

No. 1-09-3210

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).

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. 08 CR 18569
)	
JAMES CLAY,)	Honorable
)	Neil J. Linehan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE MURPHY delivered the judgment of the court.
Justices Neville and Salone concurred in the judgment.

ORDER

¶ 1 *Held:* Where the evidence was not closely balanced the plain error doctrine could not overcome defendant's forfeiture of a challenge to allegedly improper jury *voir dire* under Rule 431(b), and where defendant's sentence was not excessive, the trial court's judgment was affirmed.

¶ 2 Following a jury trial, defendant James Clay was found guilty of possession of a controlled substance with intent to deliver 15 or more grams but less than 100 grams of cocaine and sentenced to 16 years' imprisonment. On appeal, defendant maintains that he should receive a new trial because the trial court violated Supreme Court Rule 431(b) (eff. May 1, 2007) during

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jury selection. Defendant further contends that his sentence was excessive and certain fines and fees were improperly assessed. We modify the fines and fees order, and affirm in all other respects.

¶ 3 The evidence at trial revealed that at about 11:25 p.m. on September 12, 2008, two police officers were driving in an unmarked vehicle near 9158 South Stony Island Avenue in Chicago. They observed defendant stumbling as he was crossing the street in front of cars. The officers exited their car, approached defendant, and asked him where he was going. Defendant responded that he was "ok," and that he was on his way to a restaurant. When the officers asked defendant for his identification, defendant held out his hand, without going into his pocket, and revealed papers and a clear bag of cannabis. The officers arrested defendant and performed a custodial search which resulted in the recovery of a clear plastic bag containing 37 knotted bags of cocaine, which weighed over 15 grams, and \$33,007 in cash. Defendant did not testify or present any evidence.

¶ 4 Following trial, the jury found defendant guilty of the Class X offense of possession of a controlled substance with intent to deliver 15 or more grams but less than 100 grams of cocaine. At sentencing, the State commented in aggravation that defendant had five prior felony convictions, including burglary and possession of burglary tools, residential burglary, burglary, aggravated battery to a peace officer, and arson. The State also noted that not only was the instant offense a Class X offense, but defendant's background made him Class X mandatory. In mitigation, defense counsel stated that defendant had no gang affiliation, graduated high school, was a self-employed landscaper, had a live-in-girlfriend for the past 10 years, helped raise his girlfriend's two children, and his daughter from a previous relationship had a baby. Defense counsel further stated that defendant did not have any violent felonies in his background and had a drug problem since 1991. In allocution, defendant stated that he was not a drug dealer, but was a drug addict and relapsed when he found money in his grandparent's house.

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¶ 5 Following aggravation and mitigation, the trial court sentenced defendant to 16 years' imprisonment. In doing so, the court stated that it considered the facts of the case, matters in aggravation and mitigation, and arguments and statements made by the parties. The trial court further noted that defendant had an extensive criminal background which included violence, *i.e.*, aggravated battery to a peace officer and arson. The court then stated,

"[Defendant] was in possession of a considerable amount of narcotics. Those amounts certainly indicate more than a personal use. In fact, the amount is so large that our legislature found that to be in possession of more than 15 grams with intent to deliver is a Class X amount, meaning that the range of the penalties are considered a severe sentence from 6 to 30 years, because our legislature has found that, in fact, that amount certainly indicates that someone has the intent to deliver and spread those narcotics on the street."

¶ 6 Moreover, the court stated that it disbelieved defendant's claim that the drugs found in his possession were for his personal use, and further found that it was a reasonable inference for the trier of fact to conclude that the funds found in defendant's possession were proceeds from narcotics sales. Finally, the court assessed fines and fees totaling \$3,680, and credited defendant with \$2,085 (\$5 per day) for the 417 days he was in presentence custody.

¶ 7 On appeal, defendant contends that a new trial is warranted because the trial court failed to comply with Supreme Court Rule 431(b). Defendant specifically maintains that the trial court "failed to ask any of the potential jurors whether they understood and accepted the principle that [he], as the defendant, was not required to offer any evidence on his behalf."

¶ 8 The State correctly asserts that defendant forfeited this issue by failing to object during jury selection and to raise the issue in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Defendant, however, seeks review under the plain error doctrine. The plain error

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doctrine allows us to review an issue affecting substantial rights despite forfeiture in either of two circumstances, *i.e.*, (1) when the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). Defendant only contends that he is entitled to a new trial under the first prong of plain error, arguing that the evidence supporting the jury's verdict was closely balanced. The burden is on the defendant to establish plain error. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 9 In *Thompson* the supreme court articulated the need for the court to question the potential jurors about the four principles stated in Rule 431(b): (1) the defendant is presumed innocent of the charges against him; (2) before a defendant is convicted, the State must prove his guilt beyond a reasonable doubt; (3) the defendant is not required to offer any evidence on his own behalf; and (4) the defendant's failure to testify cannot be held against him. *Thompson*, 238 Ill. 2d at 606-07, quoting Ill. S. Ct. R. 431(b) (eff. May 1, 2007). The trial court is also required to ask potential jurors if they understand and accept each principle and provide an opportunity to respond to each concept. Ill. S. Ct. R. 431(b) (eff. May 1, 2007); *Thompson*, 238 Ill. 2d at 607; *People v. Calabrese*, 398 Ill. App. 3d 98, 120 (2010).

¶ 10 Defendant only challenges the court's admonishment of the third principle. The trial court's "failure to address the third principle, by itself, constitutes noncompliance with the rule." *Thompson*, 238 Ill. 2d at 607.

¶ 11 During jury selection, the trial court admonished the venire in general and regarding the third principle, stated: "The defendant is not required to prove his innocence nor is he *** required to present any evidence on his own behalf." The court then told the venire that it would ask them questions and reiterate basic principles of law that are to be followed. If any of the potential jurors had questions or disagreed with any of these principles of law, they were to raise their hands. Moreover, the court indicated that it would ask each juror individually if he or she

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had "any problems" with any of the principles. The closest reference to the third principle was stated as follows: "The defendant is not required to prove his innocence."

¶ 12 During its general admonishment to the venire, the court clearly stated that the defendant is not required to present any evidence on his own behalf. During the individual inquiries about each principle, however, the court stated the "defendant is not required to prove his innocence." We need not determine whether or not these statements fail to comply with the third principle in Rule 431(b) because defendant forfeited the alleged error. Accordingly, our inquiry is whether the plain error doctrine should be applied to overcome the forfeiture. The answer is no.

¶ 13 Defendant has not shown that this alleged error would warrant relief under the first prong of plain error review which requires "a finding that the evidence is so closely balanced that the guilty verdict may have resulted from the error." *Thompson*, 238 Ill. 2d at 613. To be clear, "[p]lain-error review under the closely-balanced-evidence prong of plain error" means "that the evidence is so closely balanced that the alleged error alone would tip the scales of justice against him, *i.e.*, that the verdict 'may have resulted from the error and not the evidence' properly adduced at trial." *People v. White*, No. 2011 IL 109689, slip op. at 43 (August 4, 2011). The alleged error here is that the prospective jurors were not sufficiently informed before jury selection that defendant did not have to offer any evidence on his own behalf. Defendant has not, and cannot, show that this alleged error could have caused the guilty verdict instead of the actual evidence presented at trial, which included 37 bags of cocaine and more than \$33,000 in cash, even though the jury sent notes seeking clarification of the element of intent to deliver. See *People v. Johnson*, 408 Ill. App. 3d 157, 172-73 (2010) (rejecting defendant's claim pursuant to the first prong of plain error for a Rule 431(b) violation even though the jury sent a note to the court during deliberations questioning a witness' credibility). Accordingly, the plain error doctrine does not apply to overcome defendant's forfeiture of this issue.

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¶ 14 Defendant next contends that his 16-year sentence was excessive. He specifically maintains that the circumstances of the offense, and other mitigating factors, do not justify such a harsh sentence.

¶ 15 Possession of a controlled substance with intent to deliver 15 or more grams but less than 100 grams of cocaine is a Class X felony carrying not less than 6 and not more than 30 years' imprisonment. 720 ILCS 570/401(a)(2)(A) (West 2008).

¶ 16 A trial court has broad discretion to determine an appropriate sentence, and a reviewing court may reverse only where the trial court has abused that discretion. *People v. Patterson*, 217 Ill. 2d 407, 448 (2005). The reviewing court should not substitute its judgment for that of the trial court simply because it would have balanced the appropriate sentencing factors differently. *People v. Alexander*, 239 Ill. 2d 205, 214-15 (2010). A sentence within the statutory range does not constitute an abuse of discretion unless it varies greatly from the purpose of the law or is manifestly disproportionate to the nature of the offense. *People v. Henderson*, 354 Ill. App. 3d 8, 19 (2004).

¶ 17 The trial court clearly stated that it had considered appropriate factors in mitigation and aggravation. At defendant's sentencing hearing, the court stated that it:

"considered the facts of the case, those matters in aggravation and mitigation and then arguments and statements made by the parties[.] *** I will note, for the record, that the defendant's background doesn't [*sic*] include violent offenses. Aggravated battery to a police officer is certainly a violent offense, and arson, although it's not an aggravated arson, indicating that it's a dwelling, arson by it's very nature of burning something down is certainly considered violent. The defendant does have an extensive criminal history."

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¶ 18 From these statements, it is clear that the trial court thoughtfully weighed the appropriate mitigating and aggravating factors and sentenced defendant to a term within the permissible sentencing range. The record makes clear that the trial court relied heavily on defendant's extensive criminal background when it sentenced him to 16 years' imprisonment. Therefore, we cannot find that the trial court abused its discretion in imposing a 16-year sentence, which is 14 years less than the maximum.

¶ 19 Defendant also contends that the trial court used a factor inherent in the offense of possession of a controlled substance with intent to deliver 15 or more grams but less than 100 grams of cocaine as an aggravating factor. He specifically maintains that the court improperly relied on the amount of cocaine that he possessed as a factor in aggravation.

¶ 20 Defendant concedes that although the issue of his excessive sentence was preserved when he filed his motion to reconsider, he failed to argue that the trial court improperly relied on an element of the offense as a factor in aggravation, thus waiving that particular issue on appeal. *People v. Enoch*, 122 Ill. 2d 176, 186-87 (1988). A forfeited argument regarding sentencing, however, may be reviewed for plain error. *People v. Freeman*, 404 Ill. App. 3d 978, 994 (2010). In order to obtain relief under the plain error doctrine, a defendant must first show that a clear or obvious error occurred. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). In the sentencing context, a defendant must then show either that (1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing. *Hillier*, 237 Ill. 2d at 545. Under both prongs of the doctrine, the defendant has the burden of persuasion. *Hillier*, 237 Ill. 2d at 545. In this case, defendant maintains that he should obtain relief under the first prong.

¶ 21 Even reliance on an improper factor in aggravation does not necessarily warrant any relief where the record demonstrates that the weight placed on the improperly considered factor did not result in a "harsher sentence than might otherwise have been imposed." *Freeman*, 404 Ill. App. 3d at 996-97, citing *People v. Phelps*, 211 Ill. 2d 1, 11-12 (2004). Therefore, if it

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appears from the record that the weight placed on the improperly considered factor was so insignificant that it did not result in a greater sentence, we need not remand for resentencing.

Freeman, 404 Ill. App. 3d at 996.

¶ 22 Here, defendant failed to satisfy his burden to establish plain error under the first prong.

Although defendant alleged that the court used the amount of cocaine he possessed as an aggravating factor, the record shows that the weight placed on this factor, if any, was so insignificant that it did not result in a harsher sentence. *Freeman*, 404 Ill. App. 3d at 996-97.

The court's statements regarding the amount of cocaine, when taken in context, show that it was merely referring to the amount in relation to the fact that the legislature made it a Class X offense to possess more than 15 grams of cocaine. The trial court's explanation for the sentence, however, showed that it relied on the totality of defendant's criminal record.

¶ 23 In reaching this conclusion, we find defendant's contentions that the mitigating evidence outweighed the aggravating evidence, and the evidence at sentencing was closely balanced, unpersuasive. Although defendant attempts to minimize the importance of his criminal history, it is considerable. He had five prior felony convictions, which included aggravated battery to a peace officer and arson. By contrast, the mitigating evidence presented at sentencing was minimal, establishing that defendant worked as a landscaper, helped raise his girlfriend's children, had a grandchild, and a history of drug addiction.

¶ 24 Defendant next maintains that he was improperly fined \$100 under the Cannabis Control Act (720 ILCS 550/10.3 (West 2008)), a \$20 preliminary hearing fee under Counties Code (55 ILCS 5/4-2002.1(a) (West 2008)), and that the total amount of fines and fees reflects a mathematical error that must be corrected. Defendant concedes in his reply brief that he erroneously maintained he was fined \$100 under the Cannabis Control Act and thus retracts his initial argument in his opening brief. The State concedes, and we agree, that the \$20 preliminary hearing fee was not authorized where defendant did not receive a preliminary hearing. See *People v. Smith*, 236 Ill. 2d 162, 174 (2010) (holding that where the defendant did not receive a

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probable cause hearing, he cannot be assessed a preliminary examination fee). The State also concedes, and we agree, that the total amount of fines and fees reflects a mathematical error that must be corrected. The court subtracted a credit of \$2,085 for 417 days served in presentence custody from the total amount of fines and fees (\$3,680), and erroneously calculated that defendant was assessed \$2,595, when, in fact, he was only assessed \$1,595. In making this correction, we now subtract an additional \$20 because the preliminary examination fee was improperly imposed, resulting in a total of \$1,575.

¶ 25 Defendant finally contends, and the State agrees, that defendant's mittimus should be corrected to reflect the actual offense of which he was convicted. The trial court found defendant guilty of possession of more than 15 but less than 100 grams of cocaine with the intent to deliver under section 401(a)(2)(A) of the Illinois Controlled Substances Act. 720 ILCS 570/401(a)(2)(A) (West 2008). The mittimus reflects the correct statute, but incorrectly shows that defendant was convicted of "MFG/DEL 1<15 GR COCA/ANALOG." Pursuant to Illinois Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we amend the mittimus to reflect defendant's conviction for possession of more than 15 but less than 100 grams of cocaine with the intent to deliver. *People v. Brown*, 255 Ill. App. 3d 425, 438-39 (1993).

¶ 26 For the foregoing reasons, we vacate the \$20 preliminary hearing fee, correct defendant's mittimus to reflect a total of \$1,575 in fines and fees, and correct defendant's mittimus to reflect possession of more than 15 but less than 100 grams of cocaine with the intent to deliver, and affirm his conviction in all other respects.

¶ 27 Affirmed as modified.