FOURTH DIVISION
JUNE 30, 2011

No. 1-07-2821

| | | |
|---|---|---|
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | |
| | ) | Appeal from the |
| Plaintiff-Appellee, | ) | Circuit Court of |
| | ) | Cook County. |
| v. | ) | |
| | ) | |
| TYRONE BREWER, | ) | |
| | ) | |
| Defendant-Appellant. | ) | Honorable |
| | ) | Kenneth J. Wadas, |
| | ) | Judge Presiding. |

JUSTICE SALONE delivered the judgment of the court, with opinion.
Presiding Justice Lavin and Justice Sterba concurred in the judgment and opinion.

**OPINION**

A jury found defendant, Tyrone Brewer, guilty of first degree murder and that he personally discharged a firearm that proximately caused the victim's death. Defendant was subsequently sentenced to 50 years' imprisonment on the first-degree murder-conviction and an additional consecutive 30 years' imprisonment for personally discharging a firearm that caused the victim's death. On appeal, this court reversed defendant's conviction and sentence, finding that the trial court's violation of Supreme Court Rule 431(b) (eff. May 1, 2007) required a new trial. *People v. Brewer*, No. 1-07-2821 (2010) (unpublished order under Supreme Court Rule 23).

In *Brewer*, we applied the plain error analysis to determine if defendant had forfeited his claim that the trial court failed to fully comply with Rule 431(b). Ill. S. Ct. R. 615(a); see *People*

*v. Herron*, 215 Ill. 2d 167, 187 (2005) (the court may consider a forfeited error "when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence").

After determining that error had occurred, this court concluded that the failure to fully comply with Rule 431(b) denied defendant a substantial right and a fair trial and obviated the need to inquire into the prejudice of the defendant. *Brewer*, slip op. at 16. As the error constituted plain error under the second prong of the plain error analysis, the defendant's claim of error was not forfeited, and he was entitled to a new trial. We noted, however, that our supreme court had yet to construe the 2007 version of Rule 431(b) at issue in this case. See *Brewer*, slip op. at 16.

On January 26, 2011, our supreme court denied the State's petition for leave to appeal but entered a supervisory order directing this court to vacate and reconsider its judgment in light of *People v. Thompson*, 238 Ill. 2d 598 (2010). *People v. Brewer*, No. 110429 (Ill. Jan. 26, 2011). In accordance with the supervisory order, we vacated our judgment in *Brewer*.

Defendant requested and was granted leave to provide a supplemental brief on this issue. While he does not contend that the error resulted in a biased jury, defendant does, however, maintain that the closeness of the evidence requires a finding of plain error under the first prong of the plain error analysis. Specifically, defendant contends that the *Thompson* decision only applies to plain error under the second prong and thus review of the *Zehr* violation is not forfeited for purposes of appeal. We disagree.

In *Thompson*, our supreme court construed the 2007 version of Rule 431(b) and held that

"[a] violation of Rule 431(b) does not implicate a fundamental right or constitutional protection, but only involves a violation of th[e] court's rules." *Thompson*, 238 Ill. 2d at 614-15. As such, the court concluded that despite its amendment to the rule, it could not conclude that Rule 431(b) questioning was indispensable to the selection of an impartial jury. *Thompson*, 238 Ill. 2d at 615. The supreme court further found that defendant failed to establish that the trial court's violation of Rule 431(b) resulted in a biased jury and that defendant had not met his burden of showing that the error affected the fairness of the trial or challenged the integrity of the judicial process, as the prospective jurors received some of the required Rule 431(b) questioning and the venire was admonished and instructed on Rule 431(b) principles. *Thompson*, 238 Ill. 2d at 615. The court then rejected defendant's request for plain error review under the second prong. *Thompson*, 238 Ill. 2d at 615.

As indicated previously, defendant argues that the evidence in the case at bar is closely balanced. Defendant notes that during jury deliberations, the jury sent out two notes containing five questions. Additionally, he contends that there was no physical evidence tying him to the offense and his conviction turned on several conflicting accounts. First, defendant argues that defense witness Roy Ferguson, who knew both defendant and codefendant Rashaune Finley, testified that defendant was not present. Further, defendant notes that Kimberly Smith, who was in the car with the victim at the time of the shooting, identified Finley as the shooter in a lineup where both defendant and codefendant were present. Additionally, defendant argues that codefendant Finley's identification of him as the shooter is suspect because his testimony was given in exchange for a lower sentence in his own case. Finally, defendant argues that his own

inculpatory statement was the product of his unmedicated and post-traumatic state. Collectively, defendant concludes that these factors establish the closeness of the evidence.

Where as here, a defendant fails to object to an error at trial and include the error in a posttrial motion he forfeits ordinary appellate review of that error. *People v. Johnson*, 238 Ill. 2d 478, 484 (2010) (citing *People v. Enoch*, 122 Ill. 2d 176, 186 (1988)). Consequently, defendant forfeited, or procedurally defaulted, his challenge to the *Zehr* violation by failing to object and raise his claim in a posttrial motion.

Under Illinois' plain error doctrine, however, a reviewing court may consider a forfeited claim when:

> " '(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the strength of the evidence.' " *Johnson*, 238 Ill. 2d at 484 (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) (citing *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005))).

The doctrine is intended to ensure that a defendant receives a fair trial, but it does not guarantee every defendant a perfect trial. *Johnson*, 238 Ill. 2d at 484. Rather than operating as a general

savings clause, it is construed as a narrow and limited exception to the typical forfeiture rule applicable to unpreserved claims. *Johnson*, 238 Ill. App. 3d at 484.

Our court typically undertakes plain error analysis by first determining whether error occurred at all before proceeding to consider whether either prong of the doctrine has been satisfied. *People v. Sargent*, 239 Ill. 2d 166, 189-90 (2010). The burden of persuasion rests with the defendant under both prongs of the plain error analysis. *Sargent*, 239 Ill. 2d at 190. However, the ultimate question of whether a forfeited claim is reviewable as plain error is a question of law that is reviewed *de novo*. *Johnson*, 238 Ill. 2d at 485.

Under the first prong of plain error, which defendant argues here, the defendant must show that the evidence was "so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error." *Piatkowski*, 225 Ill. 2d at 565. The question of whether the evidence is closely balanced is distinct from a challenge to the sufficiency of the evidence. *Piatkowski*, 225 Ill. 2d at 566. Defendant, along with codefendants Rashaune Finley and Terrell Ivy, was charged of first degree murder and attempted armed robbery of the victim, Jeremy McEwen.

The State's evidence established that the victim was fatally shot on June 26, 2001, near 8800 South Clyde in Chicago just prior to 10:15 p.m. Kimberly Smith, who was a friend of the victim's and was in the car with him at the time of the shooting, testified that she saw two men approach the car, one wearing a black hoodie and the other in a red shirt. She stated that the shooter wore the black hoodie and after announcing a "stick up" fired once in the air before firing at the victim's chest when the victim attempted to drive away. Smith heard the victim say "T-

Man." Smith later identified the man in the red shirt in a lineup as the lookout. Joseph Fields, who was at a nearby park, heard a "pop" that night, which he initially thought was a firecracker. He then saw the victim's car before hearing a "boom and a bang." He and another man then began walking towards 88th Street. Fields saw two men near 87th and Clyde, one in a red shirt and one wearing a black hoodie. Antwan Sneed testified that he was at the same park, he heard a loud pop, saw the victim's car speeding down the street and subsequently lose control near 88th and Clyde. Sneed ran to the car and saw "two dudes in hoodies walking into the dark." One of the men was wearing a black hoodie and Sneed identified defendant, whom he knew as "T-Man," as the man in the black hoodie. When Sneed yelled "T-Man" several times, defendant picked up his pace and ran away. Two men unsuccessfully chased him. Former Assistant State's Attorney (ASA) Patrick Brosnan testified that he took defendant's inculpatory handwritten statement on June 28, 2001, which was published to the jury. Detective Patrick Golden testified that when defendant was arrested, he implicated himself and codefendants in the murder. Codefendant Finley testified that he, defendant, and codefendant Ivy were all friends. On the evening of the shooting, Finley saw defendant with a "45 or 9 millimeter gun" and while they were in a gas station, defendant saw the victim in his car. Defendant told Finley and Ivy that the victim had paid for drugs with counterfeit money. The three followed the victim's car to 89th & Clyde when defendant exited the car with the gun in his pocket. Defendant and Finley approached the victim's car from the back, and defendant stopped at the driver's side. Finley, while acting as the lookout, saw defendant fire one shot into the air while talking to the victim. When the victim began to drive off, defendant shot inside the victim's car and hit him. At that time, Finley ran

away. Defendant also ran away and took off the hoodie and wrapped the gun in it. Finley was arrested on June 27, 2001, and gave his videotaped statement at that time. Detective Russell Sutherland interviewed defendant, who said that Finley and Ivy planned the robbery, but he later stated that he fired into the victim's car. Defendant gave a handwritten statement on June 28, 2001. Dr. James Cogan, the assistant medical examiner, reviewed the autopsy results of the victim, which reflected cause of death as a gunshot wound to the chest.

Roy Ferguson testified on defendant's behalf. He stated that he had known defendant for approximately 10 years and also knew Finley. Ferguson was sitting in his car near the park on June 26, 2001, and saw Finley walk up to a white car, put a hood on and shoot two or three times into the car. Finley then ran through the park. Ferguson never saw defendant that night. Debra Pearson, an investigator for the public defender's office, stated that she spoke with Kimberly Smith on the telephone in the fall of 2006, and Smith indicated that she was afraid of Finley and his family due to threatening phone calls.

We reject defendant's characterization of the evidence as closely balanced for the purpose of plain error analysis; to the contrary, in our view, the strength of the evidence is overwhelming. Thus defendant has failed to satisfy the first prong of plain error. Accordingly, we conclude there is no basis for excusing the forfeiture of defendant's issues related to the violation of Rule 431(b) (eff. May 1, 2007) and the decision in *Thompson* requires that the defendant's conviction be affirmed on that basis.

Defendant raised five other issues in his original appeal that this court did not address. Namely, he contends: (1) the trial court failed to give a limiting instruction after the State

rehabilitated codefendant Finley by presenting his videotaped prior consistent statement as substantive evidence; (2) his sixth amendment right to confront and cross-examine witnesses was violated because the medical examiner who performed the autopsy did not testify; (3) his right to present a defense was violated because the trial court barred his expert witness from testifying as to defendant's police related post-traumatic stress disorder (PTSD), which was relevant in assessing the credibility of his statement; (4) his 80-year sentence was excessive; and (5) the mittimus should be corrected to reflect only one murder conviction.

Defendant first contends that the trial court failed to give a limiting instruction after the State rehabilitated codefendant Finley by presenting his videotaped prior consistent statement as substantive evidence. Defendant admits that Finley's videotaped statement was admissible to rehabilitate him after the defense alleged that he had a motive to testify falsely, but argues that the trial judge erred in failing to instruct the jury that the video statement could only be considered with respect to Finley's believability, not as independent proof of Brewer's guilt. He notes that although defense counsel did not request a limiting instruction, he did object to the admission of Finley's videotaped statement and raised the issue in the motion for new trial, so it is preserved for review. Alternatively, he contends that his trial counsel was ineffective for failing to request a limiting instruction.

The State counters that defendant has forfeited review of this issue or, alternatively, that even if not forfeited, the trial court properly allowed the publication of the videotaped statement; The State also argues that even if there was error, it was harmless. The State also notes that prior to the publication of the videotaped statement, the defense objected on the ground that it would

be cumulative, while the State argued that it was being offered to rebut a charge of recent fabrication. Moreover, the State notes that the trial court offered to give the jury a limiting instruction but the defense objected to the limiting instruction and, thus, the State contends that defendant's entire argument is in bad faith.

A witness's prior consistent statement is admissible only to rebut a charge or inference that he was motivated to lie or that his testimony was of recent fabrication, as long as he made the prior consistent statement before either the motive arose or the alleged fabrication was made. *People v. Smith*, 362 Ill. App. 3d 1062, 1081 (2005).

Our review of the record indicates that defense counsel made two objections to the videotape of Finley's statement being played for the jury: a reference to gang membership and because it would be cumulative of his testimony and would serve to bolster his testimony. The trial court indicated that it could only be admitted if it were impeaching, and the State noted that it could be admitted to rebut a recent fabrication that was alleged by defense counsel on cross-examination of Finley. Defense counsel offered to stipulate that Finley told the same version of events six years ago, to which both the State and the trial court replied "not the same." The trial court then indicated that the State could play the video but stop it before the gang reference and that it would give a limiting instruction as to the redacted portions of the statement, but defense counsel refused such instruction. The record further indicates that during the instructions conference, defense counsel never sought any limiting instruction regarding Finley's videotaped statement.

We find that this issue is waived for purposes of review as defense counsel never

objected to the videotaped statement on the basis that it was being used as substantive evidence by the State. *Enoch*, 122 Ill. 2d at 185-86. It is not reviewable under plain error as the evidence was not closely balanced nor did the error affect substantive rights or prejudice defendant. Nor was defense counsel ineffective for failing to request a limiting instruction as any error was harmless error in light of the overwhelming amount of evidence against defendant; Finley testified at trial consistently with the material contained on the tape; and it is unlikely that the jury's verdict would have been different but for the admission of the videotaped statement into evidence. See *Strickland v. Washington*, 466 U.S. 668, 694, 80 L. Ed. 2d 674, 698 (1984).

Defendant also contends that his sixth amendment right to confront and cross-examine witnesses was violated because the medical examiner who performed the autopsy did not testify.

Defense counsel failed to object to this testimony at trial and also failed to include this issue in defendant's posttrial motion, which would forfeit any claim of error. *Enoch*, 122 Il. 2d at 185-86. This exact issue was recently addressed by this court in *People v. Pitchford*, 401 Ill. App. 3d 826 (2010). In that case, the court noted that there was no prejudice and defendant failed

> "to make any rational argument regarding what advantage he would have gained by cross-examining the physician who performed the autopsies and prepared the reports. The medical examiner who did testify was merely relating the results of the autopsies as written in the autopsy reports. There was no issue as to the cause or manner of death of the victims." *Pitchford*, 401 Ill.

App. 3d at 836.

The court further noted:

> "[T]his was also not the type of structural error that our supreme court has said will require automatic reversal, regardless of forfeiture or lack of prejudice. *People v. Glasper*, 234 Ill. 2d 173, 197-98 (2009). * * * Accordingly, we hold that even assuming it was an error to permit one physician to testify concerning the results of an autopsy performed by another physician, that error was not reversible as it was not a structural error and there was no prejudice to the defendant where he has failed to demonstrate how cross-examination of the physician who performed the autopsies could have aided his defense or would have made any difference in the jury's determination of guilt." *Pitchford*, 401 Ill. App. 3d at 836-37.

The same result is warranted here. We have already concluded that the evidence is not closely balanced for purposes of plain error analysis; even if there was error, this is not a structural error that would require automatic reversal; and defendant has not established any prejudice by this testimony as he does not argue that cross-examining the medical examiner would have aided his defense or changed the jury's result. As such, we conclude that this issue is without merit.

Next, defendant argues that he was denied his right to present a defense where the trial

court barred Dr. Joyce Miller from testifying as to his police-related PTSD, which was relevant in assessing the credibility of his statement. He maintains that his defense theory was that his statement was incredible because he suffered from police-related PTSD when he gave the statement and the trial court prevented him from introducing evidence about his diagnosis and treatment for PTSD.

The admission of the opinion of an expert, like the admission of any evidence, is a matter within the discretion of the trial court. *People v. Driver*, 62 Ill. App. 3d 847, 853 (1978). Where the trial court's rulings restrict the right to present a defense or to cross-examine witnesses, our duty on review is to determine whether the trial court's constituted an abuse of its discretion. *People v. Jackson*, 303 Ill. App. 3d 583, 587 (1999).

The record reveals that Dr. Miller originally testified during the hearing on defendant's motion to suppress. She testified that she treated defendant between May and June of 2001 when he was referred to her for a psychiatric evaluation to determine if a home-bound program was still needed from his school. She initially met with defendant on May 14, 2001, and learned that he had been beaten by police approximately 1 ½ months prior and had been placed in a home-bound program for school. Miller diagnosed defendant with PTSD resulting from the incident and prescribed Zoloft to manage his symptoms. She testified that similar situations could bring about a stressful reaction, such as seeing a police car or hearing sirens. On cross-examination, Miller stated that she last saw defendant on June 4, 2001, and had no opinion as to any of the events surrounding his arrest on June 27, 2001, including whether he was still taking his medication or whether his statement was freely given.

Prior to trial, the State filed a motion *in limine* to preclude Miller's testimony because it was irrelevant as she had no opinion as to the voluntariness of defendant's statement. Because neither party could produce transcripts as to Miller's testimony during the motion to suppress hearing, the trial court denied the State's motion. After trial began, the State renewed its motion once transcripts were secured. In barring Miller's testimony, the trial court found that Miller's testimony could confuse the jury and not shed any light on any issue in the case; that it was an attempt to admit statements about the defendant and prior conduct with the police; and that she was unable to render any opinion or make a projection as to whether defendant was susceptible to police pressure to give a statement on the issue of voluntariness.

It is within the power and discretion of the trial court to exclude evidence offered by the defense in a criminal case on the basis of irrelevancy without infringing upon an accused's constitutional right to present a defense. *People v. Dalzotto*, 55 Ill. App. 3d 995, 998 (1977). See also *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Washington v. Texas*, 388 U.S. 14 (1967). Testimony is relevant, if it would, if believed, tend to make any fact in issue more or less probable than it would be without the testimony. *People v. Makiel*, 263 Ill. App. 3d 54, 70 (1994).

We find that the trial court did not abuse its discretion in barring Dr. Miller from testifying at trial. Contrary to defendant's assertions, it is clear that she did not have an opinion as to whether defendant's PTSD affected the voluntariness of his inculpatory statement to police. She had last seen defendant several weeks prior to the shooting and was unaware if he was taking the prescribed medication at the time of his arrest. As such, her testimony was irrelevant to the

voluntariness of his statement at the time of his arrest and its exclusion did not infringe upon defendant's right to present a defense.

Defendant further argues that his aggregate 80-year sentence, which is tantamount to a life sentence, is excessive where the trial judge placed emphasis on a factor inherent in the offense and failed to adequately consider that he was 18 at the time of the offense, had a minimal criminal background, and had significant potential for rehabilitation.

In imposing sentence on a defendant, the trial judge may not consider any fact implicit in the underlying offense for which that defendant was convicted. *People v. James*, 255 Ill. App. 3d 516, 531 (1993). However, a judge may consider the nature and circumstances of the offense, including the nature and extent of each element of the offense as committed by the defendant. *James*, 255 Ill. App. 3d at 532.

A reviewing court may not alter a defendant's sentence absent an abuse of discretion by the trial court. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). A sentence will be deemed an abuse of discretion where the sentence is " 'greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense.' " *Alexander*, 239 Ill. 2d at 212 (quoting *People v. Stacey*, 193 Ill. 2d 203, 210 (2000) (citing *People v. Fern*, 189 Ill. 2d 48, 54 (1999))). Where mitigation evidence is before a court, it is presumed that the court considered that evidence, absent evidence to the contrary. *People v. Lampley*, 405 Ill. App. 3d 1, 13 (2010) (citing *People v. Canet*, 218 Ill. App. 3d 855, 864 (1991)). The sentencing range for first degree murder is between 20 and 60 years. 730 ILCS 5/5-8-1(a)(1)(a) (West 2006).

During the sentencing hearing, the trial court noted applicable factors in mitigation and

aggravation. During aggravation, the trial court made the following statements:

> "Factors in aggravation, the defendant's conduct did cause or threaten serious harm, the ultimate serious harm, murder. The defendant received compensation for committing the offense, no, but this was a robbery that turned into a murder, felony murder.
>
> The defendant has a history of prior delinquency or criminal activity. Although minimal, yes, he does have a history of prior delinquency, not a stranger to the criminal justice system. Four is not applicable. Five is not applicable. Six is not applicable. Seven is absolutely applicable. The sentence is necessary to deter others from committing the same crime. Eight and nine are not applicable. And I believe the other factors in aggravation that I've looked through, 10, 11, 12, 13, 14, 15, on through 20 and 21 are not applicable."

The record does not indicate that the trial court emphasized a factor inherent in the offense during sentencing. Contrary to defendant's assertions, the fact that his conduct threatened or caused serious harm is not a factor inherent in the crime itself but is a proper aggravating factor to be considered during sentencing even in cases where serious bodily harm is implicit in the offense. See *People v. Saldivar*, 113 Ill. 2d 256, 269 (1986); *People v. Solano*, 221 Ill. App. 3d 272, 274 (1991); *People v. Spencer*, 229 Ill. App. 3d 1098, 1102 (1992). Moreover, defendant's sentence was well within the statutory sentencing range for first degree

murder, and the existence of mitigating factors does not mandate imposition of the minimum sentence nor preclude imposition of the maximum sentence. *People v. Flores*, 404 Ill. App. 3d 155, 158 (2010). We conclude that the trial court did not abuse its discretion in sentencing defendant to a 50-year prison term for first degree murder.

Defendant also received a consecutive 30-year prison term for personally discharging a firearm that caused the death of another. Section 5-8-1(a)(1)(d)(iii) of the Unified Code of Corrections states: "if, during the commission of the offense, the person personally discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement, or death to another person, 25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court." 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2006).

Here, the trial court imposed an additional 30-year prison term pursuant to the above-referenced statute, which was well within the sentencing range. Such sentence was not an abuse of discretion.

Finally, defendant contends that the mittimus should be corrected to reflect only one conviction for first degree murder and that he was sentenced to a consecutive 30-year prison term for personally discharging a firearm that proximately caused the death of the victim. See 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2006). The State concedes that the mittimus should be corrected.

This court has the authority to directly order the clerk of the circuit court to make the necessary corrections to defendant's sentencing order. *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995). Accordingly, we direct the clerk of the circuit court to make the changes to

defendant's mittimus as noted herein.

## CONCLUSION

For the foregoing reasons, we affirm the judgment of the circuit court of Cook County and direct the clerk of the circuit court to make the changes to defendant's mittimus as noted herein.

Affirmed; mittimus corrected.

**REPORTER OF DECISIONS - ILLINOIS APPELLATE COURT**

---

**THE PEOPLE OF THE STATE OF ILLINOIS,**
**Plaintiff-Appellee,**
**v.**
**TYRONE BREWER,**
**Defendant-Appellant.**

---

**1-07-2821**
**Appellate Court of Illinois**
**First District, Fourth Division**
**June 30, 2011**

---

**JUSTICE SALONE delivered the judgment of the court, with opinion.**
**Presiding Justice Lavin and Justice Sterba concurred in the judgment and opinion.**

---

**Appeal from the Circuit Court of Cook County**
**01 CR 18452 (01)**
**The Hon. Kenneth J. Wadas, Judge Presiding.**

---

**FOR DEFENDANT-APPELLANT:**

**Michael J. Pelletier, Deputy Defender**
**Office of the State Appellate Defender**
**203 North LaSalle Street, 24th Floor**
**Chicago, Illinois 60601**
***Of Counsel*: Patricia Unsinn**
**Aliza R. Kaliski**
**Geoffrey Burkhart**

**FOR PLAINTIFF-APPELLEE:**

**Anita Alvarez, State's Attorney**
**State's Attorney of Cook County**
**Richard J. Daley Center, Room 309**
**Chicago, Illinois 60602**
***Of Counsel*: James E. Fitzgerald**
**Samuel Shim**