SECOND DIVISION
September 30, 2016

No. 1-14-1509

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. 13 CR 19413
	)	
JAMES JACOBS,	)	Honorable
	)	Maura Slattery-Boyle,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Hyman and Justice Mason concurred in the judgment.

O R D E R

¶ 1 *Held:* Defendant's Class X sentence was not the result of double enhancement. Defendant's 605(a) argument fails because he failed to establish prejudice or a denial of real justice.

¶ 2 Sentencing as a Class X offender requires a conviction of a Class 2 or greater felony and two previous Class 2 or higher convictions. The question presented in this case is whether the use of one prior Class 2 conviction as an element of the offense and the use of a separate prior Class 2 conviction to notify the defendant that the charged offense will be elevated from a Class 3 felony to a Class 2 felony prohibits the use of either previous conviction for Class X sentencing

purposes under the concept of a double enhancement.

¶ 3 Defendant James Jacobs was charged with failure to report as a sex offender and knowingly registering a false address in violation of section 3(A) and section 10(A) of the Sex Offender Registration Act (Act) (730 ILCS 150/1 *et seq*. (West 2012)). The first count alleged that, having been previously convicted of aggravated criminal sexual abuse (a Class 2 felony) in case 86CR1532901, defendant was required to register and knowingly failed to report a change of address from September 13, 2012, through September 26, 2013, in violation of section 3(A) of the Act (730 ILCS 150/3(A) (West 2012)). The second count alleged that during the same period of time, defendant who had previously been convicted of aggravated criminal sexual abuse in case 86CR1532901, was required to register and knowingly or willfully registered a false address in violation of section 10(A) of the Act (730 ILCS 150/10(A) (West 2012)). In both counts, it was stated that "the State shall seek to sentence [defendant] as a Class 2 offender because [he] was previously convicted of failure to register as a sex offender under case number 09C55022701."

¶ 4 The evidence at a bench trial established that defendant had slept at a homeless shelter sporadically between April 2012 and September 2012. On June 27, 2013, he registered with the Chicago Police Department as a sex offender and listed the homeless shelter as his address. After June 27, 2013, defendant never indicated to police that he lacked a fixed residence or had changed his address. On September 26, 2013, defendant was arrested and told police that he had not stayed at the homeless shelter in several months. The State introduced a certified copy of defendant's prior conviction for aggravated criminal sexual abuse (86 CR 1532901) to prove the element of the offense that he was required to register as a sex offender.

¶ 5 The trial court found defendant guilty on both counts of violating the Act. During

sentencing, the State informed the court that defendant had three prior convictions for Class 1 or 2 felonies: a Class 2 aggravated criminal sexual abuse in case 86CR1532901, a Class 1 attempted aggravated criminal sexual assault in case 91CR172710011, and a Class 2 failure to register as a sex offender in case 09C55022701. Additionally, defendant had two Class 4 convictions for failure to register as a sex offender. Based on this record, the State argued that defendant was eligible for Class X sentencing. Defense counsel did not challenge any of defendant's previous convictions, which were listed in the presentence investigation report (PSI), but contended that Class X sentencing would constitute improper double enhancement. Defense counsel stated:

> "*** [T]he charging document itself sets forth the case number of 86 CR 15329 (01), which was the underlying sex offense, which obligated my client to register as a sex offender. In addition, the other case number 09 C 55022701, which was a failure to register Class 2, that was used to enhance the current failure to register from a Class 3 to a Class 2. We would argue that both cases as cited in the charging document [are] an element of the offense and, therefore, both cases cannot be used to *** enhance it to a Class X [offense]."

The prosecutor responded:

> "*** [T]he legislature intended the defendant to be charged [with] a harsher penalty by using one of his previous failures to register as an enhancement to make him a Class 2. *** [I]t just so happens that the defendant has failed to register so many times that one of them that we did use happened to be a Class 2 [felony]."

¶ 6 The court stated:

> "*** [T]here's several failures to register in here which are Class 2's in and of themselves [and] then that raises *** Class X sentencing guidelines. So that is the

> intervening factor here. Not [that] it's a sex case, and then one failure to register, that cannot be used as a double enhancement, but all of a sudden the fact of failure to register, not registering, not registering, not registering, those cases and this subsequent case [are] what make him fall under the Class X sentencing guidelines."

¶ 7 The court sentenced defendant as a Class X offender to concurrent terms of eight years' imprisonment for each offense. Defendant did not file a motion to reconsider sentence.

¶ 8 On appeal, defendant argues that (1) the trial court used his prior conviction for aggravated criminal sexual abuse as an element of the charged offenses and as a basis for Class X sentencing enhancement, resulting in improper double enhancement, and (2) the trial court issued improper postsentencing admonishments in violation of Illinois Supreme Court Rule 605(a)(3) (eff. Oct. 1, 2001). We affirm defendant's conviction and sentence.

¶ 9 Defendant contends that his Class X sentences resulted from improper double enhancement because his prior conviction for aggravated criminal sexual abuse (86CR1532901) was used as an element of both charges and as one of the two prior Class 2 or greater felonies that made him eligible for Class X sentencing.

¶ 10 As an initial matter, the State argues that defendant forfeited review of this issue by failing to file a motion to reconsider sentence in the trial court. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010) ("to preserve a claim of sentencing error, both a contemporaneous objection and a written postsentencing motion raising the issue are required"). Plain errors affecting sentencing may be addressed on review even when not properly preserved. *People v. Lewis*, 2014 IL App (1st) 122126, ¶ 27. However, the first inquiry before determining whether there was a plain error is to determine whether there was a clear and obvious error. *People v. Eppinger*, 2013 IL

114121, ¶ 19. Absent an error, there can be no plain error and defendant's forfeiture will be honored. *Id.* Therefore, our initial inquiry is whether error occurred.

¶ 11 In sentencing, a double enhancement occurs when either (1) the same factor is used as an element of an offense and as a basis for imposing a harsher sentence, or (2) the same factor is used twice to elevate the severity of the charged offense. *People v. Guevara*, 216 Ill. 2d 533, 545 (2005). The prohibition against double enhancement is a rule of statutory construction, "premised on the assumption that the legislature considered the factors inherent in the offense in determining the appropriate range of penalties for that offense." *People v. Rissley*, 165 Ill. 2d 364, 390 (1995). However, where the legislature clearly expresses its intention for there to be a double enhancement, there is no prohibition. *People v. Phelps*, 211 Ill. 2d 1, 15 (2004). As the double enhancement rule involves statutory construction, our standard of review is *de novo*. *Id.* at 12.

¶ 12 Under section 6 of the Act, individuals defined as sex offenders must report in person to the law enforcement agency with whom they last registered no later than 90 days after the date of his or her last registration and every 90 days thereafter. 730 ILCS 150/6 (West 2012); 730 ILCS 150/2(A)(1)(a) (West 2012). A sex offender who lacks a fixed residence or temporary domicile must notify, in person, the agency of jurisdiction of his or her last known address within three days after ceasing to have a fixed residence. *Id.* A first conviction for violation of the Act is a Class 3 felony, and a second or subsequent violation of the Act is a Class 2 felony. 730 ILCS 150/10(a) (West 2012) ("Any person who is convicted for a violation of this Act for a second or subsequent time is guilty of a Class 2 felony").

¶ 13 The State argues that double enhancement did not occur here because it was only required to prove "defendant had a conviction" that made his registration necessary. The State

argues that sex offenders, as defined, include certain persons convicted of first- degree murder, (730 ILCS 150/2(C-5) (West 2012)) or one who is charged with a sex offense or an attempt sex offense and is either convicted, found not guilty by reason of insanity or not acquitted at a discharge hearing pursuant to section 104-25(c) (725 ILCS 5/104-25 (West 2012)). 730 ILCS 150/2(A)-(B) (West 2012); See *In re S.B.*, 2012 112204, ¶ 23 (juvenile found "not not guilty" of sex offense after discharge hearing was a defined sex offender and required to register.) While this argument may be correct in another context, this distinction does not apply in this case because the State alleged the defendant was required to register because of a previous conviction that brought defendant within the definition of a sex offender. If there was no allegation and proof that defendant was previously convicted of aggravated criminal sexual abuse in case 86CR1532901, there would have been no proof that he was required to register under the Act. Thus, in this case, without proof of a predicate conviction there would be no violation to begin with.

¶ 14 Defendant argues that this case is controlled by *People v. Hall*, 2014 IL App (1st) 122868. In *Hall*, the defendant was convicted for failure to report under section 6 of the Act and charged as a Class 2 offender because of a previous conviction for failure to register. *Id.* ¶ 2, ¶ 11. Defendant had two prior Class 2 or higher felony convictions: one for driving under the influence of alcohol, and another for aggravated criminal sexual assault. *Id.* ¶ 13. Based on these convictions, he was sentenced as a Class X offender. *Id.* The aggravated criminal sexual assault conviction was used to prove the element of the offense that he was a sex offender required to register under the Act. *Id.* ¶ 14. On review, a different division of this court concluded that "the use of the same conviction as an element of the offense and as a basis for imposing a Class X sentence amounted to an impermissible double enhancement" because "defendant was subject to

the Act's reporting requirements and Class X sentencing based [on] his prior conviction for aggravated criminal sexual assault." *Id.* ¶¶ 13-14.

¶ 15 The State argues that *Hall* was wrongly decided because the defendant's conviction for aggravated criminal sexual assault was used to establish that he was subject to the Act's reporting requirements but is not an element of the offense itself. As previously stated, this conviction was necessary to prove the charged offenses so it was an element of these offenses. We also note that we expressly rejected this argument in *Hall*. *Id*. ¶ 14 ("we reject the State's argument that defendant's prior conviction for aggravated criminal sexual assault was not used to 'enhance' both the charge in the instant case and the sentence"). We again rejected this argument in *People v. Brock*, 2015 IL App (1st) 133404, ¶ 42 (following *Hall*).

¶ 16 Here, defendant was charged with two counts of violating the Act. To meet the pleading requirement that defendant was required to register, the State chose to allege in both counts that defendant had previously been convicted of Class 2 aggravated criminal sexual abuse in case number 86CR1532901. This conviction was established by introduction of a certified copy of conviction. Without evidence of this alleged conviction there would have been no proof that defendant was required to register under the Act. The State then turned around and used the same conviction as one of the convictions necessary to make defendant Class X eligible. As such, under *Hall*, the State improperly used this conviction as both an element of the offenses and as one of the two prior Class 2 or higher felonies required to make defendant eligible for Class X sentencing. *Hall*, 2014 IL App (1st) 122868, ¶¶ 13-14.

¶ 17 With the Class 2 aggravated criminal sexual abuse (86CR1532901) being ineligible for Class X sentencing purposes, the next issue is whether the defendant had two prior Class 2 or higher convictions to qualify for Class X sentencing? A defendant convicted of a Class 1 or

Class 2 felony is eligible for Class X sentencing where he or she is over the age of 21, and has at least two prior convictions for two Class 2 or higher class felonies arising out of a different series of acts. 730 ILCS 5/5-4.5-95(b) (West 2012).

¶ 18 As previously stated, defendant has additional convictions for a Class 1 attempted aggravated criminal sexual assault in case 91CR172710011, and a Class 2 failure to register as a sex offender in case 09C55022701. The conviction in 91CR17271001 can stand as one of the two qualifying Class 2 or higher convictions to make defendant class X eligible because it was not used in this case as either an element of the offense or to notify the defendant that the State would seek to elevate the class of this offense.

¶ 19 That leaves defendant's prior Class 2 conviction for failure to register as a sex offender in case 09C55022701. The problem with using defendant's conviction under case 09C55022701for failure to register as a sex offender to establish defendant's eligibility to be sentenced as a Class X offender, defendant argues, is that the State used this conviction in the charging instrument to provide notice to defendant that because of this conviction, it was seeking seek to enhance the class of offense from a Class 3 to a Class 2.

¶ 20 Section 111-3(c) of the Code of Criminal Procedure, provides:

> "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 ***." 725 ILCS 5/111-3(c) (West 2010).

The notice provision contained in section 111-3(c) applies when "the prior conviction that would enhance the sentence is not already an element of the offense." *People v. Easley*, 2014 IL

115581, ¶ 19; see also *People v. Jameson*, 162 Ill. 2d 282, 290-91 (1994) (recognizing legislative intent for section 111-3(c) to require pretrial notice "when a prior conviction will raise the classification of the offense").

¶ 21 We find the analysis in *People v. Easley*, 2014 IL 115581, instructive on this issue. In *Easley*, defendant was convicted of Class 3 felony UUW by a felon and sentenced as a Class 2 offender under section 24–1.1(e) because it was his second felony UUW conviction. 720 ILCS 5/24–1.1(e) (West 2008) ("any second or subsequent violation shall be a Class 2 felony"). *Id*. ¶ 10. The State did not give notice that it would seek sentencing as a Class 2 felony. Easley argued that section 111-3(c) required the State to give him notice of its intent to seek an enhanced sentence and the failure to do so required resentencing as a Class 3 offender. *Id*. ¶¶ 13-15. The *Easley* court found section 111-3(c) did not apply 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 section 24-1.1(e) of the Criminal Code (720 ILCS 5/24–1.1(e) (West 2008)). Defendant could not have been given a Class 3 sentence under the applicable sentencing statute." *Id*. ¶ 22.

¶ 22 The *Easley* court also cited with approval *People v. Powell*, 2012 IL App (1st) 102363, ¶ 12. In *Powell*, the defendant was convicted of UUW by a felon based on a prior burglary conviction. The defendant argued the court erred in sentencing him as a Class 2 felon when, after using his forcible felony burglary conviction to upgrade the misdemeanor UUW offense to a felony, the court used the same burglary conviction to enhance his sentence. *Id.* ¶ 6. The court observed that "an exception to the prohibition against double enhancement occurs where the legislature clearly intends to enhance the penalty based upon some aspect of the crime and that intention is clearly expressed. *People v. Phelps*, 211 Ill.2d 1, 12 (2004.) (citing *People v. Rissley*,

165 Ill.2d 364, 390 (1995)). *Powell* reasoned that the legislature intended to elevate the class of felony and impose a greater sentence for a person with a prior forcible felony conviction and "[O]nce defendant was convicted of the Class 2 felony, no further enhancement occurred. *Id.* ¶ 11. The *Powell* court went on to find "[t]he flaw in defendant's reasoning is that the sentencing court did not determine that defendant committed a Class 2 felony; the General Assembly made that determination in enacting [the] section. * * * The trial court did not impermissibly enhance defendant's penalty, but simply imposed the special penalty range established by the legislature for defendant's conduct." *Id.* ¶ 12. Simply stated, defendant was consistently charged with a Class 2 offense, found guilty of a Class 2 offense, and sentenced as a Class 2 offender. There is no error here." *Id.* ¶ 26.

¶ 23 Similar to *Easley* and *Powell*, defendant's prior conviction under 09C55022701 for failure to register is not an element of either of the charged offenses. Rather, the use of defendant's conviction in 09C55022701 for failure to register merely provided notice to the defendant under section 111-3(c) that the State would be seeking a Class 2 sentence according to the penalty set by the legislature for those individuals who have been previously convicted of failing to register more than two times. As in *Easley* and *Powell*, defendant could not have been sentenced as a Class 3 offender where the legislature did not allow for the State to seek anything but a Class 2 sentence for defendant's failure to register. 730 ILCS 150/10(a) (West 2012) ("Any person who is convicted for a violation of this Act for a second or subsequent time is guilty of a Class 2 felony"). 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 Code. Therefore, defendant's conviction under

09C55022701 was not used by the State to enhance the class of sentence and can be used as the other qualifying offense that makes defendant Class X eligible.

¶ 24 In sum, while the State could not use defendant's conviction in 86CR1532901 as one of the qualifying offenses to sentence defendant as a Class X offender, his Class 1 conviction for attempted aggravated criminal sexual assault in case 91CR172710011, and his Class 2 failure to register as a sex offender in case 09C55022701 can serve as qualifying offenses. Therefore, we find that no error occurred in sentencing defendant as a Class X offender and plain error analysis is unnecessary. As no error occurred, defendant could not have suffered from ineffective assistance of counsel for failure to preserve this issue.

¶ 25 We similarly reject defendant's argument that, plain error aside, we should vacate defendant's Class X sentence because the trial court failed to properly admonish defendant pursuant to Illinois Supreme Court Rule 605(a) (eff. Oct 1, 2001). Rule 605(a) requires:

> "(3) At the time of imposing sentence or modifying the conditions of the sentence, the trial court shall also advise the defendant as follows:
>
> A. that the right to appeal the judgment of conviction, excluding the sentence imposed or modified, will be preserved only if a notice of appeal is filed in the trial court within thirty (30) days from the date on which sentence is imposed;
>
> B. that prior to taking an appeal, if the defendant seeks to challenge the correctness of the sentence, or any aspect of the sentencing hearing, the defendant must file in the trial court within 30 days of the date on which sentence is imposed a written motion asking to have the trial court reconsider the sentence imposed, or consider any challenges to the sentencing hearing, setting forth in the motion all issues or claims of error regarding the sentence imposed or the sentencing hearing;

C. that any issue or claim of error regarding the sentence imposed or any aspect of the sentencing hearing not raised in the written motion shall be deemed waived; and

D. that in order to preserve the right to appeal following the disposition of the motion to reconsider sentence, or any challenges regarding the sentencing hearing, the defendant must file a notice of appeal in the trial court within 30 days from the entry of the order disposing of the defendant's motion to reconsider sentence or order disposing of any challenges to the sentencing hearing." Ill. S. Ct. Rule 605(a) (eff. Oct. 1, 2001).

¶ 26 Defendant complains that the trial court gave inadequate 605(a) admonishments because the trial court described his case as a guilty-plea case, conflated the rules and failed to explain that a postsentencing motion could address challenges to the sentencing hearing. There is no doubt based on the record that the admonishments defendant received did not reflect the exact language of Rule 605(a). However, where a defendant is given incomplete Rule 605(a) admonishments regarding the preservation of sentencing issues for appeal, remand is required only where there has been prejudice or a denial of real justice as a result of the inadequate admonishment. *People v. Henderson*, 217 Ill. 2d 449, 466 (2005). While defendant argues that the trial court's admonishments were inadequate, he has failed to demonstrate that he suffered prejudice or a denial of real justice. *Id.* Accordingly, we find that remand is not required.

¶ 27 Based on the foregoing, the judgment of the trial court is affirmed.

¶ 28 Affirmed.