



Class X sentence was based on an ineligible prior felony conviction; (2) the trial court failed to adequately inquire into his claim of ineffective assistance of counsel made at sentencing; and (3) a new trial is required because the court failed to comply with Illinois Supreme Court Rule 431(b) (eff. May 1, 2007).

The record shows that defendant was charged with burglary and elected a jury trial. After the prospective jurors were sworn, the trial court addressed them as follows:

"The defendant in this case just like every single criminal case across the country in state and federal court, is presumed to be innocent of the charges placed against him. He in this case just like all other cases, has to be proven guilty beyond a reasonable doubt. That is one of the cornerstones of our criminal justice system."

The trial court then asked, "Is there anybody here that has a problem with that concept. If you do, raise your hand and let me know." No one raised his or her hand.

The court then continued:

"Along those lines, when I said the defendant is presumed to be innocent, what goes hand in hand with that is the fact the defendant does

not have to call any witnesses at all. Including himself. The defendant does not have to testify. Again, that all goes back to the original principle, which is if the state brings the charge, it is their burden to prove somebody guilty beyond a reasonable doubt. That means the defendant does not have to testify."

The court then asked, "Does everybody here understand that cornerstone of our criminal justice system?" The court clarified for the record that everyone nodded in agreement, and then concluded by asking, "Even though you understand it, is there anybody here that would hold it against the defendant if he chose not to testify and exercised that constitutional right of his?" Again, no one raised his or her hand.

The trial commenced and evidence was presented that showed, in relevant part, that about 12:05 a.m., on March 3, 2008, Jerome Wilder returned home to his apartment at 3812 South Michigan Avenue in Chicago. Two or three minutes later, he heard banging from the maintenance room below him, then called 911 and Bryant Lee, the property manager. He then looked out his window and saw a man he knew to be Mike Flowers, come out of the building, run across Michigan Avenue, and cut through a vacant lot while carrying "some shiny stuff." Wilder checked the maintenance room

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for damage at Lee's request, and observed that the door to it was newly broken and cracked open about 12 inches. When police arrived on the scene, he pointed out the direction that Flowers had gone.

Wilder returned to his apartment and through his window saw defendant and Flowers coming across Michigan Avenue together. Defendant had a black garbage can, and Flowers had a shopping cart. They entered the front door of the building with their containers, and Wilder once again called 911 and Lee.

Chicago police officer Anastasia Patterson and her partner responded to the burglary-in-progress call at this address, and, as they approached the building, Officer Patterson saw defendant pushing out a garbage can and Flowers pushing out a shopping cart. When the men saw the officers, defendant ran toward Michigan Avenue, and Flowers went back inside the building. The officers apprehended defendant and placed him in the squad car, then apprehended Flowers from an apartment in the building.

The officers' ensuing investigation of the crime scene revealed that the garbage can and shopping cart contained plumbing supplies taken from the maintenance room, which they found had a damaged door and was in disarray. Lee and two of his maintenance staff were the only ones with a key to the maintenance room, and Lee did not give permission to either defendant or Flowers to remove any items from it. Flowers

testified for the defense that he had burglarized the maintenance room by himself, but the jury found defendant guilty of burglary.

At the outset of the post-trial proceedings, the court gave defendant an opportunity to examine his presentence investigation report (PSI) with his attorney to see if any corrections were needed. The case was passed and when proceedings resumed, the court struck a prior misdemeanor conviction at defendant's request.

At the sentencing hearing which followed, the State asserted that defendant is Class X mandatory based on his prior felony convictions. The State reviewed these convictions and entered into evidence, certified copies of defendant's 1984 conviction for possession of a stolen motor vehicle, and a 1989 conviction for attempted murder. Based on defendant's prior convictions, the court determined that he was subject to mandatory Class X sentencing, and asked him if there was anything he wished to say before sentence was imposed.

Defendant took issue with the fact that his eligibility for Class X sentencing was predicated upon convictions that occurred many years ago, and the following colloquy was had between defendant, his counsel, and the court:

THE DEFENDANT: I am saying but if all this here was explained to me from the day one, you know what I am saying - -

MS. YURCHAK: Your Honor, I am going to have to object to that. apologize. It was explained very clearly to him by myself and by co-counsel, so the record is very clear.

THE COURT: You did explain to him what he would be facing if he were to take the case to trial?

MS. YURCHAK: Yes, your Honor, X by background came into play every single day that we were in here, your Honor, yes, both myself and Ms. Bauman explained that to him, yes.

THE COURT: So that's where we are at now. So is there anything else that you want to say?

THE DEFENDANT: No, ma'am. No, ma'am.

The court then sentenced defendant to eight years' imprisonment, and this appeal follows.

Defendant first contends that the trial court erred in sentencing him as a Class X offender based on his 1984 conviction for possession of a stolen motor vehicle because, at the time, it was a Class 3 felony. The State responds that there was uncontested evidence that defendant has five other qualifying convictions, that he forfeited his claim that his 1984 conviction could not qualify as a Class 2 felony, and that the use of this conviction does not violate the proscription against *ex post*

*facto* laws. Defendant replies that his claim that the enhanced sentence is void is not subject to forfeiture, citing *People v. Thompson*, 209 Ill. 2d 19, 27 (2004). Because our resolution of this issue requires us to interpret and apply a statutory provision, our review is *de novo*. *People v. Brown*, 229 Ill. 2d 374, 382 (2008).

As set forth above, defendant was convicted of burglary, a Class 2 felony (720 ILCS 5/19-1(b) (West 2008)), and sentenced as a Class X offender based on his prior convictions (730 ILCS 5/5-5-3(c)(8) (West 2008) (eff. June 1, 2008)). Under the codification in effect at the time defendant was sentenced, Class X sentencing was mandatory where:

"defendant \*\*\* is convicted of a Class 1 or Class 2 felony, after having twice been convicted in any state or federal court of an offense that contains the same elements as an offense now classified in Illinois as a Class 2 or greater Class felony and such charges are separately brought and tried and arise out of different series of acts."

730 ILCS 5/5-5-3(c)(8). A defendant's criminal record, as evidenced by a PSI, has been deemed sufficient to establish his eligibility under this statute (*People v. Williams*, 149 Ill. 2d 467, 487-88 (1992)), and may be relied upon by the court in

imposing a Class X sentence (*People v. Rivera*, 362 Ill. App. 3d 815, 821 (2005)).

In this case, defendant's PSI reflects a criminal history which mandates Class X sentencing under section 5-5-3(c)(8). In addition to his PSMV and attempted murder convictions, defendant's PSI shows, *inter alia*, that defendant has a 1998 Wisconsin conviction for possession of a controlled substance with intent to deliver, which qualifies as a minimum Class 2 felony in Illinois. 720 ILCS 570/407(b)(1)-(6) (West 2008). He was also thrice convicted in Illinois for burglary, a Class 2 felony, in 1978, 1980, and 1986. The record thus shows that defendant was Class X mandatory, and we need not address whether the 1984 PSMV conviction qualifies for purposes of Class X sentencing.

Defendant, however, takes issue with the accuracy of the PSI. The record shows that the trial court specifically asked defendant whether any corrections were to be made to the PSI and gave him time to consult with his counsel on this matter. Defendant objected to a prior misdemeanor, but not to the record of his prior felonies that established his eligibility for sentencing as a recidivist. We thus find that defendant has forfeited this challenge to the PSI by failing to bring the claimed deficiencies or inaccuracies in the PSI to the attention of the sentencing court. *Williams*, 149 Ill. 2d at 493.

Defendant claims, in the alternative, that his trial counsel was ineffective for failing to object to the Class X sentence based on an ineligible conviction. As noted above, even if defendant's prior conviction of PSMV did not qualify for Class X sentencing, his other felony convictions established his eligibility for such sentencing, and, thus, he cannot show that he was prejudiced by counsel's failure to object, and his ineffective assistance of counsel claim necessarily fails. *People v. Flores*, 153 Ill. 2d 264, 283 (1992), citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Defendant next contends that the trial court failed to adequately inquire into his "indication" at sentencing that he was insufficiently advised about the potential penalty he faced if convicted of burglary, as required under *People v. Krankel*, 102 Ill. 2d 181 (1984). The State initially responds that defendant's statement was insufficient to require additional inquiry. Our review is *de novo*. *People v. Moore*, 207 Ill. 2d 68, 75 (2003).

We first address whether defendant actually made an ineffective assistance claim requiring a *Krankel* inquiry. The record shows that defendant took umbrage with the fact that his prior convictions made him eligible for Class X sentencing, and then stated, "if all this here was explained to me from the day one, you know what I am saying." Counsel informed the court that

defendant had repeatedly been apprised of his eligibility for Class X sentencing, and when given the opportunity to refute that statement, defendant declined.

The supreme court addressed an analogous situation in *People v. Taylor*, 237 Ill. 2d 68, 73 (2010), where defendant was eligible for Class X sentencing, but told the sentencing court that he was unaware of the penalty he faced by going to trial and claimed that he would have taken the State's plea offer had he known. The supreme court found that defendant never specifically complained about his attorney's performance or expressly claimed ineffective assistance of counsel, and noted that defendant's appellate characterization of his statement as an "implicit claim of ineffective assistance of counsel" was an acknowledgment of this point. *Taylor*, 237 Ill. 2d at 76. The supreme court then held that defendant's statement at sentencing was insufficient to trigger a *Krankel* inquiry. *Taylor*, 237 Ill. 2d at 77.

Here, as in *Taylor*, defendant never expressly claimed ineffective assistance of counsel, or complained about his attorney's performance, and acknowledges this point by the manner in which he characterizes his assertion on appeal. Accordingly, we likewise find that defendant's statement was insufficient to trigger a *Krankel* inquiry, and, as a result, we need not address the sufficiency of the inquiry conducted by the trial court. *Taylor*, 237 Ill. 2d at 76-77.

Defendant, nonetheless, claims that counsel violated her duty to advocate for his cause by objecting to his statement that he was unaware of his eligibility for Class X sentencing, and that this act suggests a conflict of interest. However, defendant fails to explain, or provide any support for, his position that counsel should allow defendant to provide false information to, or mislead, the court. Thus, we find that defendant's argument is without merit.

Defendant finally claims that the trial court failed to comply with its duty under Illinois Supreme Court Rule 431(b). Defendant admits that he did not raise this issue in his motion for a new trial (*People v. Enoch*, 122 Ill. 2d 176, 186 (1988)), but argues that he should not be required to preserve the issue to avoid forfeiture because it would be inconsistent with the rule. Defendant cites no controlling authority for his position, and the record clearly shows that defendant forfeited that issue by failing to raise it in the trial court. Under these circumstances, we will review the record only for plain error (*People v. Thompson*, 238 Ill. 2d 598, 612 (2010)), and our review is *de novo* (*People v. Garner*, 347 Ill. App. 3d 578, 583 (2004)).

The plain error doctrine is a narrow and limited exception to the general rule (*People v. Hillier*, 237 Ill. 2d 539, 545 (2010)), and to invoke this exception, defendant must show that the evidence is closely balanced, or the error is so serious that

it affected the fairness of defendant's trial and challenged the integrity of the judicial process (*People v. Naylor*, 229 Ill. 2d 584, 593 (2008)). Under both prongs, defendant bears the burden of persuasion (*Naylor*, 229 Ill. 2d at 593), and must first show that a clear or obvious error occurred (*Hillier*, 237 Ill. 2d at 545).

Defendant maintains that the evidence in this case was closely balanced. We disagree. At trial, Wilder provided an eyewitness account of how the burglary unfolded, including that he saw defendant approaching the building with Flowers while carrying a black garbage can. Officer Patterson testified that as she approached the building, she personally observed defendant pushing out a garbage can which contained plumbing supplies stolen from the maintenance room, and that defendant fled when he saw her. Defendant cites the competing testimony of Flowers, who claimed that he burglarized the maintenance room by himself. However, given the strength of the State's case against defendant, the jury acted well within its authority by rejecting Flowers' testimony. We thus find, contrary to defendant's claim, that the evidence against him was not closely balanced.

Defendant also maintains that the court's improper Rule 431(b) questioning was so serious as to affect the fairness of his trial. However, defendant presents no evidence of a biased jury, and we cannot presume such bias solely on the basis of an

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error in conducting Rule 431(b) questioning. *Thompson*, 238 Ill. 2d at 614. We thus find that defendant has failed to meet his burden of showing that any error in the Rule 431(b) questioning conducted by the trial court affected the fairness of his trial and challenged the integrity of the judicial process. *Thompson*, 238 Ill. 2d at 615. Accordingly, we must honor his procedural default of this issue. *Hillier*, 237 Ill. 2d at 545.

For these reasons, we affirm the judgment of the circuit court of Cook County.

Affirmed.