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No. 3--09--0181

Order filed January 3, 2011.

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF)	Appeal from the Circuit Court
ILLINOIS,)	of the 10th Judicial Circuit,
)	Peoria County, Illinois
Plaintiff-Appellee,)	
)	
v.)	No. 08--CF--105
)	
DAVID L. GAINES,)	
)	Honorable James E. Shadid,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justice Wright concurred in the judgment.
Justice McDade specially concurred in the judgment.

ORDER

Held: (1) The trial court's failure to strictly comply with Supreme Court Rule 431(b), while error, did not constitute reversible error. (2) The record as a whole shows that defendant's sentence was based on appropriate factors. His sentence was not improperly enhanced because the trial court mentioned a material element of the offense during sentencing. Affirmed.

Defendant, David L. Gaines, was convicted of first degree robbery in a place of worship and sentenced to 28 years in prison. Defendant raises two issues on appeal. First, whether the circuit court's failure to comply with Supreme Court Rule 431(b) requires a new trial. Second, whether his sentence should be vacated and a new sentencing hearing held because the trial court considered improper aggravating factors. We affirm the trial court.

BACKGROUND

Katherine Horning and Mary Grace Schneider were at church praying when defendant entered the church and approached the two women. He said, "You," took Horning's purse, and started to leave. Horning followed defendant and caught up to him near the exit. Defendant told her to get back and pushed her down. At this point, Horning was looking directly at defendant from no more than an arm's length. Schneider was following Horning and caught her as she fell backwards.

As she caught Horning, Schneider locked eyes with defendant from less than ten feet away. At trial, she said

the whole time she was catching and lowering Horning to the ground, she was looking defendant in the eye. She recognized this only lasted seconds, but said it felt like she was staring at defendant for minutes.

Defendant left the church and Schneider continued to follow defendant. Horning sat down and did not join the pursuit. Schneider told defendant she was calling the police and urged him to leave the purse. Defendant turned and looked at her from no more than 18 feet away as he got into a car to leave. This gave Schneider another opportunity to get a clear and unobstructed view of defendant.

As defendant drove away in the car, Schneider wrote down the license plate number. Schneider gave the plate number and description of the car to both the 911 operator and an officer who arrived at the church. She explained that the car had a temporary plate, and described the car as a green Pontiac Grand Prix.

At trial, the women could not give an exact time of the robbery, but they did say that it was after 1 p.m. in the afternoon and that they were finished talking to the police

at the church in time to pickup their children from school at 3 p.m.

Detective Ledbetter was in charge of investigating the robbery. He found that the temporary plate number provided by Schneider was registered to an address where defendant was known to live. The plate number provided did belong to a green Pontiac Grand Prix registered to defendant's then fiancée, now wife.

Ledbetter created photo lineups that included defendant.

Within days of the robbery, both Schneider and Horning picked defendant out of separate photo lineups without any way of knowing who, or if, the other person had identified anyone from the lineup. Schneider indicated she was 100% sure defendant was the robber. Horning indicated a confidence of nine out of ten. She said the only reason her confidence was not 10 out of 10 was because the photo showed a lighter complexion than she remembered in person.

Within a week of the robbery, Ledbetter observed defendant leave his residence in the green Pontiac and

attempted to stop him. Defendant fled at high speed, ultimately crashing the car into a house and fleeing on foot. He was apprehended 18 months later in St. Louis.

At trial, both women again identified defendant as the robber. Defendant did not testify, and the defense called three witnesses. Defendant's wife, a convicted felon, testified that she had the green Pontiac from early morning until after 5 p.m. on the day of the robbery. A pastor testified that defendant had at one point been involved with his church. He did not have any recollection of defendant being at the church on the day of the robbery, or even the month of the robbery. Finally, defendant's mother-in-law testified that she dropped him off at said pastor's church in the morning and picked him up at the same church at 3:45 p.m. None of the three defense witnesses provided any of their alibi evidence prior to trial.

I. *Voir Dire*

Prior to *voir dire*, the court instructed the venire about each of the four principles contained in Supreme Court Rule 431(b). The first juror was asked if he agreed with

the principle of presumption of innocence but was not questioned regarding the remaining 431(b) principles. The remainder of the venire were asked individually if they agreed with "the principle of law" discussed earlier. Defendant did not object to this failure to question the venire concerning the 431(b) principles.

II. Jury Instructions

At the close of evidence, the court gave the jury its instructions. As part of these instructions, the court again explained each of the 431(b) principles to the jury.

III. Sentencing Hearing

At the sentencing hearing, the court found no mitigating factors and then started listing aggravating factors. First, the court noted that the conduct threatened serious harm. It then discussed defendant's significant criminal history and the fact that most of defendant's convictions occurred while he was on parole. The court also discussed the personal nature of the belongings taken: pictures of children and a rosary.

The court then took note that since a criminal sexual

assault that defendant committed at age 14, his entire life was a series of criminal behavior. It went on to note that since his crime as a juvenile, he was convicted of 12 felonies, now 13. The court then summarized:

"You have just spent your entire life taking what doesn't belong to you, violating people's privacies, creating situations where people don't feel safe, creating situations where people have to look over their shoulders, picking on people that are vulnerable, either whether they be elderly or whether they be in prayer."

The court recognized that the robbery had been elevated from a Class 2 to a Class 1 felony because it occurred in a place of worship. The court stated that this elevation precluded it from using the location of the crime as an aggravating factor. The court said that it did not factor in the location, but that it did use the surrounding circumstances as aggravating factors.

The court then said:

"This was a place where people went at any time of the day to be alone with themselves, to be alone with friends, to be alone with family, or to be alone with their God, and to pray and to meditate, and now the disruption causes, from my reading, that of the victim impact statements, that they are required now, the place is locked, the worship place is locked, they have to go get a key to enter, they don't go alone, others that used to go there no longer go there. It is just unfortunate.

Life is difficult enough, the very least people should be able to expect is to be able to have these quiet moments of prayer and meditation with their family, their friends and with God. So this sentence is not being handed out because it was a place of worship, but because of all the factors that I've stated."

After stating the sentence was for 28 years, the court said:

"I realize that's a lengthy sentence, but you have spent the better part of your life since age 14 in the Department of Corrections, and each time you have been out, you do something that sends you back. This time, I can't protect everybody, but at least I can protect these people for the next 14 years."

ANALYSIS

Defendant argues that the circuit court failed to comply with Supreme Court Rule 431(b). Recognizing he did not preserve this error for appeal, he asks this court to find a failure to comply with Rule 431(b) is a structural error. Alternatively, defendant requests this court review the alleged error under both prongs of plain-error review.

I. Supreme Court Rule 431(b)

Rule 431(b) requires the circuit court to ask each member of the venire whether they "understand[] and accept[]" the following four principles:

- "(1) that the defendant is presumed innocent of the charge(s) against him or her;
- (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt;
- (3) that the defendant is not required to offer any evidence on his or her own behalf; and
- (4) that the defendant's failure to testify cannot be held against him or her." Ill.

S. Ct. R. 431(b) (eff. May 1, 2007).

The rule also requires that each juror shall be given an opportunity to "respond to specific questions concerning the principles set out in *** section [(b)]." *Id.*

The record shows that the first juror was asked if he agreed with the first principle. This juror was not questioned about the remaining principles as required by Rule 431(b). The remainder of the venire was merely asked if they agreed with "the principle" the court had discussed earlier. Each juror was not questioned about the four

principles listed in Rule 431(b). This was error by the circuit court.

A. Structural Error

Having found error, we first address whether it is a structural error requiring automatic reversal. A structural error is one that "renders a criminal trial fundamentally unfair or an unreliable means of determining guilt or innocence." *Thompson*, 2010 WL 4125940 at *5 (internal quotations omitted) (subject to withdrawal and modification). Structural errors are only found in very limited circumstances, and only where a constitutional violation has occurred. *Id.*

At the time the briefs in this appeal were filed, the question of whether a failure to comply with Rule 431(b) was a structural error requiring a new trial was not clearly decided. That has changed. The Illinois Supreme Court answered this question definitively in *Thompson*. The *Thompson* court said, "Although compliance with Rule 431(b) is important, violation of the rule does not necessarily render a trial fundamentally unfair or unreliable in

determining guilt or innocence." *Thompson*, 2010 WL 4125940, at *6.

The facts in *Thompson* are identical to this case. The circuit court instructed the venire on Rule 431(b) factors but did not question them individually. *Id.* at *1. Thompson did not testify at the trial. *Id.* at *2. At the end of the trial, the judge instructed the jury on Rule 431(b) principles. *Id.* at *3.

We find nothing in this case to distinguish it from *Thompson* and hold that no structural error occurred in this case.

B. Plain Error

In *Thompson*, after finding that a failure to follow Rule 431(b) is not a structural error, the court went on to perform plain error analysis. *Id.* at *8. We now turn to defendant's plain error arguments.

Defendant forfeited his right to appeal the circuit court's failure to follow Rule 431(b) because he did not object at trial. *People v. Johnson*, ____ Ill. 2d. ____, ____, No. 10-8253, 2010 WL 4126462, at *3 (Ill. Oct. 21,

2010) (subject to withdrawal and modification). In criminal cases, the courts can review forfeited issues that appear on the record and denied the defendant "substantial means of enjoying a fair and impartial trial." *People v. Herron*, 215 Ill. 2d 167, 176 (2005). "Fairness, in short, is the foundation of our plain-error jurisprudence." *Id.* at 177. The burden of proof is on the defendant. *Thompson*, 2010 WL 4125940 at *8. He must "show that the error caused a severe threat to the fairness" of the trial. *People v. Hopp*, 209 Ill. 2d 1, 12 (2004).

Plain error can be found when: "(1) a clear or obvious error occurs 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 occurs 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 closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

1. Closely Balanced

The first prong of plain-error review allows us to find error if the evidence was so closely balanced that the outcome of the trial could have been determined by the error. The evidence in this case was not close. The State presented two eyewitnesses that identified defendant as the robber. Each of the eyewitnesses identified defendant as the robber in photo lineups and in court. Both witnesses had opportunities to view defendant from mere feet away during the robbery. In addition to the visual identification, Schneider provided a temporary license plate number and matching vehicle description that led to defendant.

The evidence presented by defendant did not create a close issue. First, the witnesses he presented did not provide their evidence of innocence to anyone until right before trial. The fact that they only came forward right before trial raises questions about their testimony. For example, defendant's wife knew that the police were looking for her husband in connection with this robbery, but she

never told them that he could not have done it because she had the car at work all day.

The actual testimony they provided would not make this a close case even if they would have presented it to the police immediately after the robbery. Defendant's wife testified that, on the date of the robbery the car he allegedly used was with her at work all day. This is hardly believable when a witness at the scene wrote down the license plate number of the car during the robbery. It is implausible that Schneider would makeup a temporary plate number and a description that match. The odds against making up a plate number and a vehicle description that match that number must be astronomical. Even if the matching plate number with the car was a fluke we still have independent identification of defendant by two eyewitnesses.

The other two defense witnesses only testified that defendant had been involved with another church around the time of the robbery and that he was at that church before and after the robbery at question in this case. We find the evidence not closely balanced in this case.

2. Obvious Error

The second prong does not depend on closely balanced evidence, but instead, defendant must show clear or obvious error that affected the fairness of his trial. In *Thompson*, the court said: "We cannot presume the jury was biased simply because the trial court erred in conducting the Rule 431(b) questioning." *Thompson*, 2010 WL 4125940 at *8. Defendant has presented no evidence that would show that the circuit court's error resulted in an unfair trial. He argues only that because of the error a new trial should be granted, this is in effect an argument for structural error that we have already addressed. We hold that defendant has failed to show plain error under prong two of the analysis.

II. Sentencing

Defendant argues that the circuit court relied upon an improper aggravating factor when it sentenced him. Robbery is a Class 2 felony unless, among other things, it is committed in a place of worship. 720 ILCS 5/18--1(b) (West 2008). Because this robbery took place in a church, defendant was convicted of a Class 1 felony.

Defendant argues that the circuit court used the fact that the robbery occurred in a church as an improper aggravating factor. Anything that is a material element of an offense cannot be used as an aggravating factor in sentencing. *People v. Saldivar*, 113 Ill. 2d 256, 272 (1986).

However, victims of crimes have a statutory right to present a statement to the court at sentencing. 725 ILCS 120/4(a)(4) (West 2008). The court is required to consider any victim impact statement that is presented. 725 ILCS 120/6(a) (West 2008). Ultimately, it is up to the court to determine how much weight it will give to a victim impact statement. *People v. Felella*, 131 Ill. 2d 525, 539 (1989).

A circuit court abuses its discretion when it considers an improper factor in aggravation at sentencing, but remand is not necessary if the improper factor did not lead to a more severe sentence. *People v. Cotton*, 393 Ill. App. 3d 237, 266 (2009). "[A] reviewing court should not focus on a few words or statements made by the trial court, but must consider the record as a whole." *People v. Sims*, ____ Ill.

App. 3d _____, _____, 931 N.E.2d 1220, 1234 (2010).

In this case, the court did not improperly rely on the location of this robbery. The court specifically said that it did not consider the location in aggravation. It then went on to discuss the impact on the victim and the safety of the public. The court specifically references the victim impact statements and discusses the fact that some people who used to attend the church no longer do and that the location must now be locked at all hours.

When reading the entire transcript of the sentencing, it is clear that the court did not impose this sentence due to where this crime happened but instead to protect people from defendant. The court recognized that since the age of 14, defendant has been in nearly continuous trouble with the law. The court discussed the sheer number of defendant's past convictions, 12 past felony convictions, this robbery conviction and a juvenile delinquency for criminal sexual assault.

Another factor the court discussed was that many of defendant's convictions came while he was on parole.

Finally, the judge said "I can't protect everybody, but at least I can protect these people for the next 14 years." This sentence was not enhanced due to where it took place, it was enhanced in order to protect the public from defendant, a repeat offender.

CONCLUSION

The circuit court's failure to question the venire concerning all four principles found in Rule 431(b) is not plain error requiring a new trial. The sentence imposed by the court was not due to the application of an improper aggravating factor but was due to defendant's extensive criminal history. The judgment of the circuit court of Peoria County is affirmed.

Affirmed.

JUSTICE McDADE, specially concurring:

Defendant, David Gaines, was convicted by a jury of robbery occurring in a place of worship and was sentenced by the trial court to a prison term of 28 years. On appeal, defendant has challenged the *voir dire* under Supreme Court

rule 431(b) (Ill. S. Ct. R. 431(b) effective May 1, 2007) and his sentence, which he claims was excessive because the trial court considered improper aggravating factors.

I agree that the trial court committed error in the instructions concerning the *Zehr* factors and also agree that the supreme court's decision in *People v. Thompson*, 2010 WL 4125940 compels our finding that there was neither structural nor plain error that would require a new trial.

I further agree that, to the extent the sentence was grounded in defendant's past criminal history, the trial court cannot be said to have abused his discretion in imposing the 28 year term. I, therefore, concur in affirming the sentence. I write separately, however, to express my belief that the trial court's consideration of discrete elements that go into the total experience of worshipping and of recognizing and protecting a place of worship as a sanctuary is double counting an element of the offense and is, therefore, giving weight to an improper aggravating factor. I believe the trial court's articulation and the majority's tacit approval of what

appears to be nothing more than reliance on a distinction without a difference is wrong and, standing alone as a basis for the extended sentence, would be reversible error.