining order in the courtroom and it is his duty to do so.")); see also *People v. Williams*, 201 Ill.App.3d 207, 221, 558 N.E.2d 1258, 146 Ill. Dec. 924 (1st Dist. 1990); *People v. Shaw*, 98 Ill.App.3d 682, 688, 424 N.E.2d 834, 54 Ill. Dec. 84 (1st Dist. 1981). In addition, it is recognized that a trial court is also "vested with the inherent power to preserve its dignity by the use of contempt proceedings." *Bell*, 276 Ill.App.3d at 949 (citing *In re Baker*, 71 Ill.2d 480, 484, 376 N.E.2d 1005, 17 Ill. Dec. 676 (1978). To that end, Illinois Supreme Court Rule 63 (A)(3) (eff. July 1, 2013), which is cannon 3 of the Code of Judicial Conduct, provides the following: "A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and other with whom the judge deals with in an official capacity, and should require similar conduct of lawyers, and of staff, court officials, [**25] and others subject to the judge's direction and control."

[*P37] While the contents of the note itself did not raise a security issue, the fact that Heath and defendant engaged in the passing of notes to each other during the middle of the trial proceedings was enough for the judge to exercise his discretion to bar her from the courtroom. See *People v. Cooper*, 365 Ill.App.3d 278, 282, 849 N.E.2d 142, 302 Ill. Dec. 527 (4th Dist. 2006) (the trial court had an overriding interest in maintaining proper courtroom decorum when he barred five spectators, who displayed disruptive behavior in the middle of the defendant's trial). Likewise, the closure was no broader than necessary to protect that interest. Because only the two people involved in passing the note were excluded, exclusive of defendant's own involvement, the closure was no broader than necessary. See *Cooper*, 365 Ill.App.3d at 283 ("Because only those spectators known to have caused the disturbances were excluded, the closure was no broader than necessary.") The judge also considered reasonable alternatives to permanently barring Heath from the courtroom when he subsequently permitted her to testify at defendant's sentencing hearing. Finally, the record clearly shows that the judge made findings adequate to support the closure.

[*P38] The cases relied upon by [**26] defendant indicate that violations of the right to a public trial have been found where the judge closed proceedings to the public or excluded certain persons from the courtroom based on space limitations or baseless concerns that the presence of defendant's family members in the courtroom would prejudice the jury selection

process. See *People v. Evans*, 2016 IL App (1st) 142190, ¶¶ 11-16, 410 Ill. Dec. 97, 69 N.E.3d 322 (concern for preventing jury contamination during *voir dire*); *People v. Willis*, 274 Ill.App.3d 551, 554, 654 N.E.2d 571, 211 Ill. Dec. 109 (1st Dist. 1995) (same); *People v. Taylor*, 244 Ill.App.3d 460, 468, 612 N.E.2d 543, 183 Ill. Dec. 891 (2d Dist. 1993) (same). These cases, however, are factually distinguishable from the case at bar and do not persuade us from finding that the second trial judge exercised appropriate discretion.

[*P39] II. Admissibility of Testimony that Defendant Groped One of the Victims

[*P40] Defendant argues that the original trial judge abused his discretion in allowing the State to introduce other crimes evidence that was "irrelevant, prejudicial, extensive testimony of a sex crime" when Chevel testified that defendant groped her while searching her. In turn, the State argues that the judge exercised appropriate discretion because it was not "other crimes" evidence and, instead, an integral and natural part of her description of the circumstances of the offense. Both parties agree that the abuse of discretion standard [**27] applies. See *People v. Morales*, 2012 IL App (1st) ¶ 22; *People v. Bell*, 2021 IL App (1st) 190366, ¶ 53, 454 Ill. Dec. 270, 189 N.E.3d 531 ("A trial court will not be found to have abused its discretion with respect to an evidentiary hearing unless it can be said that no reasonable person would take the view adopted by the court.") We find that the second trial judge exercised appropriate discretion in permitting the State to introduce this evidence.

[*P41] Prior to trial, defendant filed a motion in *limine* to preclude the State from introducing evidence that the defendant patted down Chevel in a sexually suggestive manner arguing that it was prejudicial where there were no charges pending related to this conduct. The State argued that this witness should be permitted to describe what happened to her while defendant was robbing her and, citing to *People v. Rutledge*, 409 Ill.App.3d 22, 948 N.E.2d 305, 350 Ill. Dec. 236 (1st Dist. 2011), argued that "[t]he defense isn't entitled to a sanitized version of what happened simply because the other crimes haven't been charged." The judge denied defendant's motion, finding that "[i]f that is what the witness is going to say happened to her, she is entitled to describe the incident."

[*P42] On appeal, the State cites *People v. Manuel*, 294 Ill.App.3d 113, 689 N.E.2d 344, 228 Ill. Dec. 472 (1st Dist. 1997). In *Manuel*, we analyzed when conduct should be considered evidence of "other crimes[.]" and found that the conduct "'must have been *extrinsic* to the matter [**28] being tried, not contained in it, not part of it.'" (Emphasis in original.) *Id.* at 124 (quoting Mauet, Wolfson, *Trial Evidence*, ch. V, p. 102 (1997). In contrast, "'[w]hen the prior conduct is *intrinsic* to the matter being charged, belonging to it, part of it, or, as some cases say 'inextricably intertwined' or a 'continuing course of conduct,' the rules of evidence for other crimes' is not implicated, and the general principles of relevance apply.'" (Emphasis in original.) *Id.*

> "Stated differently, if the prior crime is part of the 'course of conduct' leading up to the crime charged, then it constitutes intrinsic evidence of the charged offense and its admissibility is not analyzed as 'other crimes' evidence, requiring proof that the defendant committed or participated in the uncharged offense." *People v. Morales*, 2012 IL App (1st) 101911, ¶ 25, 966 N.E.2d 481, 359 Ill. Dec. 160 (citing *Manuel*, 294 Ill.App.3d at 124).

[*P43] In *Manuel*, we determined the evidence of defendant's previous drug deals with a confidential source were not "other crimes" evidence. *Id.* at 124. We observed, "[t]hough the prior deals were not part of the same episode, they were a necessary preliminary to the current offense." *Id.* We also determined that the evidence of prior deals explained that the defendant delivered more cocaine than bargained for to [**29] make up for a prior deal where the quality of the cocaine had been bad. *Id.*

[*P44] Following *Manuel*, in *Rutledge*, the defendant was charged with aggravated battery to a police officer. *Rutledge*, 409 Ill.App.3d at 22-23. Prior to committing this offense, the defendant was sitting in a car parked in an alley with a woman; he was intoxicated and became angry when the woman refused his sexual advances. *Id.* at 23. When the defendant began hitting the woman, she exited the car and ran to a man standing in his open garage.

Id. The man identified himself as a police officer, and defendant struck the officer. *Id.* We held that evidence of the defendant's actions towards the woman was necessary to show that he was "drunk and angry," which tended to explain the events leading up to the altercation with the officer. *Id.* at 25-26.

[*P45] Here, as in *Manuel* and *Rutledge*, the evidence of defendant's conduct of groping Chevel did not constitute "other crimes" evidence unrelated to the charged offense considering defendant's conduct on that date. Defendant's act of groping Cheval was "inextricably intertwined" or a "continuing course of conduct" with the armed robbery and aggravated vehicular hijacking. This conduct occurred while defendant was robbing Chevel and Ceja and thus, were relevant to [**30] show defendant's course of conduct when he was inside the victims' car.

[*P46] Thus, we find that the second trial judge exercised appropriate discretion in allowing the State to introduce evidence of defendant's conduct of groping Chevel as part of the course of his conduct.

[*P47] III. Admissibility of Defendant's Flight from Police

[*P48] Defendant's next contention relates to testimony as to defendant's flight from police upon his arrest on March 31, 2015. Specifically, he acknowledges that the original trial judge ruled, prior to trial, that the State could introduce this testimony to show identification, but he argues that the State went on to describe defendant's flight "in lengthy detail" and "went far beyond the purpose for which it was admitted." Thus, it appears that defendant now concedes the admissibility of this evidence, and he focuses his argument on the extent of the detail elicited from Officer Braun regarding defendant's flight.

[*P49] As a threshold matter, we find that defendant failed to properly preserve this issue by failing to raise this claim in his posttrial motion for a new trial. It is well-established that to properly preserve an issue for appeal, a defendant must object to the purported [**31] error at trial and specify the error in a posttrial motion. *People v. Bannister*, 232 Ill.2d 52, 65, 902 N.E.2d 571, 327 Ill. Dec. 450 (2008); *People v. Enoch*, 122 Ill.2d 176, 186, 522 N.E.2d 1124, 119 Ill. Dec. 265 (1988). Defendant acknowledges the forfeiture of this issue but asks us to review it pursuant to first prong of the plain-error doctrine. The plain-error rule bypasses normal forfeiture principles and allows us to review unpreserved claims of error in certain circumstances. *People v. Thompson*, 238 Ill.2d 598, 613 (2010). Under the first prong of the plain-error doctrine, a reviewing court can consider unpreserved issues where the evidence is so closely balanced that the error alone severely threatened to tip the scales of justice against the defendant. *People v. Herron*, 215 Ill.2d 167, 186-87, 830 N.E.2d 467, 294 Ill. Dec. 55 (2005). In any event, a defendant must preliminarily establish there was error. *Herron*, 215 Ill.2d 167, 187, 830 N.E.2d 467, 294 Ill. Dec. 55 (2005).

[*P50] Prior to trial, the State filed a motion seeking to admit evidence regarding defendant's arrest on March 31, 2015, in which officers saw defendant commit a traffic violation, attempted to execute a traffic stop, and while defendant fled from the officers, he threw a black revolver. That weapon was recovered, subsequently shown to Chevel and Ceja, and was identified as the gun used in committing this offense. During the pre-trial hearing, the State argued that this evidence was admissible for identification, consciousness of guilt, and to show the circumstances [**32] of defendant's arrest so that it does not constitute "other crimes" evidence. The original trial judge found that "the probative value outweighs the prejudice when it comes to admitting this evidence on the issue of your identification where these witnesses from the armed robbery have identified a weapon that you were allegedly in possession of at a later time..."

[*P51] Now, on appeal, defendant argues when the State presented this testimony, it was "in lengthy detail" and "the vast majority of the testimony was irrelevant to this case." However, he does not provide us with any relevant caselaw in support of his argument. Under Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013), an appellant's brief must include "the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." Even overlooking this failure, we recognize that other

crimes evidence "must not become a focal point of the trial." *People v. Boyd*, 366 Ill.App.3d 84, 94, 851 N.E.2d 827, 303 Ill. Dec. 640 (1st Dist. 2006). "Courts have warned against the dangers of putting on a 'trial within a trial,' with detail and repetition greatly exceeding what is necessary to establish the particular purpose for the evidence." *Boyd*, 366 Ill.App.3d at 94 (quoting *People v. Bartall*, 98 Ill.2d 294, 315, 456 N.E.2d 59, 74 Ill. Dec. 557 (1983)).

[*P52] Here, we find that defendant was not prejudiced by [**33] the introduction of this evidence. The State presented the testimony of only one witness, Officer Braun, to recount the circumstances of defendant's arrest. Officer Braun's testimony in which he recounted the details of this chase amounted to less than ten pages of trial transcript, which included a sidebar discussion requested by defense counsel. Moreover, the number of details provided by Officer Braun as to the chase of defendant was more closely related to defendant's repeated and prolonged efforts to elude the police officers than as an attempt to present unnecessary and prejudicial details. Because this evidence did not become the focal point of defendant's trial, defendant has not shown that he was prejudiced by its admission. Finding no error in the inclusion of this evidence, we need not look at whether the evidence was closely balanced under the plain-error doctrine.

[*P53] IV. Propriety of Evidence Relating to the Weapon Found in Defendant's Possession

[*P54] Although defendant raises numerous overlapping arguments related to the introduction of the black revolver used in the armed robbery, his claims can be boiled down to three specific challenges: (1) the manner in which the victims [**34] were shown the handgun prior to trial was "unduly suggestive"; (2) during the pretrial hearing, the State "dishonestly represented" to the original trial judge when it proffered that both victims identified the gun when only one victim testified at trial as to that identification; and (3) the State committed a discovery violation pursuant to *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), when it failed to disclose written documentation relating to the meeting in which the two victims were shown the weapon and Ceja's familiarity with weapons.

[*P55] Prior to trial, defendant filed several motions relating to the admission of evidence surrounding the gun found during his subsequent arrest. Initially, the State filed a pre-trial motion seeking to admit this gun as well as testimony explaining the victims' pre-trial identification of it. In that motion, the State explained that on May 23, 2016, two assistant state's attorneys met with Ceja and Chevel and showed them the black revolver recovered during defendant's arrest. The State explained that "[t]he victims positively identified the black revolver as being the same firearm used by the defendant during the...armed robbery..."

[*P56] Defendant subsequently filed a *pro se* motion seeking to suppress [**35] this testimony on the grounds that the identification procedure was unnecessarily suggestive and prejudicial because the victims were only shown one weapon and was not done in the presence of defense counsel.[3] The original trial judge heard argument from both parties as to defendant's contention and rejected defendant's argument, finding that his argument related to the identification of a person, rather than an object. The judge informed defendant that he "need[ed] to show me something that says that it attached to the identification of a weapon, or an inanimate object or something like that, I certainly will consider it..."

[*P57] A. Whether the Identification Procedure for the Weapon Was Suggestive

[*P58] Defendant argues that the original trial judge erred in allowing the State to introduce testimony that one of the victims identified the gun recovered from defendant during his arrest as the same gun that was used in the armed robbery because the

identification was done so in a suggestive manner. In doing so, defendant relies upon caselaw relating to show-up identifications of suspects and the identification factors outlined in *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972). In turn, the State argues that defendant does not cite to [**36] any case in which the circumstances surrounding a witness pre-trial identification of an object, as opposed to a suspect, implicate due process. This issue concerns an evidentiary ruling which are within the trial court's sound discretion and will not be reversed absent an abuse of that discretion. *People v. Caffey*, 205 Ill.2d 52, 89, 792 N.E.2d 1163, 275 Ill. Dec. 390 (2001).

[*P59] We agree that there is no caselaw to support defendant's suggestion that the pre-trial identification of an object amounts to a due process violation. We recognize, however, that defendant's claim is essentially that the State could not establish the proper foundation for the admission of this evidence during the trial because of the allegedly suggestive manner in which the item was identified pre-trial. When deciding whether evidence was properly admitted, we look to the Illinois Rules of Evidence. Pursuant to Rule 901(a), "[t]he requirement of authentication or identification as a condition precedent to admissible is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Ill.R.Evid. 901(a) (eff. Sept. 17, 2019). Rule 901 also provides "examples of authentication or identification conforming with the requirements of this rule..." Ill.R.Evid. 901(b) (eff. Sept. 17, 2019). Two of the [**37] examples provided in that rule include a witness with knowledge that "a matter is what it is claimed to be" and identification of an item with "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics..." Ill.R.Evid. 901(b)(1) and (4) (eff. Sept. 17, 2019).

[*P60] Here, the evidence supports the admissibility of Chevel's testimony as to the identification of the gun. There was sufficient evidence to find that the gun is what Chevel claims. He was able to see the gun used by defendant during the offense, and he described it as a black revolver. Thus, he had knowledge of this matter of the object. He also testified that during pre-trial preparation, he was shown a weapon, and he identified it as the .38 caliber revolver that he saw defendant point at him. Moreover, any concern about the suggestiveness of his pre-trial identification of this object was a matter that could be addressed, and was addressed, during cross-examination at trial. Thus, the original trial judge did not abuse his discretion in allowing the State to present this testimony.

[*P61] B. Whether the State's Proffer Was Proper or Misleading

[*P62] Defendant argues that the State "dishonestly represented" to the original trial judge [**38] when it proffered to the trial court that Chevel and Ceja would both identify the gun recovered from defendant during his subsequent arrest as the gun that was used in committing this offense. While Chevel identified the gun at trial as the one used in the offense and testified that he identified it as such during a pre-trial meeting, Ceja testified that she was unable to identify the gun during this meeting, but that Chevel was able to make that identification.

[*P63] There is no evidence to support defendant's suggestion that the State, in its proffer, purposely misled the judge. "A proffer is used to convince a trial court to admit evidence, and must apprise the trial court 'what the offered evidence is or what the expected testimony will be, by whom it will be presented and its purpose.'" *People v. Weinke*, 2016 IL App (1st) 141196, ¶ 41, 401 Ill. Dec. 546, 50 N.E.3d 688 (citing *Kim v. Mercedes-Benz, U.S.A., Inc.*, 353 Ill.App.3d 444, 451, 818 N.E.2d 713, 288 Ill. Dec. 778 (1st Dist. 2004)). In its motion seeking to admit the gun recovered during defendant's arrest, the State proffered that both victims identified this gun as the same gun used in the armed robbery. However, Chevel testified that she did not identify the gun during this pre-trial meeting. When asked to explain this discrepancy, the State subsequently explained that Chevel had given "different" answers when she [**39] was interviewed in the presence of a victim/witness advocate earlier that day. Thus, the State's proffer contained the evidence that it expected to present. Chevel, however, testified inconsistently. Consequently, the evidence shows that the State did not "dishonestly represent[]" in their proffer to the trial court.

[*P64] C. Discovery and *Brady* Violation

[*P65] Defendant contends that the State failed to produce written statements taken at the time of the meeting at which Chevel and Ceja were asked if they could identify the gun recovered during defendant's arrest. Alternatively, he argues that even if no written statements were taken, the State was required to provide information from this meeting that Cheval did not identify the gun and that Ceja knew about this type of gun from the time that he lived in Mexico with his grandfather, who had weapons.

[*P66] Initially, the State contends that defendant forfeited these claims by failing to properly preserve them in his motion for a new trial. In his reply brief, defendant asks us to find that defendant preserved this issue by looking at the number of times that counsel raised these claims throughout the trial and, alternatively, asks us to find that the [**40] failure to preserve these claims amounted to ineffective assistance of posttrial counsel. It is well-established, however, that to properly preserve an issue for appeal, a defendant must object to the purported error at trial and specify the error in a posttrial motion. *People v. Bannister*, 232 Ill.2d 52, 65, 902 N.E.2d 571, 327 Ill. Dec. 450 (2008); *People v. Enoch*, 122 Ill.2d 176, 186, 522 N.E.2d 1124, 119 Ill. Dec. 265 (1988). In any event, a defendant must preliminarily establish there was error. *People v. Herron*, 215 Ill.2d 167, 187, 830 N.E.2d 467, 294 Ill. Dec. 55 (2005).

[*P67] Not only did defendant fail to properly preserve his claims at trial, but he also failed to cite to any authority for these claims with the exception of the seminal case of *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Defendant's failure to provide relevant citation to authority is in contradiction with Illinois Supreme Court Rule 341 (h)(7) (eff. Oct. 1, 2020). Consequently, we find that these arguments have been forfeited. Forfeiture, however, "'is a limitation on the parties and not the reviewing court, and we may overlook forfeiture where necessary to obtain a just result or maintain a sound body of precedent.'" *People v. Phillips*, 2022 IL App (1st) 181733, ¶ 156, 461 Ill. Dec. 834, 205 N.E.3d 922 (quoting *People v. Holmes*, 2016 IL App (1st) 132357, ¶ 65, 400 Ill. Dec. 236, 48 N.E.3d 185). Looking at the substantive arguments, we find that there was no error.

[*P68] Regarding defendant's claim that the prosecution failed to produce written statements taken during the meeting with Chevel and Ceja, Illinois Supreme Court Rule 412 (a)(i) requires the disclosure of any "relevant written or recorded statements, memoranda containing [**41] substantially verbatim reports of their oral statements..." Ill.Sup.Ct.R. 412 (a)(i) (eff. Mar. 1, 2001). Prior to trial, when defendant requested any discovery regarding this meeting, the State proffered the substance of the witnesses' testimony and stated that "[t]here is no other documentation that was done by [the assistant state's attorney]...So there's nothing to produce other than giving counsel the information that she already has that's been documented in the motion." When defendant raised this issue again on a later date, the State informed the second trial judge that there were no written memoranda. Ultimately, the second trial judge found that the State had met its discovery obligation and was not required to provide a written memoranda.

[*P69] We recognize that, pursuant to *People v. Mahaffey*, 128 Ill.2d 388, 418, 539 N.E.2d 1172, 132 Ill. Dec. 366 (1989), there is no discovery violation when the State does not disclose a witness statement that was never memorialized. "It is clear that the State is required to disclose a witness' oral statements only if they are in 'memoranda containing substantially verbatim reports of their oral statements.'" *Mahaffey*, 128 Ill.2d at 418. Here, the State repeatedly represented to the second trial judge that there was no written memorandum of the oral statements made by the [**42] two witnesses during this meeting. Consequently, there was no discovery violation.

[*P70] Moreover, we find that defendant cannot establish that the prosecution violated the requirements for disclosure pursuant to *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Defendant argues that the prosecution failed to disclose that Chevel did not identify the gun during this meeting and Ceja's testimony that he knew about various types of guns from the time that he lived with his grandfather, who owned guns, in Mexico.

[*P71] Under *Brady*, the prosecution has an affirmative duty to disclose evidence favorable to the defendant. *People v. Coleman*, 183 Ill.2d 392 (1998). To establish a violation of that rule, a defendant must show that: (1) the undisclosed evidence is favorable to the defendant because it is exculpatory or impeaching; (2) the State willfully or inadvertently suppressed the evidence; and (3) this suppression prejudiced the defendant because the evidence was material to guilt or punishment. *People v. Beaman*, 229 Ill.2d 56, 73-74, 890 N.E.2d 500, 321 Ill. Dec. 778 (2008). Evidence is material where a reasonable probability exists that its disclosure would have led to an acquittal. *People v. Brandon*, 2021 IL App (1st) 172411, ¶ 83, 457 Ill. Dec. 370, 195 N.E.3d 284. Additionally, a reasonable probability does not mean that the evidence would more likely than not result in a different verdict; rather, a reasonable probability exists if the likelihood [**43] of a different outcome is sufficient to undermine confidence in the trial. *People v. Davis*, 2012 IL App (4th) 110305, ¶ 63, 966 N.E.2d 570, 359 Ill. Dec. 249. To establish materiality, an accused must show "'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'" *People v. Coleman*, 183 Ill.2d 366, 393, 701 N.E.2d 1063, 233 Ill. Dec. 789 (1998) (quoting *Kyles v. Whitley*, 514 U.S. 419, 435, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)). Furthermore, courts must consider the cumulative effect of all suppressed evidence. *Beaman*, 229 Ill.2d at 74.

[*P72] There is no evidence to support defendant's contention that the State failed to disclose Ceja's inability to identify the gun. The State was unaware of this impeaching evidence. As previously explained, the State informed the trial court that Chevel had given "different" answers when she was interviewed in the presence of a victim/witness advocate earlier that day. Likewise, there is no evidence that the State was aware of Chevel's testimony regarding his prior knowledge of weapons. Chevel never testified that he had previously told the State this information.

[*P73] Even if defendant could have discovered this evidence, we have full confidence in the jury's guilty verdict. Thus, the impeachment evidence was not material to defendant's guilt or innocence. *People v. Roman*, 2016 IL App (1st) 141740, ¶ 18, 409 Ill. Dec. 532, 67 N.E.3d 987 (noting that "impeachment evidence may not be material where the State's [**44] remaining evidence is strong enough to preserve confidence in the verdict.") In light of the evidence of guilt in this case, we conclude that there was no reasonable probability that, even if this evidence had been disclosed to the defense, the result of defendant's trial would have been different.

[*P74] In sum, we find that defendant has not established that the State violated the applicable discovery rules or violated the disclosure requirements pursuant to *Brady*. Because there was no error, there can be no plain error, and consequently, there can be no finding that his trial counsel was ineffective. See *People v. White*, 2011 IL 109689, ¶ 133, 956 N.E.2d 379, 353 Ill. Dec. 517.

[*P75] V. Opening Statement and Rebuttal Argument

[*P76] Defendant initially contends that the State made several improper comments during opening statements and rebuttal argument. "While the State has wide latitude in both its opening statements and closing arguments and may comment on the evidence, it is still improper for the State to make comments that have no other purpose than to arouse the prejudices and passions of the jury." *People v. McNeal*, 2019 IL App (1st) 180015, ¶ 43, 443 Ill. Dec. 141, 161 N.E.3d 265 (citing *People v. Jones*, 2016 IL App (1st) 141008, ¶ 21, 410 Ill. Dec. 1, 69 N.E.3d 226). Moreover, the purpose of an opening statement is to allow a party to remark generally and concisely about the facts and issues of the case, and it should [**45] not be argumentative. *People v. Smith*, 2017 IL App (1st) 143728, ¶ 48, 418 Ill. Dec. 788, 91 N.E.3d 489 (citing *People v. Jones*, 2016 IL App (1st) 141008, ¶ 22, 410 Ill. Dec. 1, 69 N.E.3d 226). Even if the remarks are found to be inappropriate, reversal is required only if they engendered such substantial prejudice against the defendant that it is impossible to tell whether the verdict of guilt resulted from them. *People v. Cross*, 2019 IL App (1st) 162108, ¶ 99, 439 Ill. Dec. 287, 147 N.E.3d 962 (citing *People v. Wheeler*, 226 Ill.2d 92, 123, 871 N.E.2d 728, 313 Ill. Dec. 1 (2007)).

[*P77] Defendant asks this court to review the comments made during opening statements and closing arguments pursuant to *de novo* review, while the prosecution asks this court to utilize an abuse of discretion standard. Insofar as the propriety of comments made by the prosecution during closing arguments, we recognize that there is currently a split in the appellate court regarding which standard of review should apply. This split stems from two statements made by the Illinois Supreme Court in *People v. Wheeler*, 226 Ill.2d 92, 121, 871 N.E.2d 728, 313 Ill. Dec. 1 (2007), which suggested that the *de novo* standard applies, and *People v. Blue*, 189 Ill.2d 99, 128, 724 N.E.2d 920, 244 Ill. Dec. 32 (2000), which suggested that the abuse of discretion standard applies.

[*P78] In *Phagan*, this district found that the abuse of discretion standard is the proper standard, as "the trial judge is present for the entire trial, *** has the benefit of hearing the remarks of counsel on both sides" and is better situated to determine whether anything that happened or was said justifies the challenged [**46] remark." *People v. Phagan*, 2019 IL App (1st) 153031, ¶¶ 48-50 (quoting *North Chicago Street Ry. Co. v. Cotton*, 140 Ill. 486, 502, 29 N.E. 899 (1892); See also *People v. Miller*, 2020 IL App (1st) 163304, ¶ 46, 448 Ill. Dec. 142, 175 N.E.3d 1052; *People v. Cornejo*, 2020 IL App (1st) 180199, ¶ 128, 453 Ill. Dec. 614, 188 N.E.3d 344. In making this determination, we noted that "the pedigree for an abuse of discretion standard spans more than a hundred years." *Id.* at ¶ 49 (citing *People v. McCann*, 247 Ill. 130, 170-71, 93 N.E. 100 (1910); and *Bulliner v. People*, 95 Ill. 394, 405-06 (1880)).

[*P79] Application of the *de novo* standard, however, "does not enjoy historical support," as the court in *Wheeler* based its application of the *de novo* standard on *People v. Graham*, 206 Ill.2d 465, 795 N.E.2d 231, 276 Ill. Dec. 878 (2003); *Phagan*, 2019 IL App (1st) 153031, ¶ 51. As we observed, the *Graham* court referenced two different issues raised by the defendant, one of which was the defendant's challenge to the prosecutor's remarks in closing argument, and stated, "'We review this legal issue *de novo,*'" without distinguishing the two claims. *Id.* (quoting *Graham*, 206 Ill.2d at 474). Moreover, the *Graham* court considered the prosecutorial misconduct issue under the framework of an ineffective assistance claim. *Id.* at ¶ 52 (citing *Graham*, 206 Ill.2d at 476-77)), and ineffective claims are reviewed *de novo*. *Id.* (citing *People v. Demus*, 2016 IL App (1st) 140420, ¶ 27, 399 Ill. Dec. 914, 47 N.E.3d 596)). Therefore, it was unclear whether *Graham* was applying the *de novo* standard as to the prosecutorial misconduct claim or the ineffective assistance claim. *Id.*

[*P80] We agree with the reasoning in *Phagan* and conclude that defendant's claims related to prosecutorial error in closing arguments, and in opening statements, are more appropriately reviewed under the abuse of discretion standard. *Id.* at ¶¶ 48-50. [**47] Under this standard, "[t]he regulation of the substance and style of the closing argument is within the trial court's discretion, and the trial court's determination of the propriety of the remarks will not be disturbed absent a clear abuse of discretion." (Internal quotation marks omitted.) *Blue*, 189 Ill.2d at 128.

[*P81] Defendant initially concedes that he failed to properly preserve these claims on appeal by including them in his posttrial motion, however, he argues that we should review as a constitutional issue exception to this requirement, and, alternatively, under the plain error exception. See *People v. Cregan*, 2014 IL 113600, ¶ 16, 381 Ill. Dec. 593, 10 N.E.3d 1196 ("three types of claims are not subject to forfeiture for failing to file a posttrial motion: (1) constitutional issues that were properly raised at trial and may be raised later in a postconviction petition; (2) challenges to the sufficiency of the evidence; and (3) plain error"). He argues that the constitutional issue exception is applicable to his claim of due process rights violation. However, defendant fails to recognize that the constitutional issue exception is inapplicable to a claim that a defendant's due process rights were violated. *People v. Davis*, 2019 IL App (1st) 160408, ¶ 54, 439 Ill. Dec. 36, 147 N.E.3d 711.

[*P82] That being said, the plain-error doctrine rule bypasses normal forfeiture [**48] principles and allows us to review unpreserved claims of error in certain circumstances. *People v. Thompson*, 238 Ill.2d 598, 613, 939 N.E.2d 403, 345 Ill. Dec. 560 (2010). The plain-error doctrine allows a reviewing court to consider unpreserved issues where the evidence is so closely balanced that the error alone severely threatened to tip the scales of justice against the defendant (*People v. Herron*, 215 Ill.2d 167, 186-87, 830 N.E.2d 467, 294 Ill. Dec. 55 (2005)), or the error was so serious that it affected the fairness of the proceeding and challenged the integrity of the judicial process where the error affected a defendant's substantial rights. *Id.* at 187; Ill.S.Ct.R. 615(a) (eff. Jan. 1, 1967). In any event, a defendant

must preliminary establish there was an error. Consequently, our first task is to determine whether defendant has established that there was error. *People v. Herron*, 215 Ill.2d 167, 187, 830 N.E.2d 467, 294 Ill. Dec. 55 (2005).

[*P83] A. Opening Statement

[*P84] Defendant points to two comments made by the State during opening statements in which the State referred to defendant as a "taker" and pointed out that other people, including Rafael Ceja, work for a living. During opening statement, the prosecutor stated:

> "Some people work hard to make a living. They go to work every day, do the daily grind to provide for themselves and to provide for their families. Some people work. Other people take what they want from the people who work. [**49] Over the course of this trial you will learn that this defendant is one of the takers.
>
> As you will hear from Rafael Ceja that on September 30th, 2014, he was one of the workers. He was working literally cleaning up after people as a busboy in a restaurant downtown..."

[*P85] Defendant equates these comments with comments found to be improper in *People v. Smith*, 2017 IL App (1st) 143728, 418 Ill. Dec. 788, 91 N.E.3d 489. In *Smith*, the prosecutor referred to the murder victim as "a newlywed," "a loving husband," a "loving father to two beautiful girls," and "a spiritual man[,]" and that he was everything that the defendant was not. *Id.* at ¶ 12. We found that the prosecution's reference to the murder victim's spirituality was proper because it "provided context to why defendant happened to be at his house on the day in question..." and where evidence was presented at trial about these facts. *Id.* at ¶ 50. However, we found that the other comments "when juxtaposed with its later comment that [the murder victim] was everything defendant was not were improper." *Id.* at ¶ 51. We found that "the State sought to pit [the murder victim] — the loving family man with two beautiful daughters — against defendant, the antithesis." *Id.* at ¶ 52.

[*P86] Here, the State's comments do not reach the raise the same level of concern as in [**50] *Smith*. In that case, the State sought to rely upon specific characteristics of the murder victim, *i.e.* that he was a loving husband and father and a newlywed, which were not relevant to any of the issues that the jury was asked to consider. Here, on the other hand, the comments related to Rafael Ceja working were relevant to the evidence presented at trial. Both Chevel and Ceja testified that they were on their way home after Chevel picked up Ceja after he completed his 8-hour shift as a busboy. As in *Smith*, this evidence explained why they were in that particular area at that time of night when defendant robbed them. *Id.* at ¶ 50. Moreover, the description of defendant as a "taker" was relevant to the charges in this case. As the State points out, the jury was asked to decide whether defendant took a car and other items from the victims. *People v. Gilliam*, 172 Ill.2d 484, 507, 670 N.E.2d 606, 218 Ill. Dec. 884 (1996) ("the essence of robbery is the use of force in the taking of the property.")

[*P87] We also reject defendant's argument that the State attempted to improperly align themselves with the jury by these comments because "all of the seated jurors were either currently employed or retired." In these comments, the State never referenced the jurors and never asked the jurors [**51] to consider their own employments status in rendering a decision in this case. Thus, we reject defendant's arguments that these comments amounted to error.

[*P88] B. Closing Arguments

[*P89] Defendant also contends that the State made improper comments during closing argument. First, defendant argues that the State committed reversible error when it told the

jury that it could be sympathetic towards Chevel because she was pregnant at the time of the offense, and, at the time same, referred to him as a "sex offender", a "sexual predator", and was "sexually depraved." Trial counsel argued, during closing argument, that the accounts provided by Chevel and Ceja differed in significant ways and suggested that Chevel lied when she said that defendant groped her, and "...On one hand - - and you cannot let sympathy and bias and prejudice enter into it, so the fact that Jessica was 8 months pregnant at the time, you can't allow that to make you sympathetic." During rebuttal argument, the State responded to this line of argument:

> ...You know what you heard, poking, don't turn around, don't turn around, what is he saying don't turned around [sic] when he is groping Jessica's eight-month-pregnant body, and no, [**52] the fact that she is eight months pregnant makes her more sympathetic, makes him — well, not going to finish that sentence."

[*P90] The jury was instructed that "[n]either sympathy nor prejudice should influence you..." Illinois Pattern Jury Instructions Criminal, No. 1.01. The jury was also instructed more than once that the statements of attorneys in closing argument are not evidence and that it should disregard any such statement that was not based on the evidence. See Illinois Pattern Jury Instructions Criminal, No. 1.03 (approved July 18, 2014).

[*P91] We find that the State stopped short of making a comparison between Chevel and defendant, or suggesting that defendant was a sexual predator or sexually depraved. However, we find that the State's request for the jury to consider Chevel to be "more sympathetic" because she was eight months pregnant — a factor that is not relevant to a determination of the elements of either offense - amounted to error. It is well-established that a prosecutor may not use closing arguments simply to inflame the passions or develop the prejudices of the jury. *People v. Wheeler*, 226 Ill.2d 92, 129, 871 N.E.2d 728, 313 Ill. Dec. 1 (2007). Moreover, we reject the State's argument that it constituted a proper response to trial counsel's comment in closing argument. While it is well-established that a prosecutor may respond to comments made by trial [**53] counsel which clearly invite a response, this does not allow a prosecutor to make improper, prejudicial comments and arguments. *People v. Hudson*, 157 Ill.2d 401, 441, 626 N.E.2d 161, 193 Ill. Dec. 128 (1993).

[*P92] Although the comment was improper, we find that the potential for prejudice flowing from it to be minimal. First, the comment was isolated. The fact that the State did not repeatedly seek for the jury to be sympathetic for Chevel ameliorated the potential for prejudice. See *People v. Runge*, 192 Ill.2d 348, 373 (2000) (A significant factor in determining the impact of an improper comment on a jury verdict is whether "the comments were brief and isolated in the context of lengthy closing arguments.") Second, the court correctly instructed the jurors that "[n]either sympathy nor prejudice should influence you..." Illinois Pattern Jury Instructions Criminal, No. 1.01. Also, the jury was instructed more than once that the statements of attorneys in closing argument are not evidence and that it should disregard any such statement that was not based on the evidence. Illinois Pattern Jury Instructions Criminal, No. 1.03 (approved July 18, 2014). It is well settled that jury instructions "carry more weight than the arguments of counsel." *People v. Boston*, 2018 IL App (1st) 140369, ¶ 103, 439 Ill. Dec. 611, 148 N.E.3d 664. For that reason, we have recognized that "[a] trial court's instructions that closing arguments are not evidence protect [a] defendant against any prejudice caused by improper [**54] comments made during closing arguments." *Id.* "Absent some indication to the contrary, we must presume that jurors follow the law as set forth in the written instructions given them." *People v. Wilmington*, 2013 IL 112938, ¶ 49, 983 N.E.2d 1015, 368 Ill. Dec. 211.

[*P93] Moreover, we disagree with defendant's characterization of the evidence as closely balanced as far as the analysis under the first prong of plain error review. The analysis for this prong has been found similar to the test used in considering a claim of ineffectiveness of counsel based on evidentiary error. See *People v. White*, 2011 IL 109689, ¶ 133, 956 N.E.2d 379, 353 Ill. Dec. 517. Under both analyses, the defendant must show that he was prejudiced, either because the guilty verdict may have been caused by the alleged error or because there was a "reasonable probability" of a different result had the evidence in question been excluded. *Id.*; see also *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Thus, to prevail under either analysis, defendant must show that the evidence was so closely balanced that the comments impermissibly led to his conviction. "In determining whether the evidence adduced at trial was close, a reviewing court must evaluate

the totality of the evidence and conduct a qualitative, commonsense assessment of it within the context of the case." *People v. Sebby*, 2017 IL 119445, ¶ 53, 417 Ill. Dec. 756, 89 N.E.3d 675. In conducting this evaluation, a court must assess [**55] the evidence on the elements of the charged offense or offenses, along with any evidence regarding the credibility of the witnesses. *Id.*

[*P94] Evidence has been found to be closely balanced where each side has presented credible witnesses or where the credible evidence of a witness is countered by evidence that casts doubt on his or her account. *Id.* ¶ 63; *People v. Jackson*, 2019 IL App (1st) 161745, ¶ 48, 430 Ill. Dec. 385, 126 N.E.3d 473. In contrast, evidence has been deemed to be not closely balanced when one witness's version of events was either implausible or was corroborated by other evidence. See, *e.g.*, *People v Lopez*, 2012 IL App (1st) 101395, ¶¶ 88-90, 974 N.E.2d 291, 362 Ill. Dec. 770 (evidence is closely balanced where circumstantial evidence supported State's witnesses' testimony while defendant's version of events "strained credulity."); *People v. Anderson*, 407 Ill.App.3d 662, 672, 944 N.E.2d 359, 348 Ill. Dec. 406 (1st Dist. 2011) (evidence not closely balanced where defendant's version of events was implausible).

[*P95] Here, the evidence was not closely balanced. There is no credibility contest where, as here, one party's account is "'unrefuted, implausible, or corroborated by other evidence.'" *People v. Scott*, 2020 IL App (1st) 180200, ¶ 51, 446 Ill. Dec. 177, 169 N.E.3d 840 (citing *People v. Montgomery*, 2018 IL App (2d) 160541, ¶ 31, 427 Ill. Dec. 472, 118 N.E.3d 673). Both victims were able to provide a detailed physical and clothing description of the offender to the police, including a description of distinctive facial tattoos. When the police found the victims' car four days later, they subsequently viewed [**56] a surveillance video which showed a person matching defendant's physical attributes, including a facial tattoo, and the camouflage pants worn by the offender during the crime. The police composed a photo array, including defendant's photo, to the victims who separately viewed this photo array and identified defendant. When defendant was subsequently arrested during a traffic stop six months later, the officers recovered a black revolver that defendant threw out the window. Ceja identified this gun as the gun used in the commission of this offense. At trial, Ceja and Chevel both identified defendant as the offender. This amounts to a case in which the jurors were not asked to determine "relative credibility" in the absence of any witnesses to counterbalance the victims' and officers testimony. Consequently, the evidence was not closely balanced.

[*P96] Defendant also argues that the comments also constitute second-prong plain error. When a defendant seeks review of a forfeited error under the second prong of the plain error rule, the reviewing court must determine "whether the defendant has shown that the error was so serious it affected the fairness of the trial and challenged the integrity [**57] of the judicial process." *Sebby*, 2017 IL 119445, ¶ 50, 417 Ill. Dec. 756, 89 N.E.3d 675. "Indeed, comments in prosecutorial closing arguments will rarely constitute second-prong plain error because the vast majority of such comments generally do not undermine basic protections afforded to criminal defendants." *People v. Williams*, 2022 IL 126918, ¶ 56, 463 Ill. Dec. 676, 210 N.E.3d 1207 (citing *People v. Moon*, 2022 IL 125959, ¶ 29, 465 Ill. Dec. 262, 215 N.E.3d 58). We find that this case does not present one of those rare instances in which the defendant has shown that this isolated comment seriously affected the fairness of the trial and challenged the integrity of the judicial system. Moreover, the jury was properly instructed following closing arguments that the jury should not be influenced by sympathy. See *People v. Glasper*, 234 Ill.2d 173, 214, 917 N.E.2d 401, 334 Ill. Dec. 575 (2009) (relying in part on the fact the jury was properly instructed when concluding that the defendant failed to establish second-prong plain error).

[*P97] VI. Preliminary *Krankel* Inquiry

[*P98] Defendant contends that the second trial judge erred in failing to conduct a hearing in accordance with *People v. Krankel*, 102 Ill.2d 181, 464 N.E.2d 1045, 80 Ill. Dec. 62 (1984). The State argues that no further investigation was required because defendant's claim related to trial strategy and not neglect. We review *de novo* whether the trial court properly

conducted a *Krankel* inquiry. *People v. Roddis*, 2020 IL 124352, ¶ 33, 443 Ill. Dec. 49, 161 N.E.3d 173. If the trial court conducted a preliminary inquiry and reached a determination on the merits of the [**58] defendant's ineffective-assistance claims, we will reverse only if the determination was manifestly erroneous. See *People v. McCarter*, 385 Ill.App.3d 919, 941, 897 N.E.2d 265, 325 Ill. Dec. 17 (1st Dist. 2008) (trial court's ruling in preliminary *Krankel* inquiry that is based on its assessment of ineffective-assistance claim was "spurious" will be reversed where it is manifestly erroneous). Manifest error is error that is "clearly evident, plain and indisputable." *People v. Ruiz*, 177 Ill.2d 368, 384-85, 686 N.E.2d 574, 226 Ill. Dec. 791 (1997).

[*P99] The common law procedure developed from the decision in *Krankel* is triggered when a defendant raises a *pro se* claim of ineffective assistance of trial counsel. *Krankel*, 102 Ill.2d at 181. It is well-settled that new counsel is not automatically appointed when that type of claim is raised. *People v. Moore*, 207 Ill.2d 68, 77, 797 N.E.2d 631, 278 Ill. Dec. 36 (2003). However, the trial court should first examine the factual basis of the defendant's claim and then appoint new counsel if the allegations show possible neglect of the case. *Id.* at 77-78. If the trial court determines that the claim lacks merit or pertains only to matters of trial strategy, then the trial court need not appoint new counsel and may deny the *pro se* motion. *Id.* Whether the trial court properly conducted a *Krankel* inquiry presents a legal question and is subject to *de novo* review. *Id.* at 75.

[*P100] When the trial court conducts an evaluation of this type of claim, "some interchange between [**59] the trial court and trial counsel regarding the facts and circumstances surrounding the allegedly ineffective representation is permissible and usually necessary in assessing what further action, if any, is warranted on a defendant's claim. *Id.* at 78. The trial court may also discuss the allegations with defendant and may base its determination on its own knowledge of defense counsel's performance at trial. *Id.* at 78-79. The Illinois courts have repeatedly recognized that "the goal of any *Krankel* proceeding is to facilitate the trial court's full consideration of a defendant's *pro se* claims of ineffective assistance of trial counsel and thereby potentially limit issues on appeal." *People v. Jolly*, 2014 IL 117142, ¶ 29, 389 Ill. Dec. 101, 25 N.E.3d 1127 (citing *People v. Patrick*, 2011 IL 111666, ¶ 41, 960 N.E.2d 1114, 355 Ill. Dec. 943; *People v. Jocko*, 239 Ill.2d 87, 91, 940 N.E.2d 59, 346 Ill. Dec. 59 (2010).

[*P101] On January 6, 2020, the second trial judge held a hearing on defendant's motion for a new trial filed by his posttrial counsel. That day, the judge denied the motion, and immediately proceeded to begin the sentencing hearing. The judge commenced and continued the sentencing hearing until January 24, 2020. In the meantime, on January 16, 2020, defendant filed a *pro se* motion for new trial.

[*P102] On January 24, 2020, before the second trial judge began to hear additional evidence in the sentencing hearing, it asked defendant to [**60] explain the basis for his *pro se* motion. At that time, defendant explained that he was "indigent", had "no further money to pay", and they were "basically in a legal financial...bind." He further explained that he filed this "supplementary motion, per my counsel's advice" to include issues that his counsel did not include in the earlier motion for new trial. At that point, defendant stated, "...even if you don't wish to rule on, I just wish it to be a part of the record so I can have a fair post trial motion instead of a partial one."

[*P103] The judge then explained to defendant the case was proceeding to sentencing. He informed defendant that "this is the time before we go to sentencing for your lawyer, [], who I am not going to allow to withdraw, and I am not going to allow you to fire him. It's a financial reason that you are making this decision. And I understand that's between you two. That's a contractual relationship." Defendant then explained to the judge that, in addition to the financial problems, he filed the motion because there were additional issues that he wanted posttrial counsel to raise, but counsel did not agree. Defendant stated, "I am not asking you to hear those points. [**61] I am ready to proceed also with sentencing...I am just letting you know and letting the record know that there are at least 20, 30 more points that I presented to my lawyer that's not in the motion..."

[*P104] After posttrial counsel explained that he had already raised some of the issues, the second trial judge found that defendant's posttrial counsel raised "[m]ost, if not all, of what [defendant was] arguing..." The judge stated that he would "attach this as part of your file. I will note that you filed this. You are not acting as your own attorney on this. You're outside, I think, the scope of that, although I will file it..." The case proceeded to the continuation of the sentencing hearing.

[*P105] Here, defendant never asserted that his posttrial counsel was ineffective or had neglected his case in his written *pro se* motion for a new trial. When the judge inquired into the basis of defendant's claims contained in his *pro se* motion for a new trial, he learned that defendant's allegations did not surround possible neglect of the case by posttrial counsel, but differences of opinion as to trial strategy and concern over nonpayment of legal fees. Therefore, this dialogue clearly served "[t]he purpose [**62] of the preliminary inquiry [which] is to ascertain the underlying factual basis for the ineffective assistance claim and to afford a defendant an opportunity to explain and support his claim." *People v. Ayres*, 2017 IL 120071, ¶ 24, 417 Ill. Dec. 580, 88 N.E.3d 732. Because the second trial judge determined that the claim lacked merit and pertained only to matters of trial strategy, he properly denied the motion and did not appoint new counsel. Therefore, we find that there was no error.

[*P106] VII. Jury Instruction

[*P107] Defendant contends that the second trial judge erred when he refused to instruct the jury as to Illinois Pattern Jury Instruction, Civil, No. 5.01 (approved Dec. 8. 2011) (hereinafter IPI Civil No. 5.01) as to the State's failure to obtain, before its destruction, the security videotape from the management of the apartment building showing defendant presence inside the victims' car before it was recovered from the parking lot. The State responds that defendant initially forfeited this issue by failing to preserve it in his posttrial motion. Substantively, the State contends that the defendant's argument is without merit because the instruction was not supported by the evidence.

[*P108] Prior to trial, defendant filed a motion seeking to produce the video surveillance footage as well as a motion to dismiss [**63] the indictment for a discovery violation. Defendant requested, in part, a jury instruction alerting the jury to the destruction of this evidence and the failure to preserve it. During a hearing on these motions, Chicago Police Officer James Cabay testified that, after finding the victims' car in the parking lot of the apartment complex, he and his partner, Officer Lynn Meuris, went into the security office upon seeing security cameras in the area. They were unable to view the security video that day because the person inside that office did not have access to the playback on the cameras. The next day, the officers bought a USB drive to use to download a copy of the video and brought it to security office. They were able to view security video showing a male, identified as defendant, exiting the stolen car, and walking towards the apartment building. They attempted to download the security video onto the USB drive, however, the property manager said that he was unsure how to do so. The officer documented the existence of the video surveillance in his supplementary report and informed the detective assigned to the case.

[*P109] Chicago Police Detective Erik Chopp testified that when he learned [**64] that these officers located a possible video, he called the apartment building and intended to go over there. He explained that he got caught up in other investigations and failed to go there to view the video. Grahame Weather, the leasing manager for this apartment complex, testified that surveillance videos are typically retained for 30 days prior to destruction. The State informed the original trial judge that an investigator went to the apartment complex in an attempt to get a copy of that video surveillance and learned that it had been destroyed after 30 or 60 days.

[*P110] The original trial judge initially determined that there was no discovery violation because the State never had the video in their possession and no due process violation. After hearing further evidence, the judge found that there was no showing of bad faith or that the video would have been material or exculpable for defendant. The judge, however, allowed the officer to testify as to the description of the person on the surveillance video but prevented the officers from testifying as to their identification of defendant from this surveillance video.

[*P111] During the jury instruction conference, defendant tendered IPI Civil No. 5.01. The [**65] State argued that this instruction should not be included where the surveillance video was not under the control of the State or the police. Defendant responded that this

evidence could have been produced with the exercise of reasonable diligence where the police could have obtained a warrant or a subpoena for it. The second trial judge ruled as follows:

> "And I appreciate your effort, counsels, both counsels and [the original trial judge] addressed this issue previously. There was a sanction in place, the evidence and slash testimony was restricted based on that sanction. So I'm not going to overrule [the original trial judge's] ruling on that in the sense that the sanctions were carried out in this trial. The testimony was limited. And I agree with the State in the sense that there may have been a mistake by the detective not going to get that video but that was the sanction the judge granted based upon the non-tendering of that video. Again the testimony was limited. The State abided by that. The witnesses abided by that and with all due respect, counsel, I am going to deny your 5.01 civil jury instruction regarding a negative inference in regard to that very same video that was ruled [**66] on by [the original trial judge]."

[*P112] Initially, we agree that defendant forfeited this claim by failing to preserve it in his motion for a new trial. However, defendant may seek review of this claim of error if he can establish plain error. 134 Ill.2d R. 615(a). In defendant's reply brief, he responds that the State's forfeiture argument "cannot withstand scrutiny" without any further discussion or citation to the record to show that it was properly preserved. By doing so, he failed to argue for plain-error review, and "[a] defendant who fails to argue for plain-error review obviously cannot meet his burden of persuasion." *People v. Hillier*, 237 Ill.2d 539, 545, 931 N.E.2d 1184, 342 Ill. Dec. 1 (2010).

[*P113] Even reviewing this claim under the plain-error doctrine, defendant cannot establish that the second trial judge erred in refusing to include this jury instruction. A jury instruction error rises to the level of plain error only when it "'creates a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial." *People v. Herron*, 215 Ill.2d 167, 193, 830 N.E.2d 467, 294 Ill. Dec. 55 (2005). Jury instructions are intended to convey to the jury the correct principles of law applicable to the evidence submitted so that the jury can "arrive at a correct conclusion [**67] according to the law and the evidence." *People v. Anderson*, 2012 IL App (1st) 103288, ¶ 40, 977 N.E.2d 222, 364 Ill. Dec. 733 (quoting *People v. Pinkney*, 322 Ill.App.3d 707, 717, 750 N.E.2d 673, 255 Ill. Dec. 756 (1st Dist. 2000). Both parties are entitled to have a jury instructed on their theories of the case and, generally, an instruction is warranted if there is even slight evidence to support it. *People v. Miller*, 2021 IL App (1st) 190060, ¶ 44, 466 Ill. Dec. 127, 216 N.E.3d 960 (citing *People v. Jones*, 175 Ill.2d 126, 131-32, 676 N.E.2d 646, 221 Ill. Dec. 843 (1997)). In addressing the adequacy of the jury instructions, the reviewing court must consider the jury instructions in their entirety to determine whether they fully and fairly cover the law. *People v. Hoffman*, 2012 IL App (2d) 110462, ¶ 8, 980 N.E.2d 191, 366 Ill. Dec. 391.

[*P114] "Whenever applicable, an Illinois Pattern Jury Instruction (IPI) should be used whenever it accurately states the law." *People v. Danielly*, 274 Ill.App.3d 358, 367, 653 N.E.2d 866, 210 Ill. Dec. 671 (1st Dist. 1995). This does not mean, however, that a seemingly relevant civil jury instruction should be given in a criminal case. See *People v. Cloutier*, 156 Ill.2d 483, 509, 622 N.E.2d 774, 190 Ill. Dec. 744 (1993). Rather, the trial court has discretion to determine whether to give the instruction; however, there must be evidence in the record to justify giving a particular instruction. *People v. Anderson*, 2012 IL App (1st) 103288, ¶ 33, 977 N.E.2d 222, 364 Ill. Dec. 733 (citing *People v. Hammonds*, 409 Ill.App.3d 838, 957 N.E.2d 386, 354 Ill. Dec. 70 (1st Dist. 2011). "'The standard for determining an abuse of discretion is whether, taken as a whole, the instructions are sufficiently clear so as not to mislead and whether they fairly and correctly state the law.'" *Bailey v. Mercy Hospital and Medical Center*, 2021 IL 126748, ¶ 42, 452 Ill. Dec. 642, 186 N.E.3d 366 (quoting *Studt v. Sherman Health Systems*, 2011 IL 108192, ¶ 13).

[*P115] IPI Civil No. 5.01 provides, in pertinent part, that if a party fails to offer evidence within its power to produce, jurors may infer that the evidence [**68] would be adverse to the party if the jurors believe (1) the evidence was under the control of the party and could have been produced by the exercise of reasonable diligence, (2) the evidence was not equally available to an adverse party, (3) a reasonably prudent person under the same or similar circumstances would have offered the evidence if he believed the evidence to be favorable to him, and (4) no reasonable excuse for the failure has been shown. Notably, there is no

comparable missing evidence instruction in the criminal jury instructions. See *People v. Blackwood*, 2019 IL App (3d) 160161, ¶ 21, 435 Ill. Dec. 912, 141 N.E.3d 721 (citing generally Illinois Pattern Jury Instructions, Criminal (approved July 18, 2014) (hereinafter IPI, Criminal)).

[*P116] Here, defendant sought different sanctions for his claim that the State failed to produce the surveillance video, including the inclusion of IPI Civil No. 5.01. While the original trial judge did not find that there was a discovery or due process violation, he prohibited the State from having the officers testify as to their identification of defendant while viewing the surveillance video. On appeal, defendant asks us to find that the second trial judge erred in failing to instruct the jury as to IPI Civil No. 5.01.

[*P117] Defendant alleges that the police acted [**69] negligently in failing to preserve the surveillance videotape. However, unless a defendant can show bad faith on the part of the police, a failure to preserve potentially useful evidence does not constitute a denial of due process. *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988); *People v. Sutherland*, 223 Ill.2d 187, 235-36, 860 N.E.2d 178, 307 Ill. Dec. 524 (2006). Mere negligence by the police in losing evidence is insufficient. *Sutherland*, 223 Ill.2d at 236 (applying *Youngblood* and finding that the defendant failed to show any bad faith by the State where the police lost track of the defendant's vehicle in the years between his first and second trials); *People v. Ward*, 154 Ill.2d 272, 298-99, 609 N.E.2d 252, 181 Ill. Dec. 884 (1992) (merely negligent police conduct is insufficient to give rise to a due process violation). "[B]ad faith implies a furtive design, dishonesty or ill will." *Danielly*, 274 Ill.2d at 364. Of course, the better practice is for the police to gather all evidence as quickly as possible so that this exact problem can be avoided.

[*P118] The mere fact that the State was unable to tender evidence to the defendant does not mean that the defendant is entitled to an instruction that the jury may infer that the missing evidence was detrimental to the State. *People v. Montgomery*, 2018 IL App (2d) 160541, ¶21, 427 Ill. Dec. 472, 118 N.E.3d 673. Because defendant has failed to show that the State acted in bad faith in the destruction of potentially useful evidence, his claim that he was deprived of due process must fail. See *Sutherland*, 223 Ill.2d at 236-37 (unless [**70] a defendant can show bad faith, the failure to preserve potentially useful evidence is not denial of due process). Having failed to establish that he was deprived of due process, it necessarily follows that it was proper for the trial court to refuse to provide the jury with IPI Civil No. 5.01. As the "Notes of Use" to IPI Civil No. 5.01 make clear, "the trial court must first determine that in all likelihood a party would have produced [the evidence] under the existing facts and circumstances except for the fact that [the evidence] would be unfavorable." While this comment does not specifically reference a showing of bad faith, it must certainly would be required in cases like this one, where the defendant is not asserting a violation of the constitutional right to due process, but mere negligence.

[*P119] Moreover, as the State points out, this instruction specifically references a finding that "the evidence was under the control of the party..." IPI Civil No. 5.01. Here, while the officers viewed the surveillance videotape, such an act does not establish that the officers had control of this evidence, and, instead, the management for the apartment complex had control of this evidence.

[*P120] Applying these principles, we conclude that the trial court [**71] exercised appropriate discretion in refusing to instruct the jury as to IPI Civil No. 5.01. Because there was no error, there can be no plain error. *People v. Lewis*, 234 Ill.2d 32, 43, 912 N.E.2d 1220, 332 Ill. Dec. 334 (2009).

[*P121] VIII. Propriety of Sentencing Hearing

[*P122] Defendant attacks the propriety of the sentencing hearing in this case on three different grounds. He alleges that his case should be remanded for resentencing because he was not properly admonished as to his right to counsel, and thus did not validly waive his right to counsel, when he filed a *pro se* posttrial motion to reconsider his sentence, and because the second trial judge improperly considered his void aggravated unlawful use of a

weapon conviction at sentencing. Defendant also alleges that the sentence he received was excessive.

[*P123] A. Right to Counsel at Hearing on Motion to Reconsider Sentence

[*P124] First, we address defendant's contention that he is entitled to a new sentencing hearing because the second trial judge erred in allowing defendant to proceed *pro se* in his motion to reconsider sentence by failing to substantially comply with the admonishments outlined in Illinois Supreme Court Rule 401(a) (eff. July 1, 1984). Defendant concedes that he did not raise this issue at the trial level but requests that we nonetheless address it under the second [**72] prong of the plainerror doctrine. Because we acknowledge "the right to counsel is fundamental" and reviewable as a "substantial right" (see *People v. Stoops*, 313 Ill.App.3d 269, 273, 728 N.E.2d 1241, 245 Ill. Dec. 884 (4th Dist. 2000); *People v. Langley*, 226 Ill.App.3d 742, 749, 589 N.E.2d 824, 168 Ill. Dec. 424 (4th Dist. 1992)), we are compelled to address it under "plain error" regardless of defendant's failure to raise it previously. We review the trial court's compliance with Rule 401(a) admonishments is a question of law we review *de novo*. *People v. Pike*, 2016 IL App (1st) 122626, ¶ 114, 403 Ill. Dec. 93, 53 N.E.3d 147.

[*P125] In Illinois, a knowing and intelligent waiver occurs following substantial compliance with Illinois Supreme Court Rule 401(a) (eff. July 1, 1984). Pursuant to Rule 401(a), certain admonishments must be given by the trial court before a defendant may be found to have knowingly and intelligently waived counsel." *People v. Haynes*, 174 Ill.2d 204, 235-36, 673 N.E.2d 318, 220 Ill. Dec. 406 (1996). Rule 401(a) specifically provides:

> "(a) Any waiver of counsel shall be in open court. The court shall not permit a waiver of counsel by a person accused of an offense punishable by imprisonment without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:
>
> (1) the nature of the charges;
>
> (2) the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences; and
>
> (3) that he has a right to counsel [**73] and, if he is indigent, to have counsel appointed for him by the court."

[*P126] The purpose of Rule 401 is to eliminate any doubt that the defendant understands the charge against him and its consequences and to preclude a defendant from waiving the right to counsel without full knowledge and understanding." *People v. Meeks*, 249 Ill.App.3d 152, 171-172, 618 N.E.2d 1000, 188 Ill. Dec. 430 ("[T]echnical compliance with Rule 401(a) is not always required; rather, substantial compliance will be sufficient to effectuate a valid waiver if the record indicates that the waiver was otherwise made knowingly, intelligently, and voluntarily, and the admonishments the defendant received did not prejudice his rights." *People v. Jiles*, 364 Ill.App.3d 320, 329, 845 N.E.2d 944, 301 Ill. Dec. 79 (2d Dist. 2006). Strict compliance is also not required where the defendant shows a high degree of legal sophistication. *Meeks*, 249 Ill.App.3d at 172.

[*P127] Prior to trial, defendant was represented by an assistant public defender. During a pretrial proceeding, defendant stated that he wanted to fire his assistant public defender and to proceed *pro se*. At that point, the original trial judge explained to defendant that he had the right to an attorney, and one would be appointed to him if he could not afford one. The judge also outlined in detail the relevant charges that he faced as well as the applicable sentencing range for these charges. [**74] When defendant subsequently requested the assistance of standby counsel, the judge denied that request, finding that he had been able to file several "coherent" motions, made "logical" arguments, and showed the ability to review the discovery. The judge, however, informed defendant that counsel could be reappointed at a later date should defendant change his mind. At a subsequent pre-trial proceeding, the

judge asked defendant if he still wanted to proceed *pro se*, and defendant asked the trial court to reappoint the public defender to represent him. During this colloquy, the judge informed defendant that he had the right to represent himself and that choice was his alone to make. The case proceeded to trial and, after the jury found defendant guilty and the case proceeded to posttrial motions, defendant sought leave to hire a private attorney to represent him. The second trial judge allowed the public defender to withdraw and granted defendant's motion. Defendant was represented by private counsel who filed a posttrial motion for a new trial and represented defendant during the sentencing hearing.

[*P128] While defendant's sentencing hearing was commenced and continued, defendant filed a written [**75] *pro se* motion for a new trial. The second trial judge subsequently allowed defendant to file this motion and made it "part of the record" but stated that "You are not acting as your own attorney on this. You're outside, I think, the scope of that..." After the second trial judge sentenced defendant, he also informed him that he had the right to appeal his conviction and sentence, but that he must file his Notice of Appeal "within 30 days of the entry of the order disclosing your motion to reconsider..." and that, if he was indigent, "the services of an attorney will be provided to you free of charge." The judge continued defendant's other pending cases to February 20, 2020.

[*P129] On February 20, 2020, defendant pled guilty in another pending case.[4] His defense counsel, who represented him in these other cases, informed the second trial judge that defendant had filed a *pro se* motion to reconsider his sentence. Defendant informed the judge that he wanted to file it to meet the filing deadline. At that point, the following colloquy occurred:

> THE COURT: Well, you have an attorney on the case still.
>
> THE DEFENDANT: No, I'm pro se.
>
> THE COURT: Okay. All right.
>
> [PROSECUTOR]: But we need to get the attorney [**76] in here, because right now it's still - the attorney of record is — who was it?
>
> THE DEFENDANT: Epstein.
>
> [PROSECUTOR]: So he's got to withdraw.
>
> THE COURT: Yeah. All right. I'll hold it on call until - -
>
> [PROSECUTOR]: He's going to want to file his - -
>
> THE COURT: I'll let him file stamp it today.
>
> [PROSECUTOR]: Yeah.
>
> THE COURT: Yeah, so he can preserve that 30 day - -
>
> THE DEFENDANT: Yeah, that's it. I just want it to be part of the record.
>
> THE COURT: Okay. Well, I have to have your attorney come in. If he's going to withdraw, he withdraws. I mean, it's part and parcel of this whole sentence. So what I'm going to need for him to do is to come in and then you can argue to dismiss him and you can make your argument for the record.
>
> THE DEFENDANT: So I can't just say right now, pro se, I would like you to submit it right now? Like he don't [sic] represent me anymore at all.
>
> THE COURT: Okay. Well, you can submit it. I'll file stamp it, which preserves your motion within the 30 days.
>
> THE DEFENDANT: Okay. And then after that I would have to file a Notice of Appeal after your decision on that, right?
>
> THE COURT: Yes.

THE DEFENDANT: Okay. So here it is right here. Thank you, sir.

[*P130] The case was continued [**77] until March 5, 2020, however, in the meantime, the trial courts were temporarily closed pursuant to court order as a result of the Covid-19 pandemic. Months later, when defendant's case was continued, defendant appeared before the second trial judge without an attorney and stated that he was proceeding *pro se*. At that time, the judge denied defendant's *pro se* motion to reconsider his sentence.

[*P131] Here, there is no dispute that the second trial judge did not strictly comply with the requirements of Rule 401 at the time that defendant filed his *pro se* motion to reconsider sentence. We find, however, that the second trial judge substantially complied sufficient to effectuate a knowing and intelligent waiver of the right to counsel. Defendant's waiver was knowing and intelligent because the record demonstrates that he knew all of the information that the Rule 401 admonishments are intended to convey. In part, we look at the admonishment that the original trial judge gave to defendant at the time that defendant waived his right to counsel during the pre-trial proceedings. At that time, the judge followed the requirements of Rule 401 and admonished defendant about the nature of the charges, the sentencing range for [**78] these offenses, and that he has a right to counsel and, if he is indigent, to have counsel appointed for him by the court. See *People v. Meeks*, 249 Ill.App.3d 152, 172, 618 N.E.2d 1000, 188 Ill. Dec. 430 (1st Dist. 1993) (the defendant's waiver was knowing and intelligent where the defendant was previously fully admonished). Defendant, in fact, took advantage of this right. Prior to trial, he was originally represented by counsel, waived his right to counsel, changed his mind and sought assistance of counsel prior to the start of his trial. He also retained the assistance of different counsel for the posttrial and sentencing phase. See *People v. Johnson*, 119 Ill.2d 119, 133, 518 N.E.2d 100, 115 Ill. Dec. 575 (1987); *People v. Jackson*, 59 Ill.App.3d 1004, 1008, 376 N.E.2d 685, 17 Ill. Dec. 539 (1st Dist. 1978). We also look at the fact that the second trial judge informed defendant, when outlining his appellate rights, that he had the right to counsel to be provided to him "free of charge" when filing a motion to reconsider his sentence.

[*P132] Defendant also showed a clear understanding of the charges and sentencing when, in his *pro se* motion, he outlined the relevant criminal offenses for which he stood convicted of as well as the sentence he received for each of these offenses. Moreover, we find that defendant is legally sophisticated. When defendant proceeded *pro se* prior to trial, he filed a motion to suppress the gun found in his possession at the [**79] time of his arrest and provided a coherent and logical argument in support of his motion. In fact, when the original trial judge considered defendant's request for standby counsel, it specifically found that defendant had "presented several coherent Motions," "made a logical argument arguing the facts," had "the ability to review the discovery, and make arguments..." Defendant also understood there was a time limitation for filing his motion and his notice of appeal. In his written *pro se* motion, he showed an understanding as to the nature of the charges, the sentencing range, and that he had been sentenced to an extended term. Therefore, we find that the record demonstrates that defendant's waiver was knowing and intelligent where he knew all the information that the Rule 401 admonishments are intended to convey.

[*P133] Moreover, the facts in the instant case closely align with the facts in *People v. Young*, 341 Ill.App.3d 379, 387, 792 N.E.2d 468, 275 Ill. Dec. 237 (4th Dist. 2003). In *Young*, after the defendant had been convicted and sentenced to three years' imprisonment, he filed a motion to reconsider sentence along with a *pro se* motion alleging ineffective assistance of counsel. *Id.* at 382. The trial court made it clear to the defendant that it would not appoint a new attorney to represent [**80] him, thereby giving the defendant a choice between accepting the representation of the public defender and proceeding *pro se*. The defendant opted to proceed *pro se*. *Id.* On appeal, the Fourth District pointed to this discussion in finding that the defendant "clearly understood that he had the right to continued representation by the public defender." *Id.*

[*P134] The *Young* court then emphasized the fact that the defendant had already been convicted and sentenced. The *Young* court also found that Rule 401 is not applicable at all where a defendant discharges his attorney late in the proceedings, finding that, under these circumstances, "[i]t would have been useless for the trial court to inform Young of the nature of a charge and the possible sentencing" range. *Id.* Instead, the court found, "[t]he language of Rule 401(a) manifests only the intent to deal with defendants who are considering a waiver of counsel at the initial appointment stage of the proceedings." *Id.*; See also *People v. Taylor*, 2022 IL App (4th) 210614-U (following *Young*). Based upon the record here, we need not

reach the issue as to whether the trial court is not required to admonish a defendant pursuant to Rule 401 at this particular stage of the proceedings. Instead, we limit our reliance upon [**81] the trial court's decision to look to whether the record, as a whole, demonstrated that the defendant knew all the information that Rule 401 admonishments are intended to convey. As previously outlined, the facts here are even stronger where defendant had already received Rule 401 admonishments prior to trial, he waived his right to counsel and was then later represented by counsel. Thus, we find that the second trial judge's failure to provide the Rule 401 admonishments did not amount to error. The judge substantially complied sufficient to effectuate a knowing and intelligent waiver of the right to counsel where the record demonstrates that he knew all of the information that the Rule 401(a) admonishments were intended to convey. Because there was no error, there can be no plain error. *People v. Lewis*, 234 Ill.2d 32, 43, 912 N.E.2d 1220, 332 Ill. Dec. 334 (2009).

[*P135] B. Consideration of Void Prior Conviction

[*P136] Defendant further contends that he is entitled to a new sentencing hearing where the second trial judge improperly considered his prior conviction for AUUW, which was subsequently held to be facially unconstitutional pursuant to *People v. Aguilar*, 2011 IL 112116, ¶¶ 19-21, and thus void. Again, defendant acknowledges that he forfeited this issue by failing to properly preserve it, and seeks to have it reviewed under both prongs of [**82] the plain-error doctrine. The State does not dispute that the defendant's prior conviction for AUUW, pursuant to 720 ILCS 5/24-1.6(a)(3)(A) (West 2000), has been found to be facially unconstitutional, but contends that the record shows that the trial court did not consider this conviction in determining defendant's sentence.

[*P137] It is well-established that a void prior conviction is incompetent evidence at sentencing.

> "[A] facially unconstitutional statute and any conviction based on the statute must be treated as if they *never existed*. Because they are nonexistent, as a matter of federal constitutional law, and must therefore be ignored by the courts, using them against a defendant in any subsequent proceeding, civil or criminal, is not only conceptually impossible (if something has no legal existence how can it be given any legal recognition?) but would subvert the very constitutional protections that resulted in the statute being found facially invalid to begin with * * *." (Emphasis in original.) *In re N.G.*, 2018 IL 121939, ¶ 74, 425 Ill. Dec. 547, 115 N.E.3d 102.

[*P138] We find that the trial record, however, directly refutes defendant's claim. Defendant raised this issue in his *pro se* posttrial motion for reconsideration of his sentence, and the second trial judge refuted defendant's [**83] claim, stating that he "did not use that as far as your sentence...I gave you 57 years based on the facts of the case, the jury verdict, and your lack of allocution." Based upon the trial court's explanation here, "the record clearly establishes that defendant's AUUW conviction did not affect the trial court's sentencing decision." *People v. Bridges*, 2020 IL App (1st) 170129, ¶ 39, 442 Ill. Dec. 163, 158 N.E.3d 1198.

[*P139] Defendant relies upon the second trial judge's statement that defendant "ha[d] been to the penitentiary in the past for a firearm." As the State points out, defendant had also been convicted and sentenced to a term of imprisonment for UUWF in another case. Thus, the record refutes defendant's claim that the trial court improperly considered defendant's prior conviction for AUUW.

[*P140] C. Excessive Sentence

[*P141] Defendant contends that his 57-year of imprisonment was excessive where it did not account for his rehabilitative potential despite his abusive and chaotic childhood and will not restore him to useful citizenship. The State, in turn, argues that the second trial judge properly exercised appropriate discretion in sentencing defendant to a term of imprisonment within the statutory guidelines based upon the seriousness of the offense, defendant's criminal history, [**84] and that the sentence is necessary to deter others from committing the same crime.

[*P142] A sentence that falls within the applicable statutory sentencing range is presumed to be proper. *People v. Knox*, 2014 IL App (1st) 120349, ¶ 6, 385 Ill. Dec. 874, 19 N.E.3d 1070. A reviewing court may reduce a sentence imposed by the trial court only when the record affirmatively shows that the trial court abused its discretion. *People v. Andrews*, 2013 IL App (1st) 121623, ¶ 23, 377 Ill. Dec. 856, 2 N.E.3d 1137; *People v. Perruquet*, 68 Ill.2d 149, 154, 368 N.E.2d 882, 11 Ill. Dec. 274 (1977). That power, however, should be exercised "cautiously and sparingly." *Alexander*, 239 Ill.2d at 212. A sentence is considered an abuse of discretion only where it is "greatly at variance with the spirit and purpose of law, manifestly disproportionate to the nature of the offense." *Id.* at 212. The spirit and purpose of the law are promoted when a sentence reflects the seriousness of the offense and gives adequate consideration to the rehabilitative potential of the defendant. *People v. Boclair*, 225 Ill.App.3d 331, 335, 587 N.E.2d 1221, 167 Ill. Dec. 606 (1st Dist. 1992).

[*P143] It is well-established that sentencing decisions are entitled to great weight and deference. *People v. Latona*, 184 Ill.2d 260, 272, 703 N.E.2d 901, 234 Ill. Dec. 801 (1998). The trial court, having observed the defendant and the proceedings, has a far better opportunity to consider these factors than the reviewing court, which must rely on the "cold" record. *People v. Alexander*, 239 Ill.2d 205, 213, 940 N.E.2d 1062, 346 Ill. Dec. 458 (2010). The trial court's decision regarding the appropriate sentence is given great deference because they are in the best position to weigh the [**85] numerous factors that may influence the appropriateness of a sentence. *Id.* at 212 (citing *People v. Fern*, 189 Ill.2d 48, 53, 723 N.E.2d 207, 243 Ill. Dec. 175 (1999)). Relevant factors in determining an appropriate sentence include the nature of the crime, protection of the public, deterrence and punishment, and the defendant's rehabilitative prospects and youth. *People v. Bobo*, 375 Ill. App. 3d 966, 988, 874 N.E.2d 297, 314 Ill. Dec. 387 (1st Dist. 2007); *People v. Lamkey*, 240 Ill.App.3d 435, 441-42, 608 N.E.2d 406, 181 Ill. Dec. 333 (1st Dist. 1992). Additionally, a trial court must base its sentencing determination on the particular circumstances of each case, considering such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. *People v. Streit*, 142 Ill. 2d 13, 18-19, 566 N.E.2d 1351, 153 Ill. Dec. 245 (1991). The weight attributed to each factor in aggravation and mitigation in imposing a sentence depends on the particular circumstances in each case. *People v. D'Arezzo*, 229 Ill. App. 3d 428, 430, 593 N.E.2d 1076, 171 Ill. Dec. 256 (2d Dist. 1992).

[*P144] In determining an appropriate sentence, the trial court must consider both "the seriousness of the offense" and "the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11; *People v. Hernandez*, 2016 IL 118672, ¶ 9, 402 Ill. Dec. 42, 51 N.E.3d 794. The seriousness of the offense or the need to protect the public, however, may outweigh any mitigating factors and the goal of rehabilitation. *People v. Abrams*, 2015 IL App (1st) 133746, ¶ 34, 399 Ill. Dec. 790, 47 N.E.3d 295. Indeed, "a defendant's potential for rehabilitation is but one factor for a sentencing court to consider, and it must be weighed against other countervailing factors, including the seriousness [**86] of the crime." *People v. Evans*, 373 Ill.App.3d 948, 968, 869 N.E.2d 920, 311 Ill. Dec. 907 (1st Dist. 2007). This Court has found, "[t]he most important factor a court considers when deciding a sentence is the seriousness of the offense...Rehabilitative potential, therefore, is not accorded more weight than any other factor." *Id.* at 968.

[*P145] Both parties agree that the applicable sentencing range here was 21 years' to 60 years' imprisonment. Both of these offenses were Class X felonies. 720 ILCS 5/18-2 (b) (eff. January 1, 2000); 720 ILCS 5/18-4 (b) (eff. July 27, 2015). Because he was previously convicted of a felony within 10 years of previously being convicted of the same or greater class felony, defendant had to be sentenced for an extended term Class X felony between 30 to 60 years. 720 ILCS 5/5-5-3.2(b)(1) (West 2010). Because defendant's sentence falls within its respective statutory sentencing range, albeit near the maximum sentence, his sentence is presumed to be proper. *People v. Knox*, 2014 IL App (1st) 120349, ¶ 46, 385 Ill. Dec. 874, 19 N.E.3d 1070.

[*P146] Defendant's argument that the second trial judge sentenced him without giving proper weight to mitigating factors is without merit. There is a presumption that a trial court considered all relevant factors in determining a sentence, and that presumption will not be overcome without explicit evidence from the record that the trial court did not consider mitigating factors. [**87] *People v. Brown*, 2018 IL App (1st) 160924, ¶ 9, 432 Ill. Dec. 262, 129 N.E.3d 150. Such a showing was not made in this case. The judge fully reviewed all evidence during the sentencing hearing and when addressing defendant's *pro* se motion to reconsider sentence. Additionally, the existence of mitigating factors does not mandate imposition of the minimum sentence (*People v. Garibay*, 366 Ill.App.3d 1103, 1103, 853 N.E.2d 893, 304 Ill. Dec. 816 (2d Dist. 2006), or preclude the imposition of the maximum sentence. *People v. Pippen*, 324 Ill.App.3d 649, 652, 756 N.E.2d 474, 258 Ill. Dec. 492 (4th Dist. 2001). In this case, the mitigation evidence presented does not persuade us to find that the second trial judge abused his discretion.

[*P147] Defendant's argument merely constitutes a request for us to reweigh the factors in aggravation and in mitigation already considered by the trial court. A reviewing court should not discount or alter the judgment of the trial court simply because it would weigh those factors differently. *Alexander*, 239 Ill.2d at 205; *People v. Stacey*, 193 Ill.2d 203, 209, 737 N.E.2d 626, 250 Ill. Dec. 4 (2000).

[*P148] The second trial judge also considered, in aggravation, evidence of defendant's prior criminal history. "Prior convictions, or recidivism, [are] a traditional, if not the most traditional, basis for...increasing an offender's sentence." *People v. Fields*, 383 Ill.App.3d 920, 921, 891 N.E.2d 990, 322 Ill. Dec. 699 (1st Dist. 2008) (citations and quotations omitted). Here, defendant's prior criminal history was significant, spanned several years, and included recidivist violent behavior involving the use of guns to commit robberies [**88] and vehicular hijackings.

[*P149] Defendant also argues that the second trial judge incorrectly interpreted and relied upon defendant's comment, in allocution, that "So I have made a lot of mistakes in life, Your Honor, but I can honestly say, Your Honor, that this was not one of them, Your Honor..." The judge explained that he interpreted this comment to reflect that defendant did not think that he had made a mistake in committing this offense. "To be clear, a sentencing court may infer lack of remorse from any admissible statement made by the defendant, the manner of commission of the offense, or any other competent evidence adduced at trial or at the sentencing hearing. *People v. Matute*, 2020 IL App (2d) 170786, ¶ 59, 445 Ill. Dec. 798, 168 N.E.3d 673 (citing *People v. Burgess*, 176 Ill.2d 289, 317, 680 N.E.2d 357, 223 Ill. Dec. 624 (1997). While defendant suggests that the second trial judge's incorrect interpretation of defendant's comment was due to the judge having a hearing problem, we do not find that the record shows that the judge suffered from difficulty hearing what defendant had stated in allocution. The judge was free to interpret defendant's comment to reflect a lack of remorse on the part of defendant, and we will not disturb this finding.

[*P150] Based upon the facts presented to the second trial judge at the sentencing hearing, we agree with [**89] the State that the evidence does not show that the judge abused his discretion in sentencing defendant to 57 years' imprisonment.

[*P151] CONCLUSION

[*P152] For the foregoing reasons, we affirm the judgment of the circuit court.

[*P153] Affirmed.

Footnotes

1

This case was originally assigned to the original trial judge; however, this judge recused himself from hearing this case during pre-trial proceedings. Then, prior to trial, the case was re-assigned to the second trial judge, who presided over the latter portion of the pre-trial proceedings as well as the trial and posttrial matters.

2 At different points, the trial court misidentified Andrea Heath as defendant's wife or defendant's girlfriend, but Heath subsequently identified herself as defendant's fiancée.

3 During a portion of the pre-trial proceedings, defendant had waived his right to counsel and represented himself *pro se*. He subsequently requested the assistance of counsel, and, at trial, he was represented by counsel.

4 Pursuant to a plea agreement, defendant pled guilty to one count of armed habitual criminal in 15 CR 3190, relating to the attempted traffic stop of defendant by Chicago police officers during which defendant threw a .39 caliber special revolver to the ground. He was sentenced to 10 years' imprisonment to be served concurrent to the sentence in the instant case. Defendant also had five other pending cases at this time, which the State elected to *nolle prosecui*.

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