FOURTH DIVISION
June 30, 2015

No. 1-13-1583

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JOEL HERRERA, Defendant-Appellant.	)	Appeal from the Circuit Court of Cook County, Illinois. No. 13DV10002 The Honorable Ursula Walowski, Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.

Justices Howse and Ellis concurred in the judgment.

ORDER

Held: Defendant's conviction for felony domestic battery affirmed where, when defendant had a previous conviction for domestic battery at the time he committed the domestic battery at issue in this cause, only a felony domestic battery was statutorily available for this subsequent domestic battery, and where the record on appeal establishes that defendant was aware of the felony nature of the charges against him. Affirmed.

¶ 1 Following a jury trial, defendant Joel Herrera was convicted of domestic battery and sentenced to 18 months in prison. On appeal, defendant contends that his felony domestic

battery conviction is void and should be reduced to misdemeanor domestic battery. Specifically, defendant argues that the State failed to comply with section 111-3(c) of the Code of Criminal Procedure of 1963 (725 ILCS 5/111-3(c) (West 2010)) where the State failed to give defendant notice that it intended to charge him with the enhanced felony offense of domestic battery rather than a Class A misdemeanor offense of domestic battery. For the following reasons, we affirm.

¶ 2 I. BACKGROUND

¶ 3 Defendant was charged by information with three counts of domestic battery. The charges arose out of an altercation between defendant and his two nephews, Michael Huerta and Juan DeJesus, at their shared home on January 6, 2013. Defendant was found guilty of domestic battery as to Huerta. The charge referring to Huerta stated that defendant:

> "committed the offense of DOMESTIC BATTERY
>
> In that HE, INTENTIONALLY OR KNOWINGLY WITHOUT LEGAL JUSTIFICATION BY ANY MEANS MADE PHYSICAL CONTACT OF AN INSULTING OR PROVOKING NATURE WITH MICHAEL HUERTA, TO WIT: THROWING LIQUID IN HIS FACE, and MICHAEL HUERTA WAS A FAMILY OR HOUSEHOLDMEMBER AS DEFINED IN SUBSECTION (3) OF SECTION 112A-3 OF THE CODE OF CRIMINAL PROCEDURE OF 1963 AS AMENDED, TO WIT: NEPHEW, AND HE HAS BEEN PREVIOUSLY CONVICTED OF DOMESTIC BATTERY UNDER CASE NUMBER 081435921,
>
> IN VIOLATION OF CHAPTER 720 ACT 5 SECTION 12-3.2(a)(2) OF THE ILLINOIS COMPILED STATUTES 1992 AS AMENDED AND

Contrary to the Statute and against the peace and dignity of the same People of the State of Illinois."

¶ 4 At defendant's arraignment, the trial court informed defendant he was charged with multiple Class 4 felonies and asked if he understood. Defendant replied, "Yes." Specifically, in the presence of an assistant state's attorney and an assistant public defender, the following discussion took place:

"THE COURT: Mr. Herrera, it looks like you are charged with two felony charges: They allege two counts of domestic battery occurring on January 6th of this year at 2235 North Latrobe, in that, you caused bodily harm to a Juan DeJesus when you struck him about the body having previously been convicted of domestic battery. And you are also charged with a domestic battery to a Michael Huerta when you threw a cup at him, also charged that you have a previous conviction of domestic battery.

These are the charges against you which are Class 4 felonies. Do you understand that, sir?

THE DEFENDANT: Yes.

THE COURT: Do you understand that a Class 4 felony carries with it a possible sentence of up to 30 months probation, 1 to 3 years in the Illinois Department of Corrections, up to 6 years if you are extendable based on background. There is a period of four years of parole, of mandatory supervised release, and fines up to $2,500.

Do you understand those are all of the possible penalties of a Class 4 felony?

THE DEFENDANT: Yes, I do."

¶ 5 Immediately thereafter, the court appointed the public defender who was present in court to represent defendant.

¶ 6 The facts of the crime are not in dispute. Briefly, on January 6, 2013, brothers Huerta and DeJesus along with friend Louie Maldonado were playing video games in their house. Defendant entered the room, "ranted" at them, and left. Defendant returned moments later and threw his warm coffee at Huerta's face. The coffee was warm, but not hot enough to cause Huerta pain. Huerta began wiping the coffee off of his face. Defendant then threw the coffee cup at him. DeJesus pushed defendant down a hallway away from Huerta. Defendant hit DeJesus twice in the face with a closed hand.

¶ 7 The State rested. The trial court denied defendant's motion for a directed finding. Defendant did not present any evidence on his own behalf.

¶ 8 The jury found defendant guilty of domestic battery against Huerta and not guilty of domestic battery against DeJesus. The court asked the parties whether there was "any further argument as to the element of the prior conviction from the State or the defense?"[1] Both defense counsel and the prosecutor responded, "No, Judge." The trial court then made a "finding that the element of the prior conviction that Mr. Herrera has the prior conviction. We'll make a finding that that element exists based on the prior certified copy of conviction, as stated previously." The Court then stated:

[1] Prior to trial, defendant had waived a jury trial "for purposes of the prior conviction element only." Thus, the State did not present evidence of defendant's prior conviction to the jury. Instead, the trial court took judicial notice of defendant's conviction outside the presence of the jury.

"[THE COURT:] So there will be a verdict of guilty as to the count against Mr. Michael Huerta, and that he was previously convicted of domestic battery under Case No. 08 1435921."

¶ 9 Defendant filed a motion to reconsider which did not include a claim regarding insufficient notice that he was charged with an "enhanced felony offense." The motion was denied.

¶ 10 The court heard arguments from the parties, including facts about prior offenses committed against family members and probation that was not properly completed. The court initially sentenced defendant to 250 days in the Cook County Department of Corrections but, upon recognition that the crime was a felony, sentenced defendant to 18 months in prison with 4 years' mandatory supervised release:

"THE COURT: Mr. Herrera, your sentence is 250 days in the Cook County Department of Corrections; 102 days, you will be given credit for. You do get day-to-day credit based on the charge you were convicted of, so you're going to serve approximately 23 more days and - - I'm sorry. Yes. This was a misdemeanor, right?

[STATE'S ATTORNEY] A: No. It's a felony.

[DEFENSE COUNSEL] A: A felony.

THE COURT: I'm sorry. It would be 18 months in the Illinois Department of Corrections with 102 days time considered served, time actually served. He does get day-for-day credit.

* * *

Then there's four years of mandatory supervised release based on this charge."

¶ 11 Defendant appeals.

¶ 12 II. ANALYSIS

¶ 13 On appeal, defendant contends that his felony domestic battery conviction should be reduced to misdemeanor domestic battery. Specifically, he argues that the State failed to comply with section 111-3(c) of the Code because "the State elected to charge [defendant] with a Class A misdemeanor offense[]" and was, thus, required to provide notice that it intended to "seek an enhanced sentence." We disagree.

¶ 14 Defendant does not dispute the facts supporting his conviction.

¶ 15 A person commits the offense of domestic battery if, in pertinent part, he knowingly without legal justification by any means causes bodily harm to any family or household member. 720 ILCS 5/12-3.2 (West 2012). Domestic battery is a Class A misdemeanor. 720 ILCS 5/12-3.2(b) (West 2012). However, domestic battery is a Class 4 felony if the defendant has *any prior conviction for domestic battery.* (Emphasis added.) 720 ILCS 5/12-3.2(b) (West 2012). Specifically, section 12-3.2(b) of the Code sets forth the possible classifications and sentences for this offense:

> "(b) Sentence. Domestic battery is a Class A misdemeanor. Domestic battery is a *Class 4 felony if the defendant has any prior conviction under this Code for domestic battery* (Section 12-3.2) or violation of an order of protection (Section 12-3.4 or 12-30), or any prior conviction under the law of another jurisdiction for an offense which is substantially similar." (Emphasis added.) 720 ILCS 5/12-3.2(b) (West 2012).

¶ 16 As a threshold matter, defendant failed to preserve this issue for review. See *People v. Enoch*, 122 Ill. 2d 176, 186-87 (1988) (To preserve an issue for appeal, a party must first

make an objection to the alleged error at trial and then raise it in a posttrial motion); see also *People v. Allen*, 222 Ill. 2d 340, 352 (2006) (noting that "even constitutional errors can be forfeited"). However, where a defendant challenges his sentence as void, as is the case in the cause at bar, we will review the sentencing issue even though it was not properly preserved for review because a void sentence can be corrected at any time. *People v. Arna*, 168 Ill. 2d 107, 113 (1995); *People v. Hillier*, 237 Ill. 2d 539, 545 (2010) (forfeited claims related to sentencing issues may be reviewed for plain error).

¶ 17 The plain error doctrine allows "a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error; or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Sargent*, 239 Ill. 2d 166, 189 (2010); see also *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) (citing *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005)); see also Ill. S. Ct. R. 615(a) ("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 the sentencing context, a defendant must then show either that (1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing." *Hillier*, 237 Ill. 2d at 545.

¶ 18 Here, defendant contends that plain error is established under the second prong, that is, defendant's substantial rights were affected such that he was denied a fair sentencing hearing. Under either prong of the plain error doctrine, the burden of persuasion remains on the

defendant. *People v. Bowman*, 2012 IL App (1st) 102010, ¶¶ 29, 30. Based on the circumstances presented in this case, defendant is unable to meet this burden.

¶ 19 Section 111-3(a) of the Code provides, in pertinent part:

> "(c) When the State seeks an enhanced sentence because of a prior conviction, the charge shall also state the intention to seek an enhanced sentence and shall state such prior conviction so as to give notice to the defendant. However, the fact of such prior conviction and the State's intention to seek an enhanced sentence are not elements of the offense and may not be disclosed to the jury during trial unless otherwise permitted by issues properly raised during such trial. For the purposes of this Section, 'enhanced sentence' means a sentence which is increased by a prior conviction from one classification of offense to another higher level classification of offense set forth in Section 5-4.5-10 of the Unified Code of Corrections (730 ILCS 5/5-4.5-10); it does not include an increase in the sentence applied within the same level of classification of offense." 725 ILCS 5/111-3(c) (West 2010).

¶ 20 Our supreme court has stated, "[t]he legislature enacted section 111-3(c) to ensure that a defendant received notice, before trial, of the *offense* with which he is charged." (Emphasis in original.) *People v. Jameson*, 162 Ill. 2d 282, 290 (1994).

¶ 21 We find this court's recent opinion in *People v. Sumler*, 2015 IL App (1st) 123381, instructive in the resolution of this issue. In *Sumler*, the defendant was found guilty, in relevant part, of aggravated kidnapping and domestic battery. *Id.* The defendant brought a number of challenges on appeal, the one pertinent to the case at bar being a challenge that his aggravated kidnapping conviction should be reduced to kidnapping where the State failed to

introduce evidence during trial of his prior domestic battery conviction that enhanced his current domestic battery charge to a felony, which felony was a predicate felony to the charge of aggravated kidnapping. *Id.* As noted above, the misdemeanor crime of domestic battery is enhanced to felony domestic battery if the defendant has a prior conviction for domestic battery. *Id.*; See 720 ILCS 5/12-3.2 (West 2010). A person commits the offense of kidnapping when, in pertinent part, he knowingly and secretly confines another against her will, or by force or threat of imminent force carries another from one place to another with intent secretly to confine that other person against her will. *Id.*; 720 ILCS 5/10-1 (West 2010). The crime of kidnapping becomes aggravated kidnapping when, when committing the crime of kidnapping, the person also commits another felony upon his victim. *Id.*; 720 ILCS 5/10-2(a)(3) (West 2010).

¶ 22 We considered section 111-3(c) of the Code, as well as decisions of this court and our supreme court interpreting the section. *Id.* We focused on *People v. Easley*, 2014 IL 115581, in which our supreme court "recently determined that when a prior conviction is already a required element of the offense as alleged in the charging instrument, notice of enhancement under section 111-3(c) is not required." *Id.* at ¶ 37 (quoting *Easley*, 2014 IL 115581, ¶¶ 19, 22-26). The defendant in Easley had been sentenced as a Class 2 offender for the crime of unlawful use of a weapon by a felon. *Id*. at ¶ 40. He argued on appeal that, in noncompliance with section 111-3(c), the State had failed to notify him that it intended to charge him with an "enhanced" Class 2 offense and he should, therefore, receive a Class 3 sentence. *Id*. at ¶ 41. Our supreme court, however, "noted that the UUW by a felon statute specifically provides that a second or subsequent violation of the section ' "shall be a Class 2

felony" ' (Emphasis omitted.) *Easley*, 2014 IL 115581, ¶ 21 (quoting 720 ILCS 5/24-1.1(e) (West 2008))." *Id*. at ¶ 40. The court in *Easley* determined:

> " 'The indictment in this case alleged that defendant was guilty of unlawful use of a weapon by a felon in that he was previously convicted of unlawful use of a weapon by a felon. The section 111-3(c) notice provision clearly does not apply in this case because the State did not seek to enhance defendant's sentence with his prior conviction. Rather, as alleged in the indictment, *defendant's Class 2 sentence was the only statutorily allowed sentence* under [the UUW by a felon statute]. Defendant could not have been given a Class 3 sentence under the applicable sentencing statute.' (Emphasis added.) *Easley*, 2014 IL 115581, ¶ 22." *Sumler*, 2015 IL App. (1st) 123381, ¶ 40.

¶ 23 Like our supreme court in *Easley*, where the defendant's Class 2 sentence was "the only statutorily allowed sentence," *Easley*, 2014 IL 115581, ¶ 22, this court also found the *Sumler* defendant's felony sentence was the only statutorily allowed sentence, noting:

> "Here, defendant had a previous conviction for domestic battery at the time he committed the domestic battery at issue in this cause. Thus, when defendant was charged with domestic battery, only a felony was statutorily available. 720 ILCS 5/12-3.2(b) (West 2010); see also *Easley*, 2014 IL 115581, ¶ 22. Defendant was also charged with aggravated kidnapping, which charge alleged kidnapping under an asportation theory and enhanced by the additional felony offense of domestic battery, that is, 'he, knowingly by force or threat of imminent force carried [the victim] from one place to another with intent secretly to confine [the victim] against her will, and he committed another felony upon [the victim], to

wit: domestic battery.' As in *Easley*, the State was not seeking an enhanced sentence, but rather, the imposition of the *only* sentence statutorily available for this offense. See *Easley*, 2014 IL 115581, ¶ 22; see also [*People v.*] *Nowells*, 2013 IL App (1st) 113209, ¶ 27." (Emphasis in original.) *Sumler*, 2015 IL App (1st) 123381, ¶ 44.

¶ 24 We reasoned:

"Defendant does not dispute the facts supporting his convictions, but argues that the jury was only given opportunity to find defendant guilty of *misdemeanor* domestic battery and not of *felony* domestic battery and, therefore, defendant's domestic battery conviction cannot satisfy aggravated kidnapping's 'another felony' element. We disagree, where the State proved defendant committed kidnapping where he confined [the victim] in a vehicle and transported her to another location against her will. The State also proved defendant committed domestic battery beyond a reasonable doubt where it established defendant knowingly caused bodily harm to [the victim], with whom he had three children. This domestic battery conviction was a felony because, where defendant had a prior conviction for domestic battery, he could not be charged with or convicted of anything less than the felony. Accordingly, the State proved defendant committed felony domestic battery while also committing aggravated kidnapping.

In compliance with *Easley* and section 111-3(c), the State did not disclose defendant's prior domestic battery conviction to the jury at trial. The jury was properly instructed:

> 'A person commits the offense of domestic battery when he knowingly and by any means causes bodily harm to any family or household member.' Illinois Pattern Jury Instructions, Criminal, No. 11.11 (4th ed. 2000).

The jury found defendant guilty of domestic battery. The State then presented defendant's prior conviction for domestic battery at the sentencing hearing, along with certified copies of defendant's previous convictions for possession of a controlled substance and for attempted murder. The trial court then sentenced defendant as a Class 4 felon for the offense of aggravated kidnapping.

Our analysis here shows that, in line with our supreme court's opinion in *Easley*, defendant was charged with and convicted of felony domestic battery as a matter of law. Felony domestic battery was the only conviction possible for the offense of domestic battery as alleged in the charging instrument ('he, intentionally or knowingly without legal justification by any means caused bodily harm to [the victim], to wit: struck [the victim] about the body, and [the victim] was a family or household member as defined in subsection (3) of section 112A-3 of the Code of Criminal Procedure of 1963 as amended, to wit: they have had a dating relationship, *and he has been previously convicted of domestic battery* under case number 08144541401"). The domestic battery statute is clear that a domestic battery offense is a Class 4 felony when the defendant has one or two prior convictions for domestic battery under section 12-3.2. 720 ILCS 5/12-3.2(b) (West 2010). Therefore, the legislature has determined that defendant committed

a Class 4 felony offense based on his prior domestic battery conviction." *Sumler*, 2015 IL App (1st) 123381, ¶¶ 45-48.

¶ 25 Like *Sumler*, defendant here has a domestic battery conviction that is a felony rather than a misdemeanor because of his prior domestic battery conviction. That he was facing a Class 4 felony charge is clear from the charging instrument, which reads:

> "[Defendant] committed the offense of Domestic Battery in that he, intentionally or knowingly without legal justification by any means made physical contact of an insulting or provoking nature with Michael Huerta, to wit: Throwing liquid in his face, and Michael Huerta was a family or household member as defined in subsection (3) of Section 112A-3 of the Code of Criminal Procedure of 1963 as amended, to wit: Nephew, and **he has been previously convicted of domestic battery under Case Number 081435921** in violation of Chapter 720 Act 5 Section 12-3.2(a)(2) of the Illinois Compiled Statutes 1992 as amended Contrary to the Statute and against the peace and dignity of the same People of the State of Illinois." (Emphasis added.)

¶ 26 Like the defendant in *Sumler*, defendant had a previous conviction for domestic battery at the time he committed the domestic battery at issue in this cause. Also like *Sumler*, when defendant was charged with domestic battery, only a felony, only a felony was statutorily available. See *Sumler*, 2015 IL App (1st) 123381, ¶ 44; 720 ILCS 5/12-3.2(b) (West 2012); see also *Easley*, 2014 IL 115581, ¶ 22.

¶ 27 Moreover, for defendant to now say he was not aware he was charged with a felony offense is disingenuous, where the trial court clearly informed defendant of the felonious nature of the charges, stating:

"THE COURT: Mr. Herrera, it looks like you are charged with two felony charges *** These are the charges against you which are Class 4 felonies. Do you understand that, sir?

THE DEFENDANT: Yes.

THE COURT: Do you understand that a Class 4 felony carries with it a possible sentence of up to 30 months probation, 1 to 3 years in the Illinois Department of Corrections, up to 6 years if you are extendable based on background. There is a period of four years of parole, of mandatory supervised release, and fines up to $2,500.

Do you understand those are all of the possible penalties of a Class 4 felony?

THE DEFENDANT: Yes, I do."

¶ 28 From the record before us, it is clear defendant was aware of the nature of the charges against him.

¶ 29 We find no error here, where, when defendant had a previous conviction for domestic battery at the time he committed the domestic battery at issue in this cause, only a felony domestic battery was statutorily available for this subsequent domestic battery, and where the record on appeal establishes that defendant was aware of the felony nature of the charges against him. As such, defendant is unable to establish plain error. See, *e.g.*, *People v. McGray*, 398 Ill. App. 3d 789, 794 (2010) (Absent error, there can be no plain error).

¶ 30 III. CONCLUSION

¶ 31 For all of the foregoing reasons, we affirm the judgment of the circuit court of Cook County.