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No. 3--08--1038

Order filed March 4, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of the 10th Judicial Circuit,
	)	Tazewell County, Illinois,
Plaintiff-Appellee,	)	
	)	
v.	)	No. 08--CF--97
	)	
JOHN S.,	)	Honorable
	)	David J. Dubicki,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE O'BRIEN delivered the judgment of the court.  
Presiding Justice Carter and Justice Wright concurred in the judgment.

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**ORDER**

*Held:* The trial court did not abuse its discretion by admitting prior instances of sexual abuse involving children other than the instant minor victim because the probative value of this evidence was not outweighed by undue prejudice to the defendant and this evidence otherwise met the requirements of section 115--7.3 of the Code of Criminal Procedure. Also, the defendant failed to meet his burden of showing the trial court's incomplete Rule 431(b) admonishments amounted to plain error under either prong of the plain error test, as there was overwhelming evidence of his guilt. Furthermore, the defendant's failure to object to the imposition of a sex offender evaluation amounted to

waiver of this issue on appeal, and because he did not argue it amounted to plain error, we are prohibited from considering it on appeal.

A jury convicted the defendant, John S., of two counts of predatory criminal sexual assault of a child (720 ILCS 5/12--14.1(a)(1) (West 2008)), and the court sentenced him to two consecutive 14-year terms of imprisonment. The defendant appeals, contending that the court: (1) abused its discretion when it admitted evidence of the defendant's prior acts of sexual contact with children other than the instant minor because the prejudice of the evidence substantially outweighed its probative value; (2) erred because it failed to strictly comply with Supreme Court Rule 431(b); and (3) violated the defendant's fifth amendment privilege against self-incrimination and Illinois statutory law by ordering him to undergo a sex offender evaluation and then using statements the defendant made during the evaluation in fashioning his sentence. We affirm.

#### FACTS

On April 3, 2008, the State charged the defendant with two counts of predatory criminal sexual assault of a child. 720 ILCS 5/12--14.1(a)(1) (West 2006). The charges stemmed from acts of sexual contact the defendant had with M.B., a four-year-old male, on June 20, 2007. The record indicates that the defendant was born on January 25, 1979.

Prior to the defendant's trial, the court conducted a

hearing pursuant to section 115--10 of the Code of Criminal Procedure of 1963 (the Code) (725 ILCS 5/115--10 (West 2008)) because the State filed a motion to introduce M.B.'s out-of-court statements regarding the instances of sexual assault.

Vickie S., the defendant's wife, testified that she and the defendant lived in an apartment with her two daughters, J.G. and K.G. Vickie explained that she was a friend of M.B.'s mother, and that M.B., who would turn five years old on June 21, 2007, was staying with them that summer.

According to Vickie, on June 20, 2007, she, J.G., and K.G. left the apartment sometime before 9 a.m., and her daughters dropped her off at work. J.G. and K.G. returned around 2:30 p.m. to retrieve Vickie from work, and during the interim, they ran errands. They returned home around 3 p.m. and found the defendant and M.B. asleep on a blanket on the living room floor. According to Vickie, M.B. was as far away on the blanket as he could be from the defendant. The defendant left for work shortly after she and her daughters returned home.

Vickie stated that around 5 p.m., she joined M.B., J.G., and K.G. in the living room to watch cartoons. At some point, Vickie went into the kitchen and noticed that the window shade was up, which was unusual, because they had always kept the shade closed. Vickie asked M.B. why the shade was open, and M.B. stated that it was because the defendant wanted to play "the nasty game."

Vickie asked M.B. how to play this game, to which M.B. responded that they had to "get naked[.]" M.B. then explained that he and the defendant touched each others "pee-pee[s,]" and that the defendant put M.B.'s "pee-pee" in the defendant's mouth. According to Vickie, when M.B. spoke of the sexual contact with the defendant, the words came from him "like a volcano erupting," and he spoke in a normal tone, except he stated "get naked" in a forceful tone. Vickie also recalled that M.B. had stated that the defendant had licked his "bottom[.]"

J.G. testified that she also heard M.B. describing the defendant's sexual assault on him, and her testimony about it essentially matched Vickie's. J.G. specifically confirmed that M.B. had stated that he and the defendant touched and licked each other's "pee-pee[s]" and also stated that "at one point each of the other one had licked the other's bottom." Sometime after M.B. was done describing the defendant's assault, J.G. called the police.

Barbara Strand testified that she was the executive director of the Tazewell County Child Advocacy Center, and she conducted a videotaped interview of M.B. at the Child Advocacy Center on June 22, 2007. The State played the interview in open court.

During the course of the interview, Strand asked M.B. if anyone ever touched his "peepee[,]" to which M.B. replied that the defendant had. M.B. explained that the defendant had touched

his "peepee" with the defendant's mouth on more than one occasion. M.B. also stated that the defendant licked the inside of "[his] tight butt."

During the interview, M.B. initially stated that when the defendant's mouth touched his "peepee," his dad was present as well. However, M.B. later answered no when Strand asked if anyone else was home when this conduct occurred. M.B. also stated that he sometimes referred to the defendant as "dad." Prior to the interview's conclusion, M.B. volunteered that the defendant also "did it to [K.G.]"

The court took the matter under advisement, and on May 30, 2008, determined that M.B.'s out-of-court statements were admissible, including those from the taped interview with Strand. The court found that the statements made by M.B. to Vickie and J.G. on the day of the incidents were sufficiently reliable to be admissible. The court also believed that during the interview, M.B. "seemed to be pretty straightforward[,] and "didn't seem to be coached."

On June 30, 2008, the court conducted a hearing on the State's section 115--7.3 (725 ILCS 5/115--7.3 (West 2006)) motion *in limine* seeking to admit instances of sexual assault the defendant perpetrated against other minors, and the defendant's corresponding motion *in limine* seeking to bar this evidence.

At this hearing, B.T., a male born March 13, 1990, testified

that he and his mother met the defendant at church, and the defendant use to babysit him in 1999. According to B.T., the defendant would put his arm around B.T. as they played video games together, and would rub B.T.'s back and leg. One day while the defendant was babysitting him, the defendant asked B.T. to remove his shirt, and B.T. obliged. The defendant removed his own shirt, and also began removing his own pants. The defendant asked B.T. to remove his pants, but B.T. declined. At that moment, B.T.'s mother returned home, "freaked out[,]" and immediately reported the incident to the police. The record does not indicate that the State filed criminal charges against the defendant pursuant to this incident.

K.G., born November 2, 1989, testified that Vickie married the defendant in October 2000. According to K.G., her first sexual encounter with the defendant occurred in 2001 at the defendant's parents' home. K.G. explained that she was lying under a blanket and watching television with the defendant and some other family members when the defendant reached under the blanket and into her pants and fondled her vagina. K.G. reacted by moving to another spot in the room.

K.G. testified that the defendant's next sexual assault on her occurred in the basement of Vickie and the defendant's home. At that time, the defendant pulled K.G.'s pants down and performed oral sex on her. According to K.G., the defendant

sexually assaulted her on numerous subsequent occasions, and the assaults progressed to the point where the defendant forced K.G. to perform oral sex on him and to submit to him performing oral sex on her. K.G. did not disclose the assaults until after M.B.'s disclosure, because the defendant told K.G. that no one would believe her, and also that he and Vickie would get divorced and Vickie would blame K.G. K.G. stated that the defendant ceased sexually assaulting her when she was "[a]lmost 15" years old.

S.S., born on February 26, 1983, testified that she was the defendant's niece. According to her, when she was six years old, the defendant overheard her telling her grandmother that another uncle had sexually assaulted her. Shortly thereafter, the defendant began sexually assaulting her while the two were at her grandmother's home. S.S. specifically stated that when the defendant started assaulting her, he would sit S.S. on his lap and rub her chest or vagina. The defendant's assaults on S.S. progressed to forcing her to perform oral sex on him and permitting him to do the same to her. When S.S. was 12 years old, the defendant forced her to have sexual intercourse with him. After this encounter, the defendant's sexual assaults on S.S. stopped. According to S.S., she did not disclose the assaults until she was 15 years old. At that time, she began to have nightmares about her other uncle's assaults, and after that,

she recalled the defendant had assaulted her. S.S. informed her mother and the police, but the State did not file charges against the defendant.

The court took the matter under advisement, and ultimately held that the State could introduce evidence of the defendant's conduct with K.G. and S.S., but barred the State from introducing the conduct with B.T.

The jury trial began on October 14, 2008. During *voir dire*, the court informed all of the potential jurors that the defendant was presumed innocent of the charges against him, and that this presumption remained with the defendant unless they were convinced of his guilt beyond a reasonable doubt. The court also informed all of the potential jurors that the State had the burden of proving the defendant's guilt beyond a reasonable doubt, and that the defendant was not required to prove his innocence or present evidence on his own behalf. The court later asked the potential jurors as a group whether they understood and accepted each of these propositions, and no one indicated that they did not.

At trial, Vickie, J.G. and Strand testified consistently with their testimony at the section 115--10 hearing. Vickie also added that she and the defendant had purchased a laptop computer in 2007 with their income tax return. Vickie and J.G. contended that everyone in the apartment had used the laptop, but the

defendant was the primary user. Vickie believed that the defendant behaved in a strange manner around the laptop. Vickie stated that in the spring of 2007, she found images on the laptop's hard drive that depicted "pornographic pictures of children in obscene actions with adults or other children[,] " to which the defendant responded that the images were due to pop-up advertisements. J.G. also testified that she had seen files on the computer with names that suggested they were pornographic, but she did not open any of the files.

K.G. and S.S. also testified consistently with their testimony at the section 115--7.3 hearing. K.G. also added that on June 20, 2007, the defendant "made [M.B.] stay [at their apartment] with him."

The court also played the videotaped interview of M.B. and Strand, and M.B. testified at trial. M.B. testified that when he lived with Vickie and the defendant, there were times he was in the apartment with only the defendant. M.B. stated that during these times, the defendant had "licked [his] pee-pee, licked [his] butt" and the defendant also "rubbed his pee-pee to [M.B.'s] pee-pee."

East Peoria police officer Zachary Frank testified that he responded to a 911 call at 9:30 p.m. on June 20, 2007, regarding the defendant's assault on M.B. According to Frank, he spoke with Vickie, J.G., and K.G. that night, but he did not speak with

M.B. Around 2:30 a.m. on June 21, Frank went back to the apartment to intercept the defendant and found him in the parking lot. Frank inquired whether the defendant had been home with M.B. during the previous day, and the defendant stated that he was with M.B. from approximately 8:30 a.m. to 4:30 p.m. According to the defendant, he and M.B. watched television, played outside, and napped together. Frank stated that while he was speaking with the defendant, the defendant avoided direct eye contact, stopped and thought before he answered questions, and appeared generally evasive and as if he was not being honest.

East Peoria police detective Brian Despines testified that on June 21, 2007, the defendant came to the police station and volunteered to speak with him. According to Despines, he advised the defendant of M.B.'s complaint. Despines then asked the defendant how M.B. came into his care. The defendant answered that "[he] and his family liked [M.B.,]" but he would not explain how M.B. came into their care. Despines was aware that K.G. alleged that one of the defendant's final assaults on her occurred while the family lived in Colorado, so he then asked the defendant "if he had an opportunity to babysit [K.G. while the family resided] in Colorado." According to Despines, the defendant responded that "[w]hat happened with [him] and [K.G.] in Colorado ha[d] nothing to with what [he] and [M.B.] did."

James Feehan testified that he was a detective with the

Peoria police department, but his current work assignment was as an Federal Bureau of Investigations computer forensic examiner with the Central Illinois Cyber Crime Unit. Feehan testified that he examined the contents of the defendant's laptop computer's hard drive after Vickie turned it over to him. According to Feehan, he discovered 47 images of prepubescent "children involved in sexual activity with either other children or adult males" on the hard drive. A number of these pictures specifically depicted infants and young boys performing oral sex on adult males, or adult males performing oral sex on the minors.

Feehan also discovered "chats" the defendant had over the computer with other users of an Internet instant message service. In chats between "John" and an individual identified as "Redfox" that occurred between June 11 and 18, 2007, "John" discussed his sexual attraction to children. "John" specifically stated that he "love[d] boys" and preferred them "somewhere around 7 to 8 [years old], but just about anything below 13." John also received some pornographic images of children from Redfox, which he described as "awesome[.]" John further stated that a child in one of the images was "just slightly cuter than the 4 year old [he was] with right now[,]" and that he and the four-year-old child had "just been touching each other."

The defendant presented no evidence other than a stipulation that the State did not charge him with the instant offenses until

February 2008 due to an ongoing federal investigation of the contents of his laptop computer. After the close of the parties' evidence, the court instructed the jury that, among other things, the defendant was presumed innocent, this presumption was not overcome unless they were convinced of his guilt beyond a reasonable doubt, the State had the burden of proving the defendant's guilt beyond a reasonable doubt, and the fact that the defendant did not testify could not be considered in reaching their verdict.

The jury convicted the defendant as charged. After the foreperson read the verdict, the State's Attorney stated that "based on the nature of the offense, the [d]efendant will need to have a sex offender evaluation done before sentencing, that should be a part of the presentence investigation." The State's Attorney then requested a sentencing date 45 days in the future. Defense counsel stated that he needed to call his office to ascertain his schedule. The defendant did not object to the State's recommendation that he needed to undergo a sex offender evaluation. On its written judgment, the court ordered the defendant to complete the sex offender evaluation.

The defendant subsequently filed a motion for a new trial. In it, he alleged a number of errors occurred at trial, but he did not contend that the court erred when it ordered him to undergo a sex offender evaluation.

At a hearing on December 19, 2008, the court denied the defendant's motion for a new trial and proceeded to sentencing. The court indicated that it had received the presentence evaluation and the sex offender evaluation. The sex offender evaluation disclosed that the defendant participated in different tests to determine his risk of reoffending. The results of these tests ranged from a low to moderate risk to a moderate to high risk of reoffending. The person conducting the evaluation opined, among other things, that the defendant was sexually attracted to children, did not have remorse for M.B. because he denied committing the instant offenses, and believed that the defendant posed a moderate to high risk of reoffending.

The court sentenced the defendant to consecutive 14-year terms of imprisonment on his convictions. In doing so, the court stated that it was concerned that the defendant denied committing the instant offenses. The court also stated that it had "a fear as [did] the person in the report that [the defendant] will offend again." The defendant appealed.

#### ANALYSIS

On appeal, the defendant first contends that the trial court abused its discretion when it admitted evidence of the defendant's prior acts of sexual contact with children other than the instant victim because the prejudice of the evidence substantially outweighed its probative value.

Under the common law, evidence of other offenses is generally inadmissible to show the defendant's propensity to commit the charged offense, *i.e.*, that the defendant is the type of person who would have committed the charged offense. *People v. Donoho*, 204 Ill. 2d 159 (2003). However, section 115--7.3 of the Code provides an exception to the common law rule against the admission of other-offenses evidence. *People v. Walston*, 386 Ill. App. 3d 598 (2008). Section 115--7.3 enables "courts to admit evidence of other crimes to show the defendant's propensity to commit sex offenses if the requirements of section 115--7.3 are met." *Donoho*, 204 Ill. 2d at 176.

Section 115--7.3 specifically allows other-offenses evidence when: (1) the defendant has been accused of predatory criminal sexual assault, sexual abuse, sexual assault, or any other enumerated offense; (2) the defendant committed another enumerated offense, *i.e.*, the other offenses; (3) the other-offenses evidence is relevant; and (4) the probative value of the other-offenses evidence is not substantially outweighed by its undue prejudice to the defendant. 725 ILCS 5/115--7.3 (West 2006). Three factors that a trial court may consider when weighing the probative value of the other-offenses evidence against the undue prejudice to the defendant are the proximity in time to the charged offense, the degree of factual similarity between the offenses, and any other relevant facts and

circumstances. 725 ILCS 5/115--7.3(c) (West 2006).

The supreme court has recognized that the admissibility of other crimes evidence should not, and cannot, be controlled by the number of years that have elapsed between the prior and current offenses. See *People v. Illgen*, 145 Ill. 2d 353 (1991); see also *Donoho*, 204 Ill. 2d 159. Courts have admitted evidence of prior offenses under section 115--7.3 in instances where the prior offenses have occurred over a decade before the offense at hand. See *Donoho*, 204 Ill. 2d 159 (court admitted other offenses that occurred 12 to 15 years prior to the offenses at hand); see also *People v. Ross*, 395 Ill. App. 3d 660 (2009) (admissible prior offense occurred 17 years earlier).

Furthermore, the existence of some differences between the prior offenses and the instant offense does not make the prior offenses inadmissible, because no two independent crimes are identical. *Donoho*, 204 Ill. 2d 159, citing *Illgen*, 145 Ill. 2d 353. The *Donoho* court recognized that differences among instances of sexual assaults perpetrated on children can occur as "a product of defendant's access to the victims." *Donoho*, 204 Ill. 2d at 186.

Our careful review of the record reveals that the trial court did not abuse its discretion when it admitted the other-offenses evidence against the defendant. K.G.'s testimony revealed that the defendant's assaults on her concluded when she

was almost 15 years old; thus, sometime in late 2004. Therefore, a period of about 2½ years elapsed between the defendant's assaults on K.G. and M.B. We conclude that a passage of time of 2½ years is not a significant period of time and that it supported the admissibility of defendant's prior offenses involving K.G. Furthermore, we acknowledge that 12 to 18 years had elapsed between the time when the defendant assaulted S.S. and when he began assaulting M.B. Nonetheless, we do not believe that the passage of 12 to 18 years between the assaults on S.S. and M.B. rendered the defendant's conduct with S.S. too remote to be admissible, and we note that such periods of time have been permitted by other Illinois courts. See *Donoho*, 204 Ill. 2d 159.

Furthermore, we believe the assaults on S.S., K.G., and M.B. bore striking factual similarities to each other. Specifically, the defendant began his assaults on each child by touching their genital areas. Over time, the assaults progressed to the point where the defendant performed oral sex on the minors, and made them perform oral sex on him. We acknowledge that M.B. was male, and the other victims were female, but we believe that the defendant chose to assault the child that was in his immediate care. Specifically, S.S. was the defendant's niece, and both K.G. and M.B. were under the defendant's supervision at the times he assaulted them. Additionally, as a supervisor and "dad" to M.B., stepfather to K.G., and uncle to S.S., the defendant held a

position of trust and authority over each victim.

Overall, on this record, we cannot conclude that the prior instances of sexual assault to S.S. and K.G. were so remote and dissimilar to the instant assault on M.B. to preclude their admission as so unduly prejudicial to the defendant. Therefore, we conclude that the trial court did not abuse its discretion when it admitted the evidence of the defendant's prior sexual assaults of S.S. and K.G.

The defendant next contends that the trial court failed to strictly comply with Supreme Court Rule 431(b) because it did not ask potential jurors during *voir dire* whether they understood and accepted the proposition that defendant did not have to testify, and that they could not hold it against defendant if he chose not to testify. Ill. S. Ct. R. 431(b) (eff. May 1, 2007).

The supreme court adopted Rule 431(b) to ensure compliance with their decision in *People v. Zehr*, 103 Ill. 2d 472 (1984). In *Zehr*, the court found that the trial court committed reversible error when it refused to ask the venire questions proffered by defendant regarding the presumption of innocence and the State's burden to prove defendant's guilt beyond a reasonable doubt, which were topics not otherwise covered during *voir dire*. *Zehr*, 103 Ill. 2d 472.

In 2007, the supreme court amended Rule 431(b). The current version of the rule, effective May 1, 2007, and thus applicable

to the instant cause, provides that:

"The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following 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; however, no inquiry of a prospective juror shall be made into the defendant's failure to testify when the defendant objects.

The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section." Ill. S. Ct. R. 431(b) (eff. May 1, 2007).

Here, defendant acknowledges that this issue is subject to plain error analysis because he did not object to the alleged error at trial, and did not include this issue in a posttrial motion. See *People v. Keene*, 169 Ill. 2d 1 (1995). However, before deciding whether the court committed plain error, we will first determine whether the trial court erred. If the trial court did not err, we need not determine whether plain error occurred. *People v. Harris*, 225 Ill. 2d 1 (2007).

In this case, the trial court did not ask the venire whether any of them understood and accepted the proposition that the defendant's failure to testify could not be held against him. Thus, those ultimately selected to serve on the instant jury were not admonished of this principle prior to serving on the jury. Therefore, the court's Rule 431(b) admonishments were incomplete, and we thus conclude that the court erred. See *People v. Amerman*, 396 Ill. App. 3d 586 (2009) (this court concluded that the trial court erred when it failed to strictly comply with amended Rule 431(b) admonishments).

We now consider whether plain error occurred.

Plain error is a limited and narrow exception to the general rule of waiver. *People v. Weathersby*, 383 Ill. App. 3d 226 (2008). The plain error doctrine allows a court of review to consider an unpreserved error where: (1) the evidence was closely balanced; or (2) the error so prejudiced defendant's case that it resulted in an unfair trial. *People v. Allen*, 222 Ill. 2d 340 (2006). The burden of persuasion is on the defendant to show that plain error occurred. See *People v. Belknap*, 396 Ill. App. 3d 183 (2009).

Here, the defendant contends that the trial court's omission constituted plain error under both prongs of the rule.

Under the first prong of the plain error analysis, the defendant must show that the court committed an error and that

the error was prejudicial because the evidence was so closely balanced that the error alone severely threatened to weigh the scales of justice against the defendant. *People v. Piatkowski*, 225 Ill. 2d 551 (2007). Thus, if the evidence is not closely balanced, but is strongly weighed against the defendant, the first prong of the plain error test cannot be established. See *People v. Gordon*, 378 Ill. App. 3d 626 (2007).

Our review of the record indicates that the State presented overwhelming evidence of the defendant's guilt. Specifically, M.B.'s account of the defendant's assaults on him remained consistent as he shared it with Vickie and J.G. on the day of the incident, with Strand at the Child Advocacy Center, and at trial. We believe that any inconsistencies alleged by the defendant pertained to M.B.'s youth and the difficulty of describing a sexual assault rather than because M.B. fabricated the incidents.

Furthermore, other witnesses testified that they engaged in similar sexual conduct with the defendant when they were children, and such propensity evidence is permitted under Illinois statutory law. See 725 ILCS 5/115--7.3 (West 2006). The evidence further consisted of transcripts of several internet "chats" the defendant had with another person in which he stated that he was "with" a four-year-old boy, and that he and the boy had "just been touching each other." The defendant further stated in these "chats" that he "love[d] boys" under 13 years of

age and possessed numerous photographs of other adults and minors engaged in the conduct in which the defendant forced M.B. to participate. On the other hand, the defendant's evidence consisted only of a stipulation that the delay in bringing charges against him was occasioned by a federal investigation of the contents of his computer. Thus, the defendant has not met his burden of establishing that the evidence adduced at trial was closely balanced. As such, we conclude that he has not met the first prong of the plain error test.

Under the second prong of the plain error analysis, a defendant must prove that the trial court committed an error that "was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *People v. Herron*, 215 Ill. 2d 167, 187 (2005). However, a fair trial is different from a perfect trial, and the plain error doctrine does not permit a reviewing court to consider all forfeited errors. *Herron*, 215 Ill. 2d 167.

The supreme court has recently considered amended Rule 431(b) in the case of *People v. Thompson*, 238 Ill. 2d 598 (2010). In *Thompson*, the trial court admonished the venire members of three of the four Rule 431(b) principles during *voir dire*, asked the individual jurors whether they understood two of the four principles, and asked them whether they accepted one of the principles. *Thompson*, 238 Ill. 2d 598. The court ultimately

held that a trial court's failure to strictly comply with the current version of Rule 431(b) did not require reversal under the second prong of the plain error analysis in the absence of a showing that the jury was actually biased due to the error. *Thompson*, 238 Ill. 2d 598.

In this case, we must follow the mandate of *Thompson* and conclude that the trial court's failure to strictly comply with Rule 431(b) did not deny defendant an impartial jury and, thus, a fair trial. Here, like *Thompson*, defendant has not alleged or shown that the trial court's failure resulted in a biased jury.

In addition, we have carefully reviewed the record, and it does not contain any evidence indicating that the jury was unfair or partial. Specifically, the court admonished the entire venire of the first three Rule 431(b) principles, and all venire members indicated that they understood and accepted these principles. Prior to deliberations, the court instructed the jury that defendant had a right not to testify, and they could not hold his decision to refrain from testifying against him. Thus, the record indicates that the jury was informed of all of the Rule 431(b) admonishments prior to their deliberations. We will not presume citizens sworn as jurors ignore the law and jury instructions given to them by the court. See *Amerman*, 396 Ill. App. 3d 586. In light of the circumstances in the case at bar, we conclude that the trial court's error regarding the Rule

431(b) admonishments did not deny defendant his right to a fair trial. Therefore, the defendant has not met his burden of establishing the second prong of the plain error analysis.

The defendant's final contention on appeal is that the trial court violated his fifth amendment privilege against self-incrimination and Illinois statutory law when it ordered that he undergo a sex offender evaluation and relied on statements the defendant made during the evaluation in fashioning his sentence.

As part of the presentence investigative report, a trial court has the discretion to include any material that it deems necessary in fashioning a proper sentence. 730 ILCS 5/5--3--2(a)(6) (West 2008). Pursuant to section 5--3--2(b--5) of Unified Code of Corrections (the Unified Code), the trial court must order a defendant to complete a sex offender evaluation as part of the presentence investigation when the defendant is eligible for a sentence of probation. 730 ILCS 5/5--3--2(b--5) (West 2006). Effective January 1, 2010, section 5--3--2 of the Unified Code prohibits the trial court from ordering a defendant to undergo a sex offender evaluation when he is not eligible for a term of probation. See Pub. Act. 96--322 (eff. January 1, 2010) (amending 730 ILCS 5/5--3--2(b--5) (West 2008)). However, this section is not applicable to the instant case because the defendant's trial occurred before the effective date of the

amendment.

In *People v. Hillier*, 237 Ill. 2d 539 (2010), the supreme court found that the defendant had forfeited his contentions that the trial court violated his fifth amendment rights and Illinois statutory law when it ordered him to undergo a sex offender evaluation following his conviction for predatory criminal sexual assault of a child when he was not eligible for a term of probation. In that case, the defendant did not object when the trial court ordered the evaluation, when the State presented the evaluation at the defendant's sentencing hearing, or when the court relied on it in sentencing the defendant. The *Hillier* defendant also failed to file a postsentencing motion raising these claims of error.

In finding the defendant forfeited his constitutional and statutory claims of error by failing to properly preserve them, the *Hillier* court noted that it could review these claims if the defendant established that the trial court had committed plain error. However, the *Hillier* defendant did not present an argument on appeal that the court committed plain error; thus, the defendant could not meet his burden of establishing plain error. As a result, the *Hillier* court honored the procedural default. The court also noted that it was of no consequence that the trial court believed the imposition of a sex offender evaluation was mandatory.

Our review of the record reveals that the instant factual situation is essentially identical to that of *Hillier*. It is well established that in order to properly preserve a claim of sentencing error, the defendant must make both a contemporaneous objection and a written postsentencing motion raising the issue. See *People v. Bannister*, 232 Ill. 2d 52 (2008); see also 730 ILCS 5/5--8--1(c) (West 2008). Here, however, the defendant did not object to undergoing the sex offender evaluation at the time the court ordered it, nor did the defendant inform the court that the evaluation was required only for offenders who were eligible for probation. The defendant also failed to object when the evaluation was presented at the sentencing hearing and when the trial court referred to the evaluation in fashioning the defendant's sentence. Furthermore, the defendant failed to file a motion to reconsider presenting any aspect of this contention.

As a result, we may review this contention only if the defendant can establish that the court committed plain error. However, like the *Hillier* defendant, the instant defendant has not advanced an argument on appeal that the trial court committed plain error regarding any aspect of the sex offender evaluation. Rather, the defendant only contends that the trial court violated his fifth amendment rights and Illinois statutory law by ordering him to participate in the evaluation and then referencing statements from the evaluation in fashioning the defendant's

sentence. Given the similarities to *Hillier*--that is, that the defendant did not make a record of this issue at trial, that he did not properly preserve the issue for appellate review, and that he did not argue that the court committed plain error on appeal--we have no choice but to follow the precedent of *Hillier* and conclude that the defendant had forfeited review of his constitutional and statutory claims.

#### CONCLUSION

For the foregoing reasons, the judgment of the trial court of Tazewell County is affirmed.

Affirmed.