

THIRD DIVISION
October 30, 2013

No. 1-11-3000

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).

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. 08 CR 14691
)	
CURTIS MCCOY,)	Honorable
)	Clayton J. Crane,
Defendant-Appellant.)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Hyman and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held:* Judgment on defendant's conviction of heinous battery affirmed where defendant forfeited claims that his sentencing hearing was unfair and violated due process.

¶ 2 Following a bench trial, Curtis McCoy, the defendant, was found guilty of heinous battery and sentenced to 19 years in prison. On appeal, defendant does not contest the sufficiency of the evidence to sustain his conviction, and solely contends that his sentencing hearing was unfair and in violation of due process because the prosecutor referred to evidence outside of the record while

arguing in aggravation, and he was not informed of his right to elect the statute under which he would be sentenced. He thus requests that we remand his cause for a new sentencing hearing.

¶ 3 The charges filed against defendant in this case stemmed from an incident that occurred on July 12, 2008, in the second floor apartment he shared with his wife Raven Brown-McCoy (Brown), and their children at 103rd and Wentworth Streets in Chicago, Illinois. During this incident, defendant and Brown were involved in an altercation which culminated in defendant setting her on fire.

¶ 4 Prior to trial, defendant engaged in a Supreme Court Rule 402 (Ill. S. Ct. R. 402 (eff. July 1, 1997)) conference, during which a potential guilty plea was discussed and certain information about defendant's background was disclosed to the trial court. No transcript of the Rule 402 conference was included in the record on appeal.¹ After the conference was concluded, defendant elected to proceed with a bench trial.

¶ 5 Defendant was convicted on evidence showing that on the night of the incident he was angry with Brown for not spending enough time with him, and, after an hour-long argument, he told her to take their children and leave the apartment. As Brown prepared to do so, defendant punched her in the face, and she defended herself by scratching him with a dart. Defendant then poured a cold liquid that smelled like acetone on Brown's face and chest, held her down, and said "we are going to do this the old fashioned way." Defendant took a lighter out of his pocket, held it near Brown's shirt, and, after two attempts, set Brown on fire with it.

¶ 6 The evidence further showed that after defendant set Brown on fire, he extinguished the flames by throwing a blanket on her, and telephoned for help prior to leaving the apartment with his gun. As he exited the building, several bystanders heard him say that they should call for help because he had set "that bitch" on fire. Defendant then left the scene, and, shortly thereafter, Brown,

¹ It appears that the conference was not transcribed.

who was badly injured, exited the building and waited for an ambulance to arrive. Evidence was presented on the extent of Brown's injuries and the multiple surgeries she underwent as a result.

¶ 7 Defendant testified that he asked Brown to leave on the night of the incident, and that she agreed to go, but stated that she would "tear [the] house up" before doing so. Brown then broke things around the apartment, swung an iron at him and repeatedly struck him with a dart. She also picked up fingernail polish remover and a lighter and stated, "I'll burn you up." She tried to throw the liquid on defendant, but he managed to deflect it and it landed on Brown, who struck the lighter and set herself on fire. Defendant further testified that his hands and shirt were also set on fire, but he was able to put the flames out quickly. Defendant denied pouring fingernail polish remover on Brown and setting her on fire.

¶ 8 The trial court found defendant guilty of heinous battery. At the sentencing hearing, the State read Brown's victim impact statement and argued that defendant's pre-sentence investigation (PSI) report revealed that he had not taken responsibility for his actions. The State also reminded the court, "Judge, I know you're aware from the 402 conference that [defendant] was found in juvenile court to be the perpetrator of sexual abuse to [that child]."

¶ 9 In mitigation, defense counsel noted that defendant had earned a GED and an associate's degree, had served in the Army for three years, and was employed full-time at the time of his arrest for this incident. The defense also presented letters from numerous people, including defendant's brother, describing their positive interactions with defendant, who then spoke in allocution.

¶ 10 Prior to announcing its decision, the trial court stated that it had reviewed the resume and letter defendant sent to the court, as well as the eight letters that were submitted on his behalf, in which he "read about a person that wasn't the person I saw in this courtroom." The court also stated that it considered the facts heard at trial, as well as "the aggravation and mitigation in this matter,

your presentation to me and all the statutory factors required of this court," then sentenced defendant to 19 years' imprisonment.

¶ 11 On appeal from that judgment, defendant first contends that his sentencing hearing was unfair because the State argued in aggravation matters that were unsupported by the record, thereby requiring that his cause be remanded for re-sentencing. He specifically cites the State's reference to "the 402 conference that [defendant] was found in juvenile court to be the perpetrator of sexual abuse" to one of Brown's children. Although defendant concedes that the prosecutor's statement regarding the juvenile court proceedings was true, he maintains that the record is devoid of any evidence to support that aggravating factor.

¶ 12 After defendant filed his opening brief, this court granted the State's request to submit the transcript of the juvenile proceedings at issue as a supplemental record on appeal. That transcript reflects the circumstances Brown's children found themselves in after she was injured due to defendant's actions and was temporarily unable to care for them.

¶ 13 This gave rise to the abuse and neglect proceedings held in Juvenile Court on September 23, 2009, after defendant's arrest in this case. Those proceedings, however, were not penal in nature, and although the court found, *inter alia*, that defendant was the perpetrator of sexual abuse to Brown's eldest daughter, who was not defendant's child, this was not a criminal conviction that would be reflected in defendant's PSI. In addition, since the Rule 402 conference was not transcribed, it is unclear what supporting evidence, if any, the State provided to the trial court at that time regarding the Juvenile Court proceedings.

¶ 14 Defendant argues here that the transcript and its contents should not be considered by this court because: (1) any information discussed during his Rule 402 conference cannot be used against him since the conference did not result in a guilty plea; (2) the State was required to introduce evidence of the juvenile proceedings through witness testimony; and (3) this court cannot consider

evidence that was not before the trial court and there is no way to verify that the State presented the transcript to the trial court at that time. That said, defendant concedes that he failed to preserve this issue for appellate review by failing to raise it both at the sentencing hearing and in his posttrial motion (*People v. Enoch*, 122 Ill. 2d 176, 186 (1988)); however, he maintains that we may consider it pursuant to the plain error doctrine.

¶ 15 The plain error doctrine is a narrow exception to the waiver rule which allows a reviewing court to consider unpreserved claims of error under certain limited circumstances. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008). To obtain such relief, a defendant must first show that a clear or obvious error occurred. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). In the sentencing context, defendant must then show that (1) the evidence presented at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny him a fair sentencing hearing. *Hillier*, 237 Ill. 2d at 545. Defendant has the burden of persuasion under both prongs of plain error. *Hillier*, 237 Ill. 2d at 545.

¶ 16 Prior to announcing its sentencing decision, the trial court stated that it had considered, *inter alia*, "the aggravation and mitigation in this matter." Although defendant claims that this necessarily included the reference to the information at the Rule 402 conference made by the State, the record shows that the trial court made no more than a general reference to the "aggravation" that was presented. The court did not single out the juvenile court adjudication in any way, nor is there any indication that the court gave the statement any particular weight in deciding the proper sentencing term. *People v. Beals*, 162 Ill. 2d 497, 509 (1994). Under these circumstances, we find that defendant has failed to establish error by the court to support his claim that his sentencing hearing was unfair. *People v. Gutman*, 2011 IL 110338, ¶ 11.

¶ 17 Notwithstanding, even if we assume that the general reference to the juvenile court adjudication reflected the court's consideration of an improper aggravating factor, defendant's argument fails. Defendant was found guilty of heinous battery for pouring a flammable substance

on Brown and setting her on fire, which is a Class X felony subject to a sentencing range of 6 to 45 years' imprisonment (720 ILCS 5/12-4.1 (West 2008)). Before announcing its sentencing decision, the trial court also stated that it had considered the facts presented at trial, and the required statutory factors. Given the seriousness of the offense (*People v. Flores*, 404 Ill. App. 3d 155, 159 (2010)), any error on the part of the trial court in considering the juvenile court adjudication was not so egregious so as to deny defendant a fair sentencing hearing, and, accordingly, defendant has failed to establish plain error under the second prong. *Hillier*, 237 Ill. 2d at 545-47.

¶ 18 Defendant further maintains that he met the first prong of plain error because the State's evidence, as reflected in the contents of Brown's victim impact statement and the fact that Brown is permanently disfigured, was closely balanced by the mitigating evidence in his favor, such as his education, military service, and the letters that were submitted on his behalf. We disagree. Although defendant presented extensive mitigating evidence, we fail to see how that evidence could be considered equivalent to the evidence of Brown's extensive injuries, permanent disfigurement, and the impact defendant's actions have had on Brown's life. We thus conclude that the evidence at the sentencing hearing was not closely balanced and that defendant has failed to establish plain error under this prong of the plain error doctrine.

¶ 19 Defendant, nevertheless, argues that the fact that the trial court sentenced him to a 19-year sentence, which is more than three times the minimum sentence, in spite of the mitigating evidence in his favor, indicates that the trial court placed more than an insignificant amount of weight on the juvenile court adjudication. We disagree.

¶ 20 The trial court specifically stated that it had considered the mitigating evidence that had been presented, and referred to the numerous letters that were submitted on defendant's behalf. However, the court also stated that the person he read about in those letters, "wasn't the same person I saw in this courtroom." It is thus evident that the trial court considered the mitigating evidence, but

weighed it against defendant's courtroom persona and the seriousness of the offense, and decided that a more lengthy sentence was required. Therefore, we find no reversible error by the trial court (*Beals*, 162 Ill. 2d at 509-10), nor plain error (*Naylor*, 229 Ill. 2d at 602), to excuse defendant's forfeiture of this issue. *Hillier*, 237 Ill. 2d at 545, 547.

¶ 21 Having reached that conclusion, we necessarily find that defendant's alternative argument that defense counsel was ineffective for failing to object to the State's unsupported allegations of sexual misconduct also fails. To establish a claim for ineffective assistance of counsel, a defendant must show that counsel's representation fell below an objective standard of reasonableness and that defendant suffered prejudice as a result thereof. *People v. Petrenko*, 237 Ill. 2d 490, 496 (2010), citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Because there was no reversible error, defendant cannot establish the prejudice prong of the *Strickland* standard. *People v. Caffey*, 205 Ill. 2d 52, 105-06 (2001).

¶ 22 Defendant next contends that his sentencing hearing violated due process in that he was not informed of his choice to elect the statute under which he would be sentenced. He concedes that he failed to preserve this issue for appeal by failing to object at sentencing or in a posttrial motion (*People v. Reed*, 177 Ill. 2d 389, 393-94 (1997)), but argues that we should review the issue pursuant to the plain error doctrine. Before we may undertake a plain error analysis, we must first determine whether any error occurred. *In re Samantha V.*, 234 Ill. 2d 359, 368 (2009).

¶ 23 At the time defendant committed the acts in this case, the offense for which he was convicted was called heinous battery (720 ILCS 5/12-4.1 (West 2008)), however, prior to the imposition of his sentence, the Illinois legislature eliminated that offense (Public Act 96-1551, Art. 5, § 5-6 (effective July 1, 2011)), and incorporated it into the offense of aggravated battery. 720 ILCS 5/12-3.05(a)(2) (West 2011). Defendant acknowledges that the two statutes are identical in terms of the elements of the offense, the felony classification, and the sentencing range, but argues that he had the right to

elect whether his conviction should be called heinous battery or aggravated battery. The State argues that no error occurred because defendant had no right to elect where there was no sentencing alternative. We agree with the State.

¶ 24 In *People v. Hollins*, 51 Ill. 2d 68, 71 (1972), the supreme court held that a defendant has the right to elect to be sentenced under either the law in effect at the time of the commission of the offense or at the time of sentencing, and, absent a showing that he was advised of that right and expressly waived it, he was denied due process of law. In doing so, the court noted the differences between the potential sentences the defendant would be subjected to under either statute at issue. *Hollins*, 51 Ill. 2d at 71. In this case, defendant cites no support for the proposition that the right to elect applies to situations, as here, where there is no change in the sentencing range and his choice would be solely limited to the name of the offense. Therefore, we find no error where the sentencing range was identical under both statutes, and, thus, defendant had no choice to make. Accordingly, because we find no error, we need not proceed with a plain error analysis (*Naylor*, 229 Ill. 2d at 602), and honor defendant's forfeiture of this issue. *Hillier*, 237 Ill. 2d at 545, 547.

¶ 25 In reaching this conclusion, we have considered *People v. Bedford*, 53 Ill. App. 3d 1005 (1977), relied upon by defendant, but find it unpersuasive. The *Bedford* case involved an election by defendant affecting sentencing alternatives. *Bedford*, 53 Ill. App. 3d at 1010-11. On appeal, this court found that defendant should have been permitted to elect which of the two statutes he would be sentenced under, and thus vacated his sentence and remanded his cause for re-sentencing pursuant to defendant's election. *Bedford*, 53 Ill. App. 3d at 1010-11. We also denied the State's subsequent petition for rehearing, stating that "fundamental fairness requires that the defendant be given the chance to choose the *sentencing alternative* he considers more desirable." *Bedford*, 53 Ill. App. 3d at 1012 (emphasis added). Here, unlike *Bedford*, there was no sentencing alternative from which

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defendant could choose, and we thus find no due process violation or error by the trial court to warrant plain error review.

¶ 26 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 27 Affirmed.