

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).

2013 IL App (4th) 120098-U
NO. 4-12-0098
IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

FILED
June 14, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Woodford County
ANTHONY M. HOSTETTER,)	No. 11CF116
Defendant-Appellant.)	
)	Honorable
)	John B. Huschen,
)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Knecht and Harris concurred in the judgment.

ORDER

- ¶ 1 *Held*: The appellate court affirmed defendant's sentence, concluding (1) defendant forfeited any claim of error regarding sentencing by failing to preserve those issues and (2) the trial court committed no error such that plain error review is appropriate.
- ¶ 2 In December 2011, following a bench trial, the trial court found defendant, Anthony M. Hostetter, guilty of aggravated battery of a child (720 ILCS 5/12-3.05(b)(1) (West 2010)). In January 2012, the court sentenced defendant to seven years in the Illinois Department of Corrections (DOC). Defendant appeals, arguing the court erred during sentencing by considering an element of the offense as an aggravating factor. Because defendant failed to object at the sentencing hearing and did not file a posttrial motion to reconsider his sentence, he has forfeited this claim. We affirm the trial court's sentencing order.

¶ 3

I. BACKGROUND

¶ 4 In July 2011, a grand jury returned a one-count indictment against defendant for aggravated battery of a child (720 ILCS 5/12-3.05(b)(1) (West 2010)) (count I), a Class X felony carrying a sentence range of between 6 and 30 years (730 ILCS 5/5-4.5-25(a) (West 2010)). The indictment alleged defendant knowingly caused great bodily harm to K.B., a child under the age of 13 years, by shaking K.B. with enough force to cause bleeding and swelling in his brain. In October 2011, a grand jury returned a second one-count indictment arising from the same incident. The October indictment alleged defendant knowingly caused great bodily harm to K.B. in that he broke K.B.'s clavicle (count II).

¶ 5 The evidence presented during the December 2011 bench trial indicated that as of July 25, 2011, defendant, his girlfriend, his girlfriend's brother-in-law, Destry Harper, his girlfriend's sister, and K. B., his girlfriend's 10-month-old son from a prior relationship, all lived in various areas of his girlfriend's mother's Woodford County home. On July 25, 2011, defendant was alone on the first floor of the home with K.B. His girlfriend's brother-in-law, Destry Harper, was in the basement of the home. Destry heard defendant loudly yell something along the lines of, "knock it off!" or "cut it out!" Approximately three minutes later, Destry heard a thump. Four or five minutes subsequent to the initial yelling, defendant cried out to Destry to call 9-1-1. Destry went to the first floor and saw defendant holding K.B., who was unresponsive. K.B. was airlifted from the home in Woodford County to St. Francis Hospital in Peoria.

¶ 6 K.B. arrived at the hospital barely responsive, with a rightward gaze preference, and no movement in the left side of his body. A computed axial tomography (CAT) scan showed

that K.B. had life-threatening injuries, a subdural hematoma which caused compression of the brain and "mass effect," a condition in which pooling blood pushes the brain to the side or downward. The CAT scan also revealed K.B. had a broken clavicle and a fractured humerus. Swelling of K.B.'s brain required immediate surgery to remove a section of his skull, which remained off for a period of "many weeks." K.B. spent approximately two months in the hospital as a result of his injuries. Following the bench trial, the court convicted defendant of count I and acquitted him of count II.

¶ 7 At the January 2012 sentencing hearing, the State requested a sentence of 14 years in DOC and the defense requested the minimum sentence of 6 years in DOC. During argument, defense counsel asserted,

"[K.B.] has been developmentally delayed, but it sounds like he has almost caught up to where he was, and he's making progress as any child. And they have been unable to determine any permanency-type issues at this time. So I think it's hard to decide how to count that or if it should be counted just because he is doing well now."

Following arguments from counsel, the trial court stated, in pertinent part, as follows:

"The Court has considered the evidence presented at trial, the Presentence Investigation, the evidence offered in aggravation, and the defendant's statement in allocution. The Court has also considered each and every statutory factor in aggravation and mitigation, including the fact that defendant did not contemplate

that his criminal conduct would cause serious physical harm.

Defendant's criminal conduct was a result of circumstances unlikely to reoccur. The character and attitude of the defendant indicate that he's unlikely to commit another crime. *Defendant's conduct caused serious harm.* The defendant has a history of prior criminal activity, although it is somewhat limited." (Emphasis added.)

The court sentenced defendant to seven years in DOC (one year above the statutory minimum). Defendant did not object to the court's comments or sentencing decision, nor did he file a posttrial motion to reconsider his sentence.

¶ 8 This appeal followed.

¶ 9 II. ANALYSIS

¶ 10 Defendant asserts because "caus[ing] great bodily harm" is an element of aggravated battery of a child (720 ILCS 5/12-3.05(b)(1) (West 2010)), the trial court's statement, "[d]efendant's conduct caused serious harm[.]" indicates that the court impermissibly considered an element of the offense as an aggravating factor at sentencing. Relying on the supreme court's decision in *People v. Saldivar*, 113 Ill. 2d 256, 497 N.E.2d 1138 (1986), defendant argues that, although he did not object at the sentencing hearing or file a posttrial motion to reconsider his sentence, defense counsel preserved the issue by making certain statements at the sentencing hearing. In the alternative, defendant argues this court should review the issue under plain error analysis because "consideration of an improper aggravating factor at sentencing clearly affects defendant's fundamental right to liberty." In response, the State asserts (1) the trial court properly

rejecting the State's argument defendant had waived that claim of error by failing to contemporaneously object or raise the issue in a posttrial motion, the supreme court explained as follows:

"We do not believe this is a proper case for the application of the waiver rule. In the argument of counsel at the close of the sentencing hearing and before the pronouncement of the sentence, the prosecutor had emphasized that the defendant had killed the victim. Defense counsel then agreed with the prosecutor that the fact there was a homicide is not enough to warrant incarceration and argued: 'By definition voluntary manslaughter involves a homicide. There is going to be a death.' After a brief discussion of the homicide as an aggravating factor, defense counsel then discussed the mitigating factors. After the argument in aggravation and mitigation, the court made its ruling during which the court made the statements now complained of. To preserve any error of the court made at that time, it was not necessary for counsel to interrupt the judge and point out that he was considering wrong factors in aggravation, especially in light of the argument that had preceded the ruling." *Saldivar*, 113 Ill. 2d at 266, 497 N.E.2d at 1141-42.

¶ 14 Defendant cites *Saldivar* to support his argument that the following statements made by defense counsel at the sentencing hearing preserved his claim of error:

"[K.B.] has been developmentally delayed, but it sounds like he has almost caught up to where he was, and he's making progress as any child. And they have been unable to determine any permanency-type issues at this time. So I think it's hard to decide how to count that or if it should be counted just because he is doing well now."

In response, the State asserts that "[a] plain reading of defense counsel's remarks fails to show he was arguing the harm suffered by the baby was implicit in the offense and could not be considered as an aggravating factor."

¶ 15 After reviewing the record of the sentencing hearing, we agree with the State and find defense counsel's statements did not convey the message that serious harm should not be considered as an aggravating factor. Moreover, even if defense counsel intended his statements to serve as a *Saldivar*-type preemptive objection, defendant's failure to renew the objection in a posttrial motion forms a basis for forfeiture. See *Enoch*, 122 Ill. 2d at 186, 522 N.E.2d at 1130. Therefore, we reject defendant's argument that he preserved his claim of error for appeal.

¶ 16 B. The Plain Error Doctrine and This Case

¶ 17 Despite having forfeited his claim on multiple grounds, 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), which reads 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.]"

"The first step of plain-error review is determining whether any error occurred." *People v. Thompson*, 238 Ill. 2d 598, 613, 939 N.E.2d 403, 413 (2010). Because we find that no error occurred, we need not address either prong of the plain-error analysis.

¶ 18 The evidence showed that K.B.'s injuries were life-threatening and horrific. At the time of the January 2012 sentencing hearing, K.B., still in his infancy, was seeing two different neurologists, a physical therapist, an occupational therapist, a developmental specialist, and an eye doctor as a result of his injuries. Indeed, the *degree* of bodily harm that defendant inflicted upon K.B. was much more than necessary to satisfy the "great bodily harm" element of the offense of aggravated battery of a child. 720 ILCS 5/12-3.05(b)(1) (West 2010).

Accordingly, it was entirely appropriate for the trial court to consider the serious degree of harm as a relevant factor in deciding the sentence, even though "caus[ing] great bodily harm" is a bare element of the offense. As the supreme court said in *Saldivar*,

"While the classification of a crime determines the sentencing range, the severity of the sentence depends upon the *degree of harm* caused to the victim and as such may be considered as an aggravating factor in determining the exact length of a particular sentence, *even in cases where serious bodily harm is arguably implicit in the offense for which a defendant is convicted.*" (Emphases in original.) *Saldivar*, 113 Ill. 2d at 269, 497 N.E.2d at 1143. See also *People v. Thomas*, 171 Ill. 2d 207, 226-27, 664 N.E.2d 76, 86-87 (1996), *People v. Carter*, 272 Ill. App. 3d 809, 813, 651 N.E.2d 248, 251 (1995), *People v. Rader*, 272 Ill. App. 3d 796, 808, 651 N.E.2d 258, 266 (1995).

¶ 19 Here, we take the trial court's statement that "[d]efendant's conduct caused serious harm" to indicate its proper consideration of the serious *degree* of harm far exceeding that which was necessary to incur liability for aggravated battery of a child. Accordingly, we decline to review defendant's claim under plain error analysis.

¶ 20 III. CONCLUSION

¶ 21 For the reasons stated, we affirm the trial court's judgment. Because the State successfully defended the criminal judgment, we grant the State its \$50 statutory assessment against defendant as costs of this appeal. See *People v. Smith*, 133 Ill. App. 3d 613, 620, 479 N.E.2d 328, 333 (1985) (citing *People v. Nicholls*, 71 Ill. 2d 166, 178, 374 N.E.2d 194, 199 (1978)).

¶ 22 Affirmed.