

No. 1-09-3577

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. 05 CR 21890
)	
TERRY BROWN,)	Honorable
)	Diane Gordon Cannon,
Defendant-Appellant.)	Judge Presiding.

JUSTICE JOSEPH GORDON delivered the judgment of the court.
Presiding Justice Epstein and Justice Howse concurred in the judgment.

ORDER

- ¶ 1 *Held:* Judgment entered on defendant's convictions of criminal sexual assault affirmed; defendant forfeited issue regarding his fitness to stand trial; mittimus modified.
- ¶ 2 Following a jury trial, defendant Terry Brown was found guilty of two counts of criminal sexual assault, then sentenced to consecutive terms of 40 years' imprisonment. On appeal, defendant contends that his right to due process was violated where the trial court ordered a behavioral clinical examination (BCX) and manifested a *bona fide* doubt as to his fitness, then accepted the examining psychiatrist's conclusion that he was fit for trial without holding a fitness

hearing. Defendant also requests that his mittimus be modified to reflect the proper offenses of which he was convicted.

¶ 3 The record shows, in relevant part, that on August 7, 2005, defendant was staying at the home of his first cousin Q.G. at 5341 South Honore Street, in Chicago. That night, he entered her bedroom as she was sleeping, got on top of her, and began choking her when she screamed "rape." He eventually stopped but threatened to start choking her again if she screamed, then performed oral sex on her and penetrated her vagina with his penis. Following this incident, defendant was arrested and charged with six counts of aggravated criminal sexual assault, unlawful restraint, and violation of the Sex Offender Registration Act.

¶ 4 At a pretrial hearing on October 28, 2005, the trial court inquired as to whether defendant had been subject to a fitness evaluation. The inquiry came after the State referred to medical records from his most recent hospitalization, in which defendant was diagnosed as bipolar and prescribed medication, and from "six other admissions." The State responded that there had been no evaluation, and the court ordered a BCX. At this time, defense counsel addressed the court as follows:

"I have had more than one, several conversations with Mr. Brown. I do not have any doubt about his fitness. Right now he seems to understand, just for your information, Judge, he seems to understand the nature of the charges against him, the penalties, his right to a jury trial, and he is cooperating with me fully."

The court nonetheless responded, "That's why it is the Court's motion, and he is currently on psychotropic medication. I think we need a determination whether or not you are fit before we proceed to trial."

¶ 5 Thereafter, Dr. Roni Seltzberg evaluated defendant and opined that he was fit to stand trial with medication. She then testified regarding her examination of defendant at a fitness hearing on January 12, 2006. At the conclusion of that hearing, the trial court found Dr. Seltzberg's testimony credible and concluded, likewise, that defendant was fit to stand trial with medication.

¶ 6 In the intervening years preceding his trial, defendant had numerous conversations with the court regarding various concerns, and as time went on, he mentioned more than once that he had been taken off the prescribed psychotropic medication. On January 20, 2009, defense counsel also mentioned that development, and requested a BCX "to make sure that [defendant] is fit for trial, because previously there had been an issue regarding his fitness with medication."

¶ 7 The court granted counsel's request, and Dr. Seltzberg subsequently evaluated defendant. Dr. Seltzberg opined that he was fit to stand trial, and in her letter to the court, noted, *inter alia*, that defendant "has not been prescribed psychotropic medication since mid-November 2008 and apparently does not require this type of intervention in order to maintain his fitness for trial though he reported subjective benefit from these in the past." The matter was then set for trial, and defendant was ultimately tried by a jury, found guilty of two counts of criminal sexual assault, and sentenced to consecutive terms of 40 years' imprisonment.

¶ 8 In this appeal from that judgment, defendant first contends that his right to due process was violated where the trial court manifested a *bona fide* doubt about his fitness and ordered a BCX, then "[m]echanically [a]ccepted" the examining psychiatrist's conclusion that he was fit for trial without holding a fitness hearing. Defendant acknowledges that he forfeited this claim by failing to raise the issue in a post-trial motion, as required (*People v. Enoch*, 122 Ill. 2d 176, 186 (1988)), but he claims that his fitness to stand trial implicates a substantial right, and that plain-error review is therefore appropriate.

¶ 9 We initially observe that the plain error rule is a narrow exception to the waiver rule (*People v. Hillier*, 237 Ill. 2d 539, 545 (2010)) which allows a reviewing court to consider unpreserved claims of error where defendant shows that the evidence is closely balanced, or the error is so serious that it affected the fairness of his trial and challenged the integrity of the judicial process (*People v. Naylor*, 229 Ill. 2d 584, 593 (2008)). Under both prongs, defendant bears the burden of persuasion, and must first show that a clear or obvious error occurred. *Hillier*, 237 Ill. 2d at 545. If defendant fails to meet his burden, his procedural default will be honored. *Hillier*, 237 Ill. 2d at 545.

¶ 10 Here, the record clearly shows that defendant did not raise any issue regarding the trial court's failure to hold a fitness hearing in a post-trial motion, and he therefore forfeited the issue for review. The State agrees that defendant failed to properly preserve the issue; but, noting the decision rendered in *People v. Moore*, 408 Ill. App. 3d 706, 710 (2011), the State asserts that it "appears" that defendant's claim involves a fundamental right, and thus should be reviewed for plain error. The supreme court, however, has reminded reviewing courts that a proper forfeiture analysis should be conducted to determine whether defendant has forfeited the issue, and then hold defendant to his burden of demonstrating plain error. *Hillier*, 237 Ill. 2d at 549. "[W]hen a defendant fails to present an argument on how either of the two prongs of the plain-error doctrine is satisfied, he forfeits plain-error review." *Hillier*, 237 Ill. 2d at 545-46.

¶ 11 In this case, defendant acknowledges the forfeiture, but has not expressly set forth how either prong of the plain error doctrine is satisfied. Rather, defendant has made a one-sentence argument for plain error review, stating, "Although Brown did not raise the issue of his fitness in a post-trial motion, 'the determination of a defendant's fitness to stand trial concerns a substantial right and plain-error review is appropriate.'" Defendant then explains why the trial court's failure to hold a fitness hearing was error, not plain error. He also fails to argue that the evidence

was closely balanced, or to explain why the error was so severe that it must be remedied to preserve the integrity of the judicial process. Under similar circumstances, defendant's failure to so argue resulted in the waiver of his plain error argument on appeal. *People v. Nieves*, 192 Ill. 2d 487, 503 (2000); see also *People v. McDade*, 345 Ill. App. 3d 912, 914 (2004); *People v. Rathbone*, 345 Ill. App. 3d 305, 311 (2003). We reach the same conclusion in this case and honor defendant's procedural default. *Hillier*, 237 Ill. 2d at 545-47.

¶ 12 Defendant next requests that his mittimus be corrected to reflect his convictions of two counts of criminal sexual assault, rather than of one count of criminal sexual assault and one count of aggravated criminal sexual assault. The State agrees that the correction is warranted and, pursuant to our authority under Illinois Supreme Court Rule 615(b) (eff. Aug. 27, 1999), we direct the clerk to modify defendant's mittimus to properly reflect his convictions of two counts of criminal sexual assault.

¶ 13 For the reasons stated, we order the clerk to modify defendant's mittimus to reflect his convictions of two counts of criminal sexual assault, and affirm the judgment in all other respects.

¶ 14 Affirmed; mittimus corrected.