

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) 120482-U

NO. 4-12-0482

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
May 3, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
JUAN M. VILLARREAL,)	No. 11CF216
Defendant-Appellant.)	
)	Honorable
)	Robert L. Freitag,
)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Steigmann and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held:* (1) We have jurisdiction to hear this appeal; (2) the officer's testimony did not constitute error as it did not show evidence of defendant's criminal history; and (3) defendant's extended-term sentence for resisting a peace officer must be vacated and reduced to a term of three years in prison.

¶ 2 In November 2011, a jury found defendant, Juan M. Villarreal, guilty of aggravated battery of a peace officer and resisting a peace officer. In February 2012, the trial court imposed a five-year sentence for aggravated battery of a peace officer and an extended term of five years for resisting a peace officer.

¶ 3 On appeal, defendant argues (1) plain error occurred when the State elicited testimony from a witness that defendant had previous contacts with police and lived at an address that had experienced violent incidents and (2) the trial court erred in sentencing him to an extended term on his conviction for resisting a peace officer. We affirm as modified in part and

vacate in part.

¶ 4

I. BACKGROUND

¶ 5 In March 2011, a grand jury indicted defendant on one count of aggravated battery (count I) (720 ILCS 5/12-4(b)(18) (West 2010)), alleging he knowingly and without legal justification made physical contact of an insulting or provoking nature with Bloomington police officer Tory Daugherty, by pushing him in the chest, when he knew that Daugherty was a peace officer engaged in the execution of his official duties. The grand jury also indicted defendant on one count of resisting a peace officer (count II) (720 ILCS 5/31-1(a-7) (West 2010)), alleging he knowingly resisted the performance of Officer Daugherty, knowing Daugherty to be a peace officer engaged in an authorized act within his official capacity, by refusing to follow Daugherty's commands and in the course of doing so proximately caused injury to Daugherty, being a scratch to the officer's finger.

¶ 6

In November 2011, defendant's jury trial commenced. Officer Daugherty testified he responded to a call of a domestic disturbance on March 13, 2011, at approximately 1 p.m. Daugherty was advised that Sandra Garza had been having problems with defendant, her nephew. Because there were only four officers on duty at that time, Officer Daugherty proceeded to the address alone, even though it was a "flagged address" because of prior violence. Upon his arrival, Daugherty recognized defendant, as Daugherty had "dealt with him in the past," saw him throw a liquor bottle into the bushes, and heard him say no one had called the police.

¶ 7

Officer Daugherty stated defendant was "highly intoxicated and ranting and raving about how he was going to hurt people." After Garza stated she was tired of defendant's threats and wanted him to leave, Daugherty asked him if he would be willing to leave the house or go to

bed. Defendant indicated his desire to leave and told Daugherty to follow him inside so he could retrieve some "stuff." Daugherty followed him through the house and, when they reached the basement steps, defendant "slammed the door" in Daugherty's face. Daugherty opened the door and continued to follow him, and defendant turned around and bumped him in the chest.

¶ 8 Defendant told Daugherty to leave, but Daugherty stated he could not do so because of the threats. Defendant then bumped Daugherty in the chest a second time. As Daugherty tried to talk with him, defendant became "more and more agitated." Defendant mentioned "he killed several white boys while he was away." The two proceeded back to the kitchen, and defendant reached for a knife. Daugherty then grabbed him by the neck and pulled him to the ground. After struggling with defendant and attempting to handcuff him, Daugherty used the Taser to finally get defendant to comply. After defendant had been taken away by another officer, Daugherty noticed a cut on his right index finger from when he hit defendant in the mouth.

¶ 9 On cross-examination, Officer Daugherty testified he was 6'4" tall and weighed approximately 400 pounds. He described defendant as "relatively short." Daugherty stated defendant bumped him while they were in the landing area above the stairs, which he described as a tight area. The scratch to his hand occurred when he punched defendant in the mouth while they were fighting in the kitchen.

¶ 10 On redirect examination, Officer Daugherty stated he felt defendant intentionally bumped him while they were on the landing. Also at that time, defendant was using "threatening language."

¶ 11 Defendant exercised his right not to testify. Following closing arguments, the jury

found defendant guilty on both counts. Defense counsel filed a motion for a new trial, which the trial court denied. In February 2012, the court sentenced defendant to five years on count I, to be served concurrent with an extended term of five years on count II. This court granted defendant's late notice of appeal.

¶ 12

II. ANALYSIS

¶ 13

A. Jurisdiction

¶ 14

Initially, the State argues this court lacks jurisdiction to consider this appeal because defendant's notice of appeal was untimely and his motion for leave to file a late notice of appeal failed to comply with Illinois Supreme Court Rule 606(c) (eff. Mar. 20, 2009). We disagree and find we have jurisdiction to hear defendant's appeal.

¶ 15

In the case *sub judice*, the trial court sentenced defendant on February 3, 2012. He did not file a postsentencing motion. Thus, he was required to file a notice of appeal within 30 days of sentencing. Ill. S. Ct. R. 606(b) (eff. Mar. 20, 2009). Defendant filed a *pro se* notice of appeal on May 11, 2012. On July 20, 2012, defendant filed a late notice of appeal. A defendant may file a late notice of appeal in this court "within six months of the expiration of the time for filing the notice of appeal" together with an affidavit stating there is merit to the appeal and the failure to file a timely notice of appeal was not due to the appellant's culpable negligence. Ill. S. Ct. R. 606(c) (eff. Mar. 20, 2009).

¶ 16

The State argues defendant's motion for leave to file a late notice of appeal failed to comply with Rule 606(c) because it did not contain an affidavit that there is merit to the appeal and did not contain a statement that the failure to file a timely motion was not due to his culpable negligence. However, "the filing of the notice of appeal is the only jurisdictional step required to

perfect an appeal." *In re D.D.*, 212 Ill. 2d 410, 417, 819 N.E.2d 300, 304 (2004). "The failure to comply strictly with the form of the notice is not fatal if the deficiency is nonsubstantive and the appellee is not prejudiced." *People v. Lewis*, 234 Ill. 2d 32, 37, 912 N.E.2d 1220, 1224 (2009). Here, defendant filed a late notice of appeal within the time frame allowed by Supreme Court Rule 606(b) (eff. Mar. 20, 2009). The State did not complain about the deficiencies of the late notice of appeal until it filed its brief in March 2013 and no prejudice to the appellee has been argued. Thus, we find the State's argument without merit. Accordingly, we have jurisdiction to hear this case.

¶ 17 B. The Testimony of Officer Daugherty

¶ 18 Defendant argues plain error occurred when the State elicited testimony from Officer Daugherty that defendant had previous contacts with police and he lived at an address that had experienced violent incidents. We disagree.

¶ 19 As defendant concedes, defense counsel did not object to the testimony of Officer Daugherty that he claims constituted error now on appeal. Defense counsel also did not raise the issue in a posttrial motion. Thus, defendant has forfeited this issue on appeal. See *People v. Hestand*, 362 Ill. App. 3d 272, 279, 838 N.E.2d 318, 324 (2005) (a defendant must object at trial and raise the issue in a posttrial motion to preserve the issue for review).

¶ 20 Defendant, however, asks this court to consider the issue as a matter of plain error. The plain-error doctrine allows a court to disregard a defendant's forfeiture and consider unpreserved error when either:

"(1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) the

error was so fundamental and of such magnitude that it affected the fairness of the trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Wilmington*, 2013 IL 112938, ¶ 31, 983 N.E.2d 1015.

Under both prongs of the plain-error analysis, the burden of persuasion remains with the defendant. *Wilmington*, 2013 IL 112938, ¶ 43, 983 N.E.2d 1015. As the first step in the analysis, we must determine whether any error occurred at all. *People v. Taylor*, 2011 IL 110067, ¶ 30, 956 N.E.2d 431. "If error did occur, we then consider whether either prong of the plain-error doctrine has been satisfied." *People v. Sykes*, 2012 IL App (4th) 111110, ¶ 31, 972 N.E.2d 1272.

¶ 21 At trial, Officer Daugherty testified he responded to a domestic disturbance after a report by Garza that she was having problems with defendant. The following exchange took place between the prosecutor and Daugherty:

"Q. And did you proceed to that address?

A. Yes, I did.

Q. All right. And did you go with any other officers?

A. No, I didn't. There was only four officers on the street that day, and even though that address is a flagged address, which is because of the violence at that address prior, there is supposed to be a two-officer call, but I was the only one available at that time.

Q. So you proceeded to that address by yourself?

A. Yes, ma'am.

Q. When you arrived, what did you find?

A. When I arrived, there was a car parked out front. I recognized Mr. Juan Villarreal get out of the car because I've dealt with him in the past. He threw a liquor bottle up into the bushes near the house and told me that no one had called the police, and I asked him where Sandra was because I knew she was the caller. And as before he answered, she walked out of the house."

¶ 22 Defendant argues Daugherty's testimony was inadmissible because it allowed the jury to conclude he was a bad person and guilty of the crimes charged because of his reputation. "[A] police officer's testimony of his or her prior acquaintance with a defendant should be avoided unless somehow relevant." *People v. Anderson*, 325 Ill. App. 3d 624, 635, 759 N.E.2d 83, 93 (2001). However, "evidence that the arresting officer was previously acquainted with defendant does not necessarily imply a criminal record." *People v. Stover*, 89 Ill. 2d 189, 196, 432 N.E.2d 262, 266 (1982).

¶ 23 We note the State did not ask Officer Daugherty whether he knew defendant or whether the house he arrived at had been flagged for prior violence. Daugherty provided more than was asked. However, his testimony did not constitute direct evidence of any prior and specific criminal activity on defendant's part. Although Daugherty stated he had dealt with defendant in the past, he did not describe the nature of those contacts or state they involved matters of violence. Daugherty could have dealt with him on noncriminal matters. It should also be pointed out that defense counsel also asked Daugherty if he recognized defendant. Daugherty's statement that the home had been flagged due to a prior incident of violence did not indicate defendant had been the cause of the violence and was simply incidental to why he did

not go to the address with other officers. We also note the State did not dwell on these two matters in furthering questioning or in its closing arguments to the jury. As Daugherty's testimony did not constitute other-crimes evidence that would taint defendant in the eyes of the jury, we find no error. Because we find no error, there can be no plain error to excuse defendant's forfeiture of this issue.

¶ 24 C. Extended-Term Sentence

¶ 25 Defendant argues the trial court improperly sentenced him to an extended term on his conviction for resisting a peace officer where it was not the highest class felony for which he was convicted. We agree, and the State concedes.

¶ 26 In this case, defendant was convicted of the Class 2 offense of aggravated battery of a peace officer (720 ILCS 5/12-4(e)(2) (West 2010)) and the Class 4 offense of resisting a peace officer (720 ILCS 5/31-1(a-7) (West 2010)). The trial court sentenced him to five years in prison for aggravated battery and an extended term of five years in prison for resisting a peace officer. We note that while defendant did not raise any claim of error in a postsentencing motion, a void sentencing judgment may be reviewed at any time. See *People v. Thompson*, 209 Ill. 2d 19, 27, 805 N.E.2d 1200, 1204-05 (2004).

¶ 27 "A judge shall not sentence an offender to a term of imprisonment in excess of the maximum sentence authorized *** for an offense or offenses within the class of the most serious offense of which the offender was convicted unless the factors in aggravation set forth in Section 5-5-3.2 or clause (a)(1)(b) of Section 5-8-1 were found to be present." 730 ILCS 5/5-8-2(a) (West 2010). Our supreme court has "interpreted section 5-8-2(a) to mean that a defendant who is convicted of multiple offenses may be sentenced to an extended-term sentence only on those

offenses that are within the most serious class." *People v. Bell*, 196 Ill. 2d 343, 350, 751 N.E.2d 1143, 1146 (2001) (citing *People v. Jordan*, 103 Ill. 2d 192, 205-06, 469 N.E.2d 569, 575 (1984)). However, the court also stated "extended-term sentences may be imposed 'on separately charged, differing class offenses that arise from *unrelated courses of conduct*.'" (Emphasis added in *Bell*.) *Bell*, 196 Ill. 2d at 350, 751 N.E.2d at 1147 (quoting *People v. Coleman*, 166 Ill. 2d 247, 257, 652 N.E.2d 322, 327 (1995)).

¶ 28 Here, the most serious class of offense for which defendant was convicted was aggravated battery of a peace officer, a Class 2 felony. The evidence indicates the aggravated battery and resisting a peace officer were offenses committed during the same course of conduct. Because resisting a peace officer was not the most serious offense for which defendant was convicted, he could not receive an extended-term sentence for that conviction. Accordingly, we vacate defendant's extended-term sentence on the resisting-a-peace-officer conviction and reduce his sentence to the maximum nonextended term of three years in prison. See *Thompson*, 209 Ill. 2d at 29, 805 N.E.2d at 1206; Ill. S. Ct. R. 615(b)(4) (eff. Jan. 1, 1967) ("On appeal the reviewing court may *** reduce the punishment imposed by the trial court"); 730 ILCS 5/5-4.5-45(a) (West 2010) (indicating the maximum term for a Class 4 felony is three years).

¶ 29 III. CONCLUSION

¶ 30 For the reasons stated, we affirm as modified in part and vacate in part. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 31 Affirmed as modified in part and vacated in part.