

2011 IL App (2d) 101248-U
No. 2-10-1248
Order filed November 1, 2011

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
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of McHenry County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 08-CF-695
)	
RICKY L. McGUIRE,)	Honorable
)	Joseph P. Condon,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Schostok concurred in the judgment.

ORDER

Held: (1) Defendant forfeited his objection to jury instructions on proximate cause and forfeited plain-error review by failing to argue for it, but absent forfeiture there was no reversible error, as proximate cause was not an element of the offense and thus any error inured to defendant's benefit; (2) the trial court did not abuse its discretion in sentencing defendant to 10 years' imprisonment (on a 3-to-14 year range) for operating a watercraft while under the influence of alcohol, as despite the mitigating evidence the sentence was justified by the seriousness of the offense and the other aggravating factors.

¶1 Following a jury trial, defendant was convicted of two counts of operating a watercraft under the influence of alcohol, which resulted in the death of another, a Class 2 felony (625 ILCS 45/5-16(A)(1)(b) (West 2008)), and sentenced to a 10-year prison term. Defendant timely appealed from

the judgment. Defendant argues: (1) he was denied due process when the jury received conflicting instructions on proximate cause; and (2) his sentence is excessive. For the reasons that follow, we affirm.

¶ 2

I. BACKGROUND

¶ 3 Defendant was indicted on two counts of operating a watercraft under the influence of alcohol in violation of section 5-16(A)(1) of the Boat Registration and Safety Act (the Boat Act) (625 ILCS 45/1-1 *et seq.* (West 2008)), which provides in pertinent part as follows:

“(A) 1. A person shall not operate or be in actual physical control of any watercraft within this State while:

(a) The alcohol concentration in such person’s blood or breath is a concentration at which driving a motor vehicle is prohibited under subdivision (1) of subsection (a) of Section 11-501 of the Illinois Vehicle Code;

(b) Under the influence of alcohol.” 625 ILCS 45/5-16(A)(1)(a), (A)(1)(b) (West 2008).

Section 5-16(A)(5) further provides:

“Every person convicted of violating this Section shall be guilty of a Class 2 felony if the offense results in the death of a person. A person guilty of a Class 2 felony under this paragraph 5, if sentenced to a term of imprisonment, shall be sentenced to a term of not less than 3 years and not more than 14 years.” 625 ILCS 45/5-16(A)(5) (West 2008).

¶ 4 Count I of the indictment alleged a violation of section 5-16(A)(1)(b) of the Boat Act and provided, in pertinent part, as follows:

“That on or about July 6, 2008, *** defendant, knowingly and unlawfully operated a watercraft *** at a time when the defendant was under the influence of alcohol and the said

defendant was involved in a watercraft accident that resulted in the death of another person, namely Nicole Jurgens, and the defendant's violation of 625 ILCS 45/5-16(b) of the Illinois Vehicle code [sic] was the proximate cause of the death of Nicole Jurgens."

¶ 5 Count II of the indictment alleged a violation of subsection 5-16(A)(1)(a) and provided, in pertinent part, as follows:

"That on or about July 6, 2008, *** defendant knowingly and unlawfully operated a watercraft *** at a time when the alcohol concentration in said defendant's blood or breath was a concentration at which driving a motor vehicle is prohibited under subdivision (1) of subsection (a) of Section 11-501 of the Illinois Vehicle code [sic] and the defendant was involved in a watercraft accident that resulted in the death of another person, namely Nicole Jurgens, and the defendant's violation of 625 ILCS 45/5-16(a) of the Illinois Vehicle Code [sic] was the proximate cause of the death of Nicole Jurgens."

Each count thus added the requirement that defendant's act "was the proximate cause of the death" of the victim.

¶ 6 At trial, the jury was instructed as to count I as follows:

"To sustain the charge of aggravated operating a watercraft under the influence of alcohol, the State must prove the following propositions:

First proposition: That the defendant operated a watercraft; and

Second proposition: That at the time the defendant operated the watercraft, the defendant was under the influence of alcohol; and

Third proposition: That the defendant was involved in a watercraft accident; and

Fourth proposition: That the watercraft accident resulted in death to another; and

Fifth proposition: That the defendant's act of operating a watercraft while under the influence of alcohol was the proximate cause of the death.

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty.”

¶ 7 The jury instruction as to count II was identical, except for the second proposition, which provided: “That at the time the defendant operated the watercraft, the defendant had an alcohol concentration in his blood or breath of 0.08 or more.”

¶ 8 The jury was also instructed on the definition of proximate cause:

“The term proximate cause means any cause which, in the natural or probable sequence, produced the death. It need not be the only cause, nor the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time, which in combination with it, causes the death.”

¶ 9 The jury found defendant guilty as to both counts.

¶ 10 Defendant filed a timely motion for a new trial, arguing that there was a conflict between the instructions that charged the elements of the offenses and the instruction that defined proximate cause. According to defendant, to find him guilty, the jury was required to find that his act of operating the watercraft while under the influence (or with a blood alcohol content of 0.08 or more) was *the* proximate cause of the death, but the proximate cause instruction provided that proximate cause meant *any* cause. Defendant maintained that the proximate cause instruction diluted the

State's burden of proof. The record does not contain an order on the motion for new trial; however, the docket list indicates that it was denied.

¶ 11 Defendant's sentencing hearing took place on November 12, 2010. Following the hearing, the trial court sentenced defendant to 10 years' imprisonment. Without first filing a motion for reconsideration of sentence, defendant timely appealed.

¶ 12 II. ANALYSIS

¶ 13 A. Jury Instruction

¶ 14 Defendant first argues that he was denied due process when the jury received conflicting instructions on proximate cause, which, according to defendant, lowered the State's burden of proof. The State responds that defendant has forfeited this argument on appeal.

¶ 15 Although defendant did file a posttrial motion complaining about the jury instruction defining proximate cause, the record on appeal fails to establish that at trial defendant objected to the given instruction or tendered an alternative instruction. "*Both a trial objection and a written post-trial motion raising the issue are required for alleged errors that could have been raised during trial.*" (Emphases in original.) *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). "[A] defendant generally forfeits review of any purported jury instruction error if the defendant does not object to the instruction, or tender an alternative instruction at trial, and does not raise the instruction issue in a posttrial motion." *People v. Bannister*, 232 Ill. 2d 52, 76-77 (2008). Here, defendant claims that at trial he objected to the jury instruction containing the definition of proximate cause. However, because the record is incomplete, it does not support this claim. "The appellant bears the burden of presenting an adequate record to support its claim of error. [Citation.] Any doubts stemming from an inadequate record will be construed against the appellant." *People v. Hunt*, 234

Ill. 2d 49, 58 (2009). Because the record does not show an objection by defendant, we find that defendant has forfeited his argument.

¶ 16 Defendant also fails to ask us to review this claim for plain error. The plain-error doctrine allows a reviewing court to reach an unpreserved error when either: (1) the evidence in the case is closely balanced, regardless of the seriousness of the error, or (2) the error is so serious that the defendant was denied a substantial right, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). When a defendant fails to request this court to review a claim for plain error, he forfeits the issue. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010) (“A defendant who fails to argue for plain-error review obviously cannot meet his burden of persuasion.”); *People v. Nieves*, 192 Ill. 2d 487, 502-03 (2000). Accordingly, beyond defendant’s failure to object to the instruction below, defendant has forfeited plain-error review by failing to request it.

¶ 17 Even if defendant had preserved the issue, the claimed error would not warrant reversal. To prove defendant guilty of Class 2 felony operating a watercraft while under the influence (or with a blood alcohol content of 0.08 or more), the State was not required to prove that defendant’s act was the proximate cause of the victim’s death; rather, it was required to prove only that defendant’s act “result[ed] in the death of a person.” See 625 ILCS 45/5-16(A)(5) (West 2008). Although the indictment erroneously added the element of proximate cause, the addition was mere surplusage and may be ignored. See *People v. Simpkins*, 48 Ill. 2d 106, 111 (1971). The jury was properly instructed as to the necessary elements of the offense charged. The fact that the jury was instructed that they had to additionally find the unnecessary element that defendant’s conduct was the proximate cause of the victim’s death only favored defendant. Thus, to the extent the instruction was error, it was harmless. See *People v. Armstrong*, 273 Ill. App. 3d 531, 534 (1995) (trial court

erred in giving self-defense and failed-self-defense second-degree murder instructions, but since the error was in the defendant's favor, it was harmless).

¶ 18 Similarly, were we to ignore defendant's forfeiture of plain-error review, we would find that, to the extent any error occurred in the proximate cause instruction, the error does not warrant reversal, because the jury was not required to find proximate cause to find defendant guilty. Defendant cannot meet his burden under the first prong of the plain-error doctrine, because he failed to file a complete transcript from the trial and thus we cannot determine whether the evidence was close. Defendant cannot meet his burden under the second prong, because the error was not so serious that defendant was denied a substantial right. In fact, as noted, the error favored defendant because it required the jury to find the additional element of proximate cause, which is not required under the statute.

¶ 19 Accordingly, we hold that defendant forfeited the issue and forfeited plain-error review. Notwithstanding forfeiture, there is no reversible error.

¶ 20 B. Sentencing

¶ 21 Defendant also argues that his 10-year sentence is excessive given that he is "brimming with rehabilitative potential," and he asks that we either reduce it or remand for a new sentence.

¶ 22 Preliminarily, we note that defendant was admonished pursuant to Illinois Supreme Court Rule 605(a)(3) (eff. Oct. 1, 2001) about the necessity of filing a motion to reconsider his sentence to preserve any sentencing issues for appellate review. However, defendant did not file a motion to reconsider his sentence. He requests that we review his sentence for plain error.

¶ 23 Generally, the failure to file a motion to reconsider a sentence waives any sentencing issues for review. *People v. Reed*, 177 Ill. 2d 389, 393-94 (1997). However, we may review the issues under the plain-error doctrine. See *People v. Breedlove*, 213 Ill. 2d 509, 521-22 (2004) (a Rule

605(a) defendant who fails to properly preserve sentencing issues for appeal is not precluded from raising a sentencing issue on appeal under the plain-error doctrine). Here, we find no error in the trial court's sentence, and, therefore, we need not consider whether defendant can meet either of the two prongs of the plain-error rule.

¶ 24 Defendant was found guilty of two counts of operating a watercraft under the influence of alcohol, which resulted in the death of another, a Class 2 felony (625 ILCS 45/5-16(A)(1)(b) (West 2008)), with a sentencing range of not less than 3 years and not more than 14 years (625 ILCS 45/5-16(A)(5) (West 2008)). A sentence within the statutory limits for the offense will not be disturbed unless the trial court has abused its discretion. *People v. Coleman*, 166 Ill. 2d 247, 258 (1995). An abuse of discretion occurs if the trial court imposes a sentence that “is greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense.” *People v. Stacey*, 193 Ill. 2d 203, 210 (2000). It is well established that “[a] trial court has wide latitude in sentencing a defendant, so long as it neither ignores relevant mitigating factors nor considers improper factors in aggravation.” *People v. Roberts*, 338 Ill. App. 3d 245, 251 (2003). The existence of mitigating factors does not mandate imposition of the minimum sentence (*People v. Garibay*, 366 Ill. App. 3d 1103, 1109 (2006)) or preclude imposition of the maximum sentence (*People v. Phippen*, 324 Ill. App. 3d 649, 652 (2001)). It is the trial court's responsibility “to balance relevant factors and make a reasoned decision as to the appropriate punishment in each case.” *People v. Latona*, 184 Ill. 2d 260, 272 (1998).

¶ 25 The Illinois Constitution requires that “[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship.” Ill. Const. 1970, art. I, § 11. The rehabilitative potential of the defendant is only one of the factors that must be weighed in deciding a sentence, and the trial court does not need to expressly outline

its reasoning for sentencing or explicitly find that a defendant lacks rehabilitative potential. *People v. Evans*, 373 Ill. App. 3d 948, 968 (2007). The most important sentencing factor is the seriousness of the offense. *Id.* There is a presumption that the 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 or relied on improper aggravating factors. *People v. Payne*, 294 Ill. App. 3d 254, 260 (1998). The reviewing court is not to reweigh factors considered by the trial court. *Pippen*, 324 Ill. App. 3d at 653.

¶ 26 Defendant argues that the trial court did not adequately consider defendant's potential for rehabilitation. The record does not contain any indication that the trial court failed to consider defendant's rehabilitative potential, and defendant points to nothing other than the sentence itself to demonstrate that the trial court did not consider this evidence. See *Roberts*, 338 Ill. App. 3d at 251 (when mitigating evidence was before the trial court, it is presumed that the trial court considered it, and the defendant must point to something beyond the sentence itself to demonstrate that the evidence was not considered). As noted, we may not reweigh the factors considered by the trial court. For this reason alone, defendant's contention fails. In any event, although defendant correctly notes that his lack of significant criminal history weighs in favor of a lesser sentence, as does his stable home life, steady employment, and the letters attesting to his character, the trial court found that defendant's requested sentence of probation would deprecate the seriousness of the offense and that the length of defendant's sentence was necessary to deter others from committing similar offenses. We conclude that this finding was not unreasonable and that thus there was no error.

¶ 27

III. CONCLUSION

¶ 28 For the reasons stated, we affirm the judgment of the circuit court of McHenry County.

¶ 29 Affirmed.