2011 IL App (1st) 082793-U
No. 1-08-2793

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SIXTH DIVISION
July 22, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 06 C 661 167
	)	
ERNEST HARDAWAY,	)	The Honorable
	)	Brian K. Flaherty,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Justices Cahill and R. E. Gordon concurred in the judgment.

ORDER

Held: Judgment on defendant's convictions for residential burglary and possession of a stolen motor vehicle affirmed over claims that trial court failed to comply with Rule 431(b) and sentenced him to excessive terms; mittimus modified to reflect time spent in presentence custody.

¶ 1 Following a jury trial, defendant Ernest Hardaway was found guilty of residential burglary and possession of a stolen motor vehicle, then sentenced to concurrent, respective terms of

22 and 14 years' imprisonment. On appeal, defendant contends that his convictions should be reversed and his cause remanded for a new trial because the trial court failed to strictly comply with Illinois Supreme Court Rule 431(b) (eff. May 1, 2007). He also contends that his sentences are excessive, and that his mittimus should be corrected to reflect an additional two days of sentencing credit.

¶ 2 We initially affirmed defendant's conviction on June 11, 2010, finding that the trial court's failure to strictly comply with Rule 431(b) was harmless beyond a reasonable doubt and not plain error, that the trial court did not abuse its sentencing discretion, and that defendant was entitled to one additional day of credit for time spent in presentence custody. *People v. Hardaway*, No. 1-08-2793 (2010) (unpublished order under Supreme Court Rule 23). Thereafter, the supreme court entered a supervisory order directing this court to vacate that order and reconsider the matter in light of *People v. Thompson*, 238 Ill. 2d 598 (2010). *People v. Hardaway*, No. 110605 (Ill. May 6, 2011). We have done so, and, for the reasons that follow, conclude that a different result is not warranted.

¶ 3 The charges filed against defendant arose from an incident on October 19, 2006, when defendant broke into the Zambrano residence in South Chicago Heights, Illinois, removed a television set, and fled in the Zambrano family car. At trial,

Sandra Zambrano testified that she lived at this residence with her brother Juan, sister Norma, and a nephew. About 5:15 that morning, she was awakened from sleep by the sound of scratching, which was preceded by the sound of footsteps outside of her bedroom door. When she got up and looked out her window, she saw defendant taking the family television set out the front door. She then saw defendant drop the television set in the front yard, and drive away in their family car using the keys.

¶ 4 Norma Zambrano called the Steger police department and Sergeant Bianco and Officer Carter responded. Sergeant Bianco radioed the direction of the vehicle to Deputy Chief Wehrle, who observed defendant driving it at a high rate of speed and gave chase. When defendant attempted to exit the vehicle he became entangled in the door, and was dragged along 29th Place. Defendant then freed himself from the vehicle, which crashed into a nearby tree, and ran to his residence at 94 West 29th Place. The deputy restrained defendant on the stairs of his home after a struggle, during which the Zambranos' television remote control fell from defendant's sweatshirt pocket.

¶ 5 Officer Carter drove Sandra and Juan Zambrano to the crash site where they identified defendant as the person they saw taking the television set out of their home and driving away in their car. Sandra Zambrano confirmed that the remote recovered during the struggle belonged to her.

¶ 6 Detective Vaci interviewed defendant after he was advised of his *Miranda* rights and confirmed that he understood them. During that interview, defendant said that he entered the Zambrano residence through a window, believing it was unoccupied, and took a television set, a remote, and car keys before driving away in the car and jumping out at his house. Officer Jones, an evidence technician for the South Chicago Heights police department, testified that he was unable to recover fingerprints from the Zambrano's television set, vehicle, or kitchen window.

¶ 7 Defendant elected not to testify or present any direct evidence. After closing arguments, the case was submitted to the jury which found him guilty of residential burglary and possession of a stolen motor vehicle.

¶ 8 At the sentencing hearing on September 19, 2008, the State presented evidence in aggravation. This included testimony from Sergeant Leuser of the Chicago Heights police department. He testified that in 2001 he had been dispatched to the home of Lola Austin, an 84-year-old woman who came upon defendant burglarizing her home about 1:52 a.m. Defendant pushed her to the ground and bruised her arm. The victim identified defendant in a lineup and his fingerprints were recovered from her wallet.

¶ 9 The State also presented evidence of defendant’s criminal history which showed that he had eight prior felony convictions including prior home invasions, and that he was on

parole for the home invasion of Lola Austin when he committed the instant offense. The State recommended that defendant be sentenced as a Class X felon to 30 years' imprisonment.

¶ 10 In mitigation, defense counsel pointed out that defendant is 36 years old, the father of four, and attends church. He also claimed that defendant was a victim of drug addiction, and presented a letter form a correctional officer who referred to defendant as a model inmate. In allocution, defendant expressed remorse for burglarizing the homes of Austin and Zambrano, and stated that he believed the house was empty and only stole to support his drug habit.

¶ 11 The trial court concluded that defendant's statements at sentencing were not believable when viewed against his conduct outside of prison. The court noted that defendant had been convicted of nine felonies in his 18 years of adulthood and that he attacked an 84-year-old woman when she refused to give up her wallet. The court then sentenced defendant to concurrent terms of 22 years' imprisonment for residential burglary and 14 years for possession of a stolen motor vehicle.

¶ 12 On appeal, defendant first contends that the trial court committed reversible error when it failed to question the prospective jurors on the four principles enumerated in *People v. Zehr*, 103 Ill. 2d 472 (1984), and codified in Rule 431(b). Under that rule, the trial court is required to ask each prospective

juror, individually or in a group, whether he or she understands and accepts, (1) that defendant is presumed innocent of the charge against him; (2) that before a defendant can be convicted, the State must prove him guilty beyond a reasonable doubt; (3) that defendant is not required to offer any evidence on his behalf; and (4) that defendant's failure to testify cannot be held against him. Ill. S. Ct. R. 431(b) (eff. May 1, 2007).

¶ 13 Defendant specifically maintains that the trial court failed to ask the prospective jurors whether they understood the third *Zehr* principle, and also failed to ask the first prospective juror if he understood any of the four *Zehr* principles. As a result, defendant contends that the court failed to strictly comply with Rule 431(b), and that his convictions should be reversed and his cause remanded for a new trial.

¶ 14 The State initially responds that defendant has forfeited this issue by failing to object at trial and in a written posttrial motion as required to preserve an error for review. *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007). In his reply brief, defendant acknowledges these omissions, but contends that requiring defense counsel to object would be inconsistent with the purpose of the amended rule, which placed the responsibility for the inquiry on the trial court, rather than defendant. He also clams that the waiver rule should be

relaxed because the error was made by the trial court.

¶ 15 In *Thompson*, 238 Ill. 2d at 612, the supreme court rejected virtually the same arguments and found no compelling reason to relax defendant's forfeiture of the issue. Rather, the supreme court recognized the application of plain error review in certain circumstances to consider unpreserved claims of error (*Thompson*, 238 Ill. 2d at 613), and the first-step in plain error review is to determine whether a clear or obvious error occurred (*People v. Hillier*, 237 Ill. 2d 539, 545 (2010)).

¶ 16 The record in this case shows that the trial court addressed the venire in pertinent part as follows:

> "[I]f the answer to any of these questions is yes, please raise your hand.
>
> * * *
>
> A defendant in a cases [*sic*] like this is presumed to be innocent until the jury determines after deliberations that the person is guilty beyond a reasonable doubt. Does anybody disagree with that?
>
> No one has raised their hands.
>
> The State has the burden of proving the defendant guilty beyond a reasonable doubt. Does anybody disagree with this rule of law?
>
> No one has raised their hand.

> A defendant does not have too [*sic*] present any evidence at all and may rely on the presumption of innocence.
>
> Does anybody disagree with this rule of law?
>
> No one has raised their hand."

¶ 17 Following a recess, the court returned the questioned venire members individually. The first prospective juror, Edmond Baker, indicated that he did not believe he would be able to be impartial because his mother was murdered in the early 1950's. The trial court did not question him further and the record shows that he was excused.

¶ 18 The trial court then questioned each of the remaining prospective jurors and affirmed that they understood and accepted that defendant was presumed innocent, that the State bore the burden of proving defendant guilty beyond a reasonable doubt, and that defendant's failure to testify could not be used against him. The trial court did not ask the prospective jurors whether they understood and accepted that defendant was not required to offer any evidence in his own defense.

¶ 19 The record further shows that immediately before opening statements were made, the trial court advised the jury that, "[a] defendant is not required to prove his innocence. A defendant need not present evidence at all and may rely upon the

presumption of innocence." Defendant did not testify and before the case was given to the jury, the court admonished the impaneled jurors that, "[t]he State has the burden of proving the guilt of the defendant beyond a reasonable doubt and his burden remains on the State throughout the case. The defendant is not required to prove his innocence."

¶ 20 The record confirms that the trial court complied with Rule 431(b) as to three of the four principles, and that it failed to ask the venire members whether they understood and accepted that defendant was not required to offer evidence. This failure to address the third principle constituted noncompliance with the rule. *Thompson*, 238 Ill. 2d at 607. Notwithstanding, the supreme court held that a violation of Rule 431(b) is not structural error and does not require automatic reversal of defendant's conviction, then considered whether it provided a basis for excusing defendant's procedural default. *Thompson*, 238 Ill. 2d at 611-15.

¶ 21 In plain error review, defendant has the burden of showing either that the evidence was closely balanced, or that the error was so serious that it affected the fairness of his trial and challenged th integrity of the judicial process. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008). With respect to the first prong, the record establishes that defendant broke into the Zambrano residence in the early morning hours of October 19,

2006. Sandra and Juan Zambrano identified defendant as the person they saw carrying their television set out of the family home and driving away in the family car. Shortly thereafter, Deputy Chief Wehrle intercepted defendant, who was driving the Zambrano's car at a high rate of speed, then jumping out of the vehicle, which crashed into a tree before he was apprehended on the steps of his home. At that time, he was in possession of the remote control for Zambrano's television set. In addition, detective Vaci testified that defendant admitted to taking the Zambrano's television set, remote control, and car keys. The evidence, therefore, was not closely balanced, and defendant has not met his burden under the first prong of plain error.

¶ 22 We also find that defendant cannot establish the second prong of plain error, *i.e.*, that the error was so serious as to affected the fairness of this trial and challenged the integrity of the judicial process. In *Thompson*, the supreme court found that defendant cannot satisfy the second prong of plain error review here he has failed to establish that a Rule 431(b) violated resulted in a biased jury. *Thompson*, 238 Ill. 2d at 615. Here, the record shows that the trial court affirmed that each of the prospective jurors understood and accepted each of the principles of Rule 431(b), except the third, *i.e.*, that defendant was not required to offer any evidence in his own defense. However, the court advised the venire of the third

principle when it addressed them as a group early on, asked if anybody disagreed with the rule of law, and not one raised their hand. The court also clearly admonished the jurors of that principle prior to opening statements, and again before deliberations. We find that, under these circumstances, defendant has not shown that he was tried by a biased jury, and, accordingly, that he has not met his burden of demonstrating that his procedural default should be excused under the second prong of plain error review. *Thompson*, 238 Il. 2d at 615.

¶ 23 Defendant's further contention with regard to the trial court's failure to question prospective juror, Baker, as to any of the four *Zehr* principles, does not warrant a different outcome. As noted, this juror was excused because he was unsure if he could put aside this potential bias against defendant because of his mother's murder, thus rendering defendant's claim regarding him moot. *People v. Roberson*, 212 Ill. 2d 430, 435 (2004).

¶ 24 Defendant next contends that the sentence imposed by the trial court were excessive and that the court failed to consider the relevant mitigating factors. The State responds that the sentence was appropriate given the aggravating factors and defendant's criminal history.

¶ 25 Where, as here, a sentence falls within the sentencing range for the offense committed, that sentence will not be

reversed on appeal, absent an abuse of discretion. *People v. Jones*, 168 Ill. 2d 367, 373-74 (1195). We find none here.

¶ 26 The record shows that in arriving at its sentencing determination, the court considered a broad range of information provided by both parties. *People v. Patterson*, 217 Ill. 2d 407, 448 (2005). These included defendant's age, his substantial criminal history (nine felonies in his adult life), and his family history. The court also considered the letter from the correctional officer on defendant's behalf, but found it unpersuasive noting that defendant did not have access to drugs while he was in prison, but when he has been outside, his habit returns along with his criminal behavior. The trial court also found defendant's statements of remorse to be insincere.

¶ 27 Defendant contends, nevertheless, that the trial court failed to consider his drug addiction and the absence of a threat of serious harm involved in the crime, as mitigation. A history of drug use, however, may not constitute mitigation where, as here, defendant has had opportunities to complete treatment in conjunction with earlier convictions. *People v. Evangelista*, 393 Ill. App. 3d 395, 399 (2009).

¶ 28 The record also negates defendant's contention that he did not threaten serious harm to others in the commission of this crime. To the contrary, the evidence presented at trial shows that he broke into a home in the early morning hours of he day

while the residents were sleeping, led police on a high-speed chase, abandoned the vehicle while it was still moving, allowing it to crash into a tree, and struggled with police to avoid arrest. Under these circumstances, we find no error in the trial court's rejection of defendant's contentions as mitigating factors. *People v. McGee*, 398 Ill. App. 3d 789, 795 (2010).

¶ 29 In sum, the records shows that the trial court considered proper factors in aggravation and mitigation (*People v. Hay*, 362 Ill. App. 3d 459, 468 (2005)), then sentenced defendant to terms within the statutory range provided for each offense (*People v. Almo*, 108 Ill. 2d 54, 70 (1985). To the extent defendant requests this court to reconsider those factors and independently determine that the sentences are excessive, we decline to do so. *Hay*, 362 Ill. App. 3d at 469. Finding no abuse of discretion, we affirm the sentences imposed by the trial court. *Almo*, 108 Ill. 2d at 70.

¶ 30 Lastly, defendant argues that the mittimus should be corrected to reflect credit for 702 days served, instead of the 700 currently shown. The State responds that defendant is entitled to 701 days credit because he was sentenced and remanded to the Department of Corrections on the same day. We agree.

¶ 31 The record establishes that defendant was sentenced and remanded to the custody of the Department of Corrections on September 19, 2008, and, pursuant to *People v. Williams*,239 Ill.

2d 503, 510 (2011), was not entitled to credit for that day. We therefore order the mittimus to be amended to reflect 701 days of sentencing credit. Ill. S. Ct. R. 615(b) (eff. Aug. 27, 1999).

¶ 32 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County, and order the mittimus to be amended to show 701 days served.

¶ 33 Affirmed, mittimus corrected.