FIRST DIVISION
March 26, 2018

No. 1-17-0346

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 19915
	)	
VINCENT D. JONES,	)	Honorable
	)	Dennis J. Porter,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Pierce concurred in the judgment.
Justice Mikva concurred in part and dissented in part.

ORDER

¶ 1 ***Held:*** We affirm defendant's conviction for being an armed habitual criminal. We also affirm defendant's sentence.

¶ 2 Defendant-appellant, Vincent Jones, was arrested by Chicago Police on suspicion of aggravated robbery. After his arrest, defendant was also charged with being an armed habitual criminal and unlawful use of a weapon. Defendant proceeded to a bench trial where he was

found guilty of all charges. Defendant filed a motion for a new trial, which the trial court denied. The trial court sentenced defendant to 30 years in prison for the aggravated robbery with a firearm conviction and 15 years for the armed habitual criminal conviction. The sentences run concurrently.

¶ 3 Defendant raises two issues on appeal. Defendant argues (1) the State failed to prove the predicate felonies used to obtain the armed habitual criminal conviction were forcible felonies, and (2) his 30-year sentence is excessive in light of the nature of the offense and his background.

¶ 4 After reviewing the record and relevant case law, we affirm defendant's conviction for being an armed habitual criminal. We also find no error in defendant's 30-year sentence.

¶ 5 JURISDICTION

¶ 6 On January 29, 2015, a judge, sitting as the finder of fact, found defendant guilty of aggravated robbery and being an armed habitual criminal. On April 23, 2015, the trial court sentenced defendant to 30 years in prison. A notice of appeal was filed on the same day. Accordingly, this court has jurisdiction pursuant to article VI, section 6, of the Illinois Constitution and Illinois Supreme Court Rules 603 and 606, governing appeals from a final judgment of conviction in a criminal case entered below. Ill. Const. 1970, art. VI, § 6; Ill. S. Ct. Rs. 603, 606 (eff. Feb. 6, 2013).

¶ 7 BACKGROUND

¶ 8 Defendant was charged with aggravated robbery, being an armed habitual criminal, and several variations of unlawful use of a weapon based on allegations he robbed Isadore Campbell of over $400. Defendant proceeded to a bench trial.

¶ 9 At trial, Isadore Campbell, the victim and, himself, a two-time convicted felon, testified that on September 28, 2013, around 4:00 p.m., he was in the area of Madison Street and

Sacramento Boulevard in Chicago. He brought loose cigarettes from an individual but denied that person was defendant. While on the street, Campbell admitted to "flaunting [his] money off just to show the women that I have money on me," in the hopes he would "impress the ladies." Campbell testified he had $411 in his possession. One $200 bundle was wrapped with a red rubber band and the remaining $211 was wrapped in a brown rubber band. The majority of the currency were ones and fives because Campbell was "going to the strip club later on that night." Campbell left the area and returned around 8:00 p.m. with a female. At this time, a man, who Campbell identified in court as the defendant, approached him and stated, "Lower that shit, bitch." Campbell understood this phrase to mean a robbery and to "give it all up." Defendant showed Campbell a grey and chrome .45 automatic with the barrel tucked into his waistband. Campbell gave defendant the two bundles of cash. After taking the money, defendant instructed Campbell to "turn around and walk the opposite way." Campbell complied with the demand. Defendant then ran off.

¶ 10 Campbell ducked behind a white van and saw defendant running away toward Jackson Boulevard and California Avenue. Campbell did not call police, but ran after defendant. He lost track of defendant, but soon came upon a group of females. After speaking with the group, Campbell ran in the opposite direction and eventually came upon police cars at Sacramento Boulevard and Monroe Street. Defendant sat in the back seat of one of the police cruisers. Campbell informed an officer on the scene that "This is the guy that just robbed me." On cross-examination, Campbell denied using any drugs that day.

¶ 11 The State then called Officer Howard Ray. Officer Ray testified he was on patrol around 8:00 p.m. in the area of 2900 West Jackson Boulevard. He saw defendant running at "full speed" while holding his side. Officer Ray then proceeded through an alley into a vacant lot and said,

"What's up" to defendant. Officer Ray intended to find out why defendant was running. Defendant looked at the officer, then looked down by his side, then looked at the officer again before running away. While running, Officer Ray observed defendant drop a black and silver gun. Officer Ray stopped to retrieve the gun and noticed defendant run into the building at 2922 West Monroe Street. Officer Ray could not recall the number of levels the building had but did recall it had a ground level and basement. After speaking with a woman at the door, Officer Ray went into the basement. In the basement, he found defendant sitting on a bathroom toilet, "with no clothes on" and "sweating a lot." A gray hooded sweatshirt was found nearby on the floor. Two bundles of cash, one with a red rubber band and another with a brown rubber band, were found inside the hooded sweatshirt.

¶ 12 Officer Herrera testified that he inventoried the gun, sweatshirt, and cash. One bundle of cash had $179 and the other had $232. One bundle had a red rubber band while the other had a brown rubber band. The State then introduced two certified prior convictions for defendant: 05 CR 21314 (aggravated robbery) and 05 CR 21315 (aggravated robbery). These certified copies of conviction were both admitted into evidence. The State then rested.

¶ 13 Defendant moved for a directed verdict, but this was denied by the trial court. Defendant did not testify but the parties agreed to a stipulation concerning the testimony of Detective Schadel. The parties stipulated that Detective Schadel spoke with Campbell, who said that he purchased loose cigarettes from defendant and also described the gun as "black semiautomatic." The defendant then rested.

¶ 14 The trial court found Campbell's testimony "massively" corroborated by the officers' testimony and the items recovered by those officers. The court found defendant guilty on all

counts. It then merged counts three through six (the variations of unlawful use of a weapon) with count two (armed habitual criminal).

¶ 15 At sentencing, the State noted defendant's prior felonies, and asked for the maximum allowable sentence, 45 years. Defense counsel noted defendant's sad family history, including the death of his older brother in a drive-by shooting when defendant was eleven. After hearing from both parties, the trial court sentenced defendant to 30 years for aggravated robbery with a firearm and 15 years for the armed habitual criminal conviction. The sentences will run concurrently.

¶ 16 Defendant timely filed his notice of appeal.

¶ 17 ANALYSIS

¶ 18 Before this court, defendant challenges his conviction for being an armed habitual criminal and the length of his sentence. Defendant does not challenge his convictions for aggravated robbery or unlawful use of a weapon.

¶ 19 In his first issue, the defendant argues this court should reverse his conviction for being an armed habitual criminal because the State failed to prove at trial that either of his prior convictions for aggravated robbery were forcible felonies. Defendant argues that aggravated robbery is neither specifically listed as a forcible felony or falls within the statute's residual clause.

¶ 20 This argument raises an issue of statutory construction, which we review *de novo*. *In re Detention of Liebermann*, 201 Ill. 2d 300, 307 (2002). The primary goal of statutory construction is to ascertain and give effect to the intent of the legislature. *Id*. Legislative intent is best ascertained by examining the language of the statute itself. *People v. Robinson*, 172 Ill. 2d 452,

457 (1996). Where the language is clear and unambiguous, there is no need to resort to aids of statutory construction. *People v. Pullen*, 192 Ill. 2d 36, 42 (2000).

¶ 21 In order to obtain a conviction for being an armed habitual criminal (AHC) under section 24-1.7(a)(1) (720 ILCS 5/24-1.7(a)(1) (West 2016)), the State must prove the defendant received, sold, possessed, or transferred a firearm after having been at least twice convicted of "a forcible felony as defined by Section 2-8" of the criminal code. *Id*. Section 2-8 defines "forcible felony" as:

> "[T]reason, first degree murder, second degree murder, predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, robbery, burglary, residential burglary, aggravated arson, arson, aggravated kidnaping, kidnaping, aggravated battery resulting in great bodily harm or permanent disability or disfigurement and any other felony which involves the use or threat of physical force or violence against any individual." 720 ILCS 5/2-8 (West 2016).

Defendant argues aggravated robbery is not specifically listed in the enumerated crimes so in order to qualify as forcible felony aggravated robbery must fall within the residual clause. We agree. *People v. White*, 2015 IL App (1st) 131111, ¶ 30 (where predicate offense not specifically listed in section 2-8, it must fall within section 2-8's residual clause in order to satisfy the forcible felony statute and in turn the [AHC] statute). To show an offense falls with section 2-8's residual clause, one of two circumstances must be present: (1) "the record must show that the specific circumstances of the defendant's [aggravated robbery] conviction fall under the residual clause"; or (2) the predicate felony "must inherently be a forcible felony under the residual clause." *Id.* ¶ 33.

¶ 22 Defendant argues that the State did not present any evidence of the circumstances underlying his aggravated robbery convictions. Defendant argues the State presented no evidence at trial that the aggravated robberies involved the use or threat of physical force or violence against another individual. We must disagree with defendant's characterization of the record. The record shows that after the testimony of Officer Herrera, the State's Attorney presented the court with two exhibits. Each exhibit was a certified copy for a different aggravated robbery conviction. Those two exhibits were accepted into evidence without objection. The State's Attorney's statements in the record are not evidence and were not the basis of defendant's conviction for AHC. The certified copies of conviction represent the basis for defendant's conviction for AHC. However, those two pieces of evidence are not in the appellate record before us. Accordingly, we are unable to determine whether the evidence showed the specific circumstances of defendant's aggravated robbery convictions involved the use or threat of physical force or violence.

¶ 23 In an appeal, "it is the appellant's burden to provide a sufficiently complete record to allow for meaningful appellate review and all doubts arising from the incompleteness in the record will be resolved against the appellant." *People v. Salinas*, 383 Ill. App. 3d 481, 489-90 (2008) citing *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Because the record concerning the underlying aggravated robbery convictions is incomplete, this issue must be resolved against the appellant and defendant's conviction for being an armed habitual criminal is affirmed.

¶ 24 Even if defendant had submitted the two pieces of evidence and they did not show the circumstances underlying the convictions, we conclude aggravated robbery represents an inherently forcible felony under the residual clause of section 2-8. Section 18-1 defines both robbery and aggravated robbery. 720 ILCS 5/18-1(a), (b) (West 2016). The section states:

> "(a) Robbery. A person commits robbery when he or she knowingly takes property, except a motor vehicle covered by Section 18-3 or 18-4, from the person or presence of another by the use of force or by threatening the imminent use of force.
>
> (b) Aggravated robbery.
>
> (1) A person commits aggravated robbery when he or she violates subsection (a) while indicating verbally or by his or her actions to the victim that he or she is presently armed with a firearm or other dangerous weapon, including a knife, club, ax, or bludgeon. This offense shall be applicable even though it is later determined that he or she had no firearm or other dangerous weapon, including a knife, club, ax, or bludgeon, in his or her possession when he or she committed the robbery.
>
> (2) A person commits aggravated robbery when he or she knowingly takes property from the person or presence of another by delivering (by injection, inhalation, ingestion, transfer of possession, or any other means) to the victim without his or her consent, or by threat or deception, and for other than medical purposes, any controlled substance." *Id.*

Both the language found in subsection (b)(1) and (b)(2) indicate they are inherently forcible felonies. Our supreme court has held that "[i]t is the contemplation that force or violence against an individual might be involved combined with implied willingness to use force or violence against an individual that makes a felony a forcible felony under the residual clause of section 2-8." *People v. Belk*, 230 Ill. 2d 187, 196 (2003). Subsection (b)(1) is obviously a forcible felony

because it requires a violation of subsection (a), which itself discusses taking property "by use of force or by threatening the imminent use of force." 720 ILCS 5/18-1(a) (West 2016).

¶ 25 Notably, subsection (b)(2) does not require a violation of subsection (a) nor does it discuss firearms or other dangerous weapons as in (b)(1). Subsection (b)(2) contemplates the use of a controlled substance to incapacitate or otherwise disable the victim in order to effectuate the taking of property. *Id.* § 18-1(b)(2). Defendant argues "the point of using a controlled substance to commit robbery indicates a desire to avoid force." This argument puts the cart before the horse. Before a taking occurs under (b)(2), the perpetrator must first deliver a controlled substance into the victim's body. This is an invasion of a most serious nature. Using a controlled substance in the manner described in subsection (b)(2) is a violent act regardless of the delivery method. *Belk*, 203 Ill. 2d at 196. We therefore conclude aggravated robbery is an inherently forcible felony so as to fall within the residual clause of section 2-8 (720 ILCS 5/2-8 (West 2016)).

¶ 26 In his second issue, defendant contends his 30-year prison sentence is excessive because his offense was non-violent and his background shows a stable marriage and commitment to his family. In his opening brief, defendant argues the excessive nature of the sentence was raised in a motion to reconsider sentence. However, the State points out that the cited page for the motion to reconsider does not exist and a motion to reconsider sentencing is found nowhere else in the record. The State argues that this failure coupled with defendant's failure to argue plain-error in his opening brief results in forfeiture on appeal.

¶ 27 In order to preserve a claim of sentencing error, a defendant must object to the error at the sentencing hearing as well as raise the objection in a post-sentencing motion. *People v. Hillier*, 237 Ill. 2d 539, 544 (2009). Issues in a post-trial motion must be raised with enough specificity

to afford the trial court the opportunity to rule on the issue presented for review. *People v. McMillen*, 281 Ill. App. 3d 247, 251 (1996). Requiring a written post-sentencing motion allows the trial court the opportunity to review a defendant's contention of sentencing errors and saves the delay and expense inherent in the appeal if the contention is meritorious. *People v. Reed*, 177 Ill. 2d 389, 393-94 (1997). We agree with the State that defendant's failure to object at sentencing and raise the issue in a post-sentencing motion results in forfeiture of the issue on appeal.

¶ 28 As stated above, defendant did not raise plain-error in his opening brief and the State, in its appellee brief, argues defendant has forfeited any plain-error claim. However, forfeiture is a limitation on the parties, not the court. *People v. Hamilton*, 179 Ill. 2d 319, 323 (1997). In the interest of justice we will review defendant's sentence to determine whether plain-error occurred.

¶ 29 The plain-error doctrine is well known in Illinois jurisprudence. This doctrine allows reviewing courts to consider an unpreserved sentencing error when "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." *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). It is defendant's burden to satisfy either prong. *Id.*

¶ 30 In this case, defendant's argument centers on the first prong. In the context of alleging an error in sentencing under the first prong, a defendant must show the mitigation and aggravation evidence were closely balanced. *People v. Hall*, 195 Ill. 2d 1, 18 (2000).

¶ 31 After reviewing the record, we conclude the evidence in aggravation and mitigation was not closely balanced. The mitigation evidence noted that defendant grew up in a troubled neighborhood and his brother was killed in a drive-by shooting at a young age. Despite this mitigation evidence, the evidence in aggravation was substantial. The evidence showed

defendant began committing crimes in 1997 at the age of 13. Since that time, defendant has run afoul of the law over twenty times. As a minor, defendant was adjudged delinquent after committing aggravated criminal sexual abuse. As previously mentioned defendant has two prior convictions for aggravated robberies. Defendant has been arrested for failing to register as a sex offender and for failing to notify the State of an address change. Defendant's criminal history can best be summarized as showing a sustained pattern of criminal activity leading up to the aggravated robbery with a firearm conviction in this matter. We find no error with defendant's sentence and affirm it.

¶ 32 CONCLUSION

¶ 33 For the foregoing reasons, we affirm defendant's conviction for being an armed habitual criminal. We also affirm defendant's sentence.

¶ 34 Affirmed.

¶ 35 JUSTICE MIKVA, dissenting in part:

¶ 36 I concur in most of the court's opinion. I dissent only from the court's conclusion that the State has shown that Mr. Jones is guilty of being an armed habitual criminal (AHC) based on nothing more than two certified convictions for aggravated robbery.

¶ 37 The Court suggests that Mr. Jones has not given us a sufficient appellate record to decide this issue because the certified copies of Mr. Jones's convictions are not in the record. *Infra* ¶ 21. However, as the State implicitly acknowledges, those certified copies will not contain any information about the specific and particularized facts of Mr. Jones's aggravated robbery convictions. The State does not contend that it put in any such evidence. Rather, the State argues that "every aggravated robbery inherently includes the threat of physical force or violence

sufficient to qualify as a forcible felony." Thus, I think the record is sufficient for us to decide Mr. Jones's argument on the merits.

¶ 38 The court goes ahead and does that, but concludes that aggravated robbery is necessarily a forcible felony. *Infra* ¶¶ 23-24. I disagree. A forcible felony is defined by section 2-8 of the Criminal Code of 2012 (Code) (720 ILCS 5/2-8 (West 2014)):

> " 'Forcible felony' means treason, first degree murder, second degree murder, predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, robbery, burglary, residential burglary, aggravated arson, arson, aggravated kidnaping, kidnaping, aggravated battery resulting in great bodily harm or permanent disability or disfigurement and any other felony which involves the use or threat of physical force or violence against any individual."

¶ 39 As the State acknowledges, although robbery is listed as a forcible felony under this definition, aggravated robbery is not. Interestingly, the Code's definition of forcible felony specifically enumerates the aggravated form of several offenses—including aggravated criminal sexual assault, aggravated arson, aggravated kidnapping—but specifically does *not* enumerate aggravated robbery.

¶ 40 Robbery, of course, does require the use of force or threat of force, so if, as the State argues, an "aggravated robbery" always encompassed simple robbery as an element, the argument that an aggravated robbery is always a forcible felony would be well taken. However, that is not the case. A defendant can be guilty of aggravated robbery without explicitly using force or the threat of force. Section 18-1 of the Code defines robbery and aggravated robbery as follows:

> "(a) Robbery. A person commits robbery when he or she knowingly takes

property, except a motor vehicle covered by Section 18-3 or 18-4, from the person or presence of another by the use of force or by threatening the imminent use of force.

(b) Aggravated robbery.

(1) A person commits aggravated robbery when he or she violates subsection (a) while indicating verbally or by his or her actions to the victim that he or she is presently armed with a firearm or other dangerous weapon, including a knife, club, ax, or bludgeon. This offense shall be applicable even though it is later determined that he or she had no firearm or other dangerous weapon, including a knife, club, ax, or bludgeon, in his or her possession when he or she committed the robbery.

(2) A person commits aggravated robbery when he or she knowingly takes property from the person or presence of another by delivering (by injection, inhalation, ingestion, transfer of possession, or any other means) to the victim without his or her consent, or by threat or deception, and for other than medical purposes, any controlled substance." 720 ILCS 5/18-1 (West 2014).

¶ 41 As the court recognizes (*infra* ¶ 24), one can commit aggravated robbery without committing robbery. Subsection (b)(2) defines aggravated robbery as the taking of property by delivery of a controlled substance that the perpetrator gets the victim to take without consent, either "by threat or deception." Although deception may not be any less pernicious than the use or threat of force or violence, it is different. I cannot assume that deceiving someone into using a controlled substance inherently qualifies as the use or threat of physical force or violence.

Therefore, I would find that the State has not carried its burden of proving Mr. Jones guilty beyond a reasonable doubt of being an AHC, and I would reverse his conviction on that count.

¶ 42 I otherwise concur in the opinion of the court.