

NOTICE
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NO. 4-10-0232 Order Filed 5/19/11

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
DARKECE T. JOHNSON,)	No. 07CF821
Defendant-Appellant.)	
)	Honorable
)	Charles G. Reynard,
)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court. Presiding Justice Knecht and Justice McCullough concurred in the judgment.

ORDER

Held: The appellate court concluded that the defendant forfeited review of his sentencing claim because he did not set forth that claim in his postsentencing motion. In affirming the defendant's conviction and sentence, the appellate court rejected the defendant's further claim that the plain-error doctrine applied to excuse his procedural default.

Following an October 2009 trial, a jury convicted defendant, Darkece T. Johnson, of armed robbery (720 ILCS 5/18-2(a)(1) (West 2006)). The trial court later sentenced defendant to nine years in prison.

Defendant appeals, arguing only that his sentence is an improper double enhancement. We disagree and affirm.

I. BACKGROUND

At an October 2009 jury trial, the State presented the following evidence concerning events that occurred on July 26, 2007, at the Aldi store in Bloomington.

Denise Shepard was working as a cashier when she saw two men come "storming in making all kinds of noise." One man, who was waving a knife, came up to Shepard, called her a bitch, and said he wanted the money in her cash drawer. Shepard noticed that during the robbery, (1) the man kept waving the knife and yelling "the whole time" and (2) both men were covered from head to toe in loose clothing. (The jury was later shown a videotape of the robbery obtained from the store's surveillance camera.) After obtaining approximately \$2,000 from Shepard's cash drawer, the men left the store. Because the robbers' faces were covered by their clothing, Shepard could not identify defendant as one of the robbers at trial. Other witnesses described what they saw as the armed robbers left the store and ran past an adjacent hotel.

Because defendant does not challenge the sufficiency of the evidence to sustain his conviction, we will not review it in further detail except to note that our review of the State's evidence (including the testimony of at least one accomplice) was sufficient to convict defendant of the armed robbery at issue beyond a reasonable doubt.

At a December 2009 sentencing hearing, the trial court and the parties received the presentence report. No additional evidence was presented, and the State argued that "this is a crime that the aggravating factor, that it threatened serious harm to someone, is obviously apparent here." The State conceded that it could not definitively state that defendant was armed with the knife but contended that both men were accountable

regardless of who actually possessed the knife. The State recommended a sentence of 12 years in prison.

Defense counsel, pointing out that defendant was only 20 years old and had grown up in stressful circumstances, including multiple foster homes, argued that the trial court should impose a sentence "closer to the minimum, which would be" 6 years in prison.

The trial court then imposed a sentence of nine years in prison and ordered defendant to pay \$2,276 in restitution. Before sentencing defendant, the court noted that he had a history of prior criminal activity, although it was not lengthy. The court also stated the following:

"In terms of aggravation, the Defendant's conduct caused and threatened serious harm, and the distinction is between serious harm and serious physical harm.

That conduct in this case was essentially terrorism, and that's--that inflicted an enormous harm upon Miss Shepard as well as the other victims in the sense that they were in the vicinity of this very dangerous, frightening, terrorizing situation."

Defendant later filed a motion to reconsider sentence, arguing only that the sentence imposed was excessive and an abuse of discretion. The trial court denied that motion, and this appeal followed.

II. ANALYSIS

Defendant argues only that his nine-year prison sentence is an improper double enhancement because the trial court stressed the risk of serious harm while imposing sentence and the threat of serious harm is a factor inherent in any armed robbery. In response, the State argues that defendant has forfeited this claim by not raising it in his written postsentencing motion. We agree with the State.

A. Forfeiture Under Section 5-8-1(c) of the Unified Code of Corrections

In *People v. Ahlers*, 402 Ill. App. 3d 726, 931 N.E.2d 1249 (2010), this court addressed the State's claim that the defendant had forfeited review of his sentencing contentions because the defendant, as here, did not set forth those contentions in a postsentencing motion. Because much of our analysis in *Ahlers* applies fully here, we repeat most of it.

In *People v. Reed*, 177 Ill. 2d 389, 394, 686 N.E.2d 584, 586 (1997), the supreme court first explained that section 5-8-1(c) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-8-1(c) (West 2008)) requires a written postsentencing motion to "allow the trial court the opportunity to review a defendant's contentions of sentencing error and save the delay and expense inherent in appeal if they are meritorious." In *People v. Montgomery*, 373 Ill. App. 3d 1104, 1123, 872 N.E.2d 403, 419 (2007), this court, citing its decision in *People v. Rathbone*, 345 Ill. App. 3d 305, 802 N.E.2d 333 (2003), reiterated

that section 5-8-1(c) of the Unified Code mandates that a defendant's challenge to any aspect of his sentence be made by a written motion filed within 30 days of the imposition of his sentence. Following the supreme court's holding in *Reed*, we concluded in *Rathbone* that strict enforcement of section 5-8-1(c) is necessary to allow the trial court to review the precise claim of error so that it can either (1) correct its mistake or (2) explain its reasons for imposing the sentence it did. Specifically, we noted as follows:

"[The] defendant's claim is precisely the type of claim the forfeiture rule is intended to bar from review when not first considered by the trial court. Had [the] defendant raised th[e] issue in the trial court, that court could have answered the claim by either (1) acknowledging its mistake and correcting the sentence, or (2) explaining that the court did not improperly sentence [the] defendant ***. If the court did not change the sentence, then a record would have been made on the matter ***, avoiding the need for [the reviewing] court to speculate as to the basis for the trial court's sentence." *Rathbone*, 345 Ill. App. 3d at 310, 802 N.E.2d at 337.

The rationale from *Rathbone*--as it was in *Montgomery*

and *Ahlers*--applies equally to this case. Here, defendant failed to raise the claim in his motion to reconsider sentence that he now posits on appeal--namely, that his nine-year prison sentence is an improper double enhancement because the trial court stressed the risk of serious harm while imposing sentence and the threat of serious harm is a factor inherent in any armed robbery. Instead, defendant asserted in that motion only that the sentence imposed was excessive and an abuse of discretion. Accordingly, defendant has forfeited his contention on appeal pursuant to section 5-8-1(c) of the Unified Code.

B. The Plain-Error Doctrine and This Case

Despite having forfeited his claims, defendant contends that his procedural default may be excused by the plain-error doctrine of Illinois Supreme Court Rule 615(a) (eff. Jan. 1, 1967). We disagree.

Illinois Supreme Court Rule 615(a) (eff. Jan. 1, 1967) provides as follows:

"Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court."

In *People v. Bannister*, 232 Ill. 2d 52, 65, 902 N.E.2d 571, 580 (2008), the supreme court provided the following guidance concerning the circumstances in which the plain-error

doctrine applies:

"The doctrine serves as "a narrow and limited exception to the general [rule of procedural default]." [Citations.] This court will review unpreserved error when a clear and obvious error occurs and: (1) the evidence is closely balanced; or (2) that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. [Citations.]"

"Under both prongs of the plain-error doctrine, the burden of persuasion remains with defendant.'" *People v. Wishard*, 396 Ill. App. 3d 283, 286, 919 N.E.2d 1118, 1120 (2009) (quoting *People v. Walker*, 232 Ill. 2d 113, 124, 902 N.E.2d 691, 697 (2009)). "When a defendant fails to establish plain error, the result is that the 'procedural default must be honored.'" *Bannister*, 232 Ill. 2d at 65, 902 N.E.2d at 580-81 (quoting *People v. Keene*, 169 Ill. 2d 1, 17, 660 N.E.2d 901, 910 (1995)).

Defendant contends that the trial court's alleged error in this case "was of sufficient magnitude to undermine the fairness of the sentencing process." He bases this claim on the fact that the court "began its review of factors in aggravation by noting that [defendant's] 'conduct caused and threatened serious harm,' calling his conduct 'essentially terrorism.' Since the improper factor was the first of the statutory aggra-

vating factors cited by the court, its impact cannot be dismissed as insignificant." Defendant also contends that the court disregarded Shepard's own testimony that she was not harmed in the robbery. We deem these arguments unpersuasive.

First, we note that at the sentencing hearing, the trial court appeared to be reviewing the statutory factors in aggravation as it considered an appropriate sentence to impose. That the court had occasion to first mention whether defendant's conduct caused or threatened serious harm should come as no surprise, given that it is the first aggravating factor listed in the statute. See 730 ILCS 5/5-5-3.2(a)(1) (West 2006).

Further, we note that the offense of which defendant was convicted, armed robbery, is a Class X felony, meaning that the trial court was required to impose a sentence of not less than 6 years nor more than 30 years in prison. See 730 ILCS 5/5-8-1(a)(3) (West 2006). Although only 20 years old, defendant had a previous conviction for the Class 3 felony of delivery of cannabis for which he received a 2-year prison sentence in 2007. He was released after six months in April 2008, and six months later was returned to prison, apparently for violating the terms of his mandatory supervised release. He also had a conviction earlier in 2007 for battery. Additionally, defendant was a high-school dropout who had a minimal employment record. Given this background, and leaving aside defendant's contention regarding the trial court's view of defendant's crime as "terrorism," we believe defendant should view himself as fortunate that he

received only a nine-year sentence, which is just three years above the mandatory minimum required by the Unified Code.

Further, we disagree with defendant's contention that "the threat of serious harm is a factor inherent in any armed robbery since the offense requires proof of a weapon." The offense of armed robbery is committed when a person takes property from the person of another by the use of force or by threatening the imminent use of force when the robber carries on or about his person or is otherwise armed with a dangerous weapon other than a firearm. 720 ILCS 5/18-1(a), 18-2(a)(1) (West 2006). Thus, defendant would have been just as guilty had he or his accomplice merely revealed the presence of a knife in a waistband and demanded money from Shepard. Waving the knife around Shepard and behaving as she described was not implicit in the definition of armed robbery and could properly constitute an aggravating factor for the reasons the trial court stated. In other words, the threat of force is always implicit in the commission of an armed robbery; when, as here, the armed robber makes the threat explicit, his doing so may be viewed as an aggravating factor.

III. CONCLUSION

For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment as cost of this appeal.

Affirmed.