2013 IL App (2d) 120244-U
No. 2-12-0244
Order filed May 23, 2013

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiff-Appellee,	)	
v.	)	No. 05-CF-4018
JOHN C. BARNES,	)	Honorable Rosemary Collins,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Hutchinson and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion in sentencing defendant to 10 years' imprisonment for criminal sexual assault: the evidence supported the court's conclusion that, by using anal beads rather than a body part, defendant threatened greater harm to the victim.

¶ 2 Defendant, John C. Barnes, appeals from a judgment of the circuit court of Winnebago County sentencing him to 10 years' imprisonment on his conviction of criminal sexual assault (720 ILCS 5/12-13(a)(3) (West 2004)). On appeal, defendant argues that the sentence was an abuse of

discretion because the trial court relied on an aggravating factor not supported by the evidence. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was indicted on five counts of criminal sexual assault (720 ILCS 5/12-13(a)(3) (West 2004)). The case arose out of allegations that defendant had sexually assault the victim, Nathan B., over a four-year period, when Nathan was between the ages of 13 and 17 and lived with defendant. Count I alleged that defendant placed his penis in Nathan's anus; count II alleged that defendant placed his finger in Nathan's anus; count III alleged that defendant placed an object (anal beads) in Nathan's anus; count IV alleged that defendant placed his penis in Nathan's mouth; and count V alleged that defendant placed Nathan's penis in defendant's mouth. Following a jury trial, defendant was found guilty of each count and sentenced to 38 years in prison. The trial court imposed consecutive 7-year terms on counts I, II, IV, and V and a consecutive 10-year term on count III. In imposing the longer sentence on count III, the court noted: "there was a foreign object placed in the victim's body, and that of course is fraught with additional peril to the health and well-being of an individual, and so that's the reason the Court did give some additional time on that count."

¶ 5 Defendant appealed. Defendant argued, *inter alia*, that the court erred in imposing a longer sentence on count III and asked that we reduce that sentence. See *People v. Barnes*, No. 2-09-0366, slip op. at 35 (2011) (unpublished order under Supreme Court Rule 23). First, defendant argued that the use of anal beads was itself an element of the offense of criminal sexual assault and, as such, their use cannot be considered as an aggravating factor. *Id*. at 36. Second, defendant argued that the court's reasoning that the use of anal beads presented additional health risks was highly speculative and nonsensical. *Id*. We rejected defendant's first argument. However, as to defendant's second

argument, we agreed that there was no evidence presented that the use of anal beads caused or threatened additional harm to Nathan. *Id*. at 38. We noted that the court's comments did not reflect that there was any particular aspect of the beads that caused or threatened more harm and further that no evidence was presented to support such a finding. *Id*. Thus, we found that the court erred in "impos[ing] a longer sentence due to its (erroneous) finding that sexual penetration by an object necessarily causes more harm than penetration by a body part." *Id*. at 39. We then considered whether remandment for resentencing was necessary. We noted that remandment is not necessary where the reviewing court can determine the weight that the court gave to the improper factor. In cases where the court can determine the weight given, the court may correct the error and reduce the sentence. We stated:

> "Here, the trial court, in explaining the additional time on count III, mentioned no factor other than the potential danger of anal beads. We are reluctant, however, to infer conclusively from the court's remarks that the court regarded the acts charged in count III as equal in severity to the acts charged in the remaining counts (but for the use of the anal beads). The court's remarks were made in passing and in isolation from the remainder of the court's sentencing discussion. Accordingly, we vacate defendant's sentence on count III and remand the cause to the trial court for resentencing on that count." *Id*. at 39-40.

¶ 6 On remand, the court conducted a sentencing hearing and heard additional evidence from the State, without any objection by defendant. Dr. Raymond A. Davis, who testified at defendant's trial and at defendant's previous sentencing hearing, testified that he had examined children who had been the victims of anal penetration, including penetration by "objects" and "body parts." Dr. Davis was shown People's exhibit No. 1 and identified the exhibit as "anal beads." When asked whether

the insertion of the anal beads into the anus of a 13- to 17-year-old child could cause injury, Dr. Davis responded:

> "Injuries with inanimate objects like this that are hard or firm have a higher chance of causing mucosal tears, injury to the lining of the rectum, injury to the lining of the anal canal. They're nondeformable, and so if the child reflexively constricts the anal canal, it will produce more force on those tissue that can lead to infections. (Indicating.) There are a lot of complications that have been seen over the years with sexual abuse where objects are used that are nondeformable."

Dr. Davis explained that "nondeformable" meant that the object was "not pliable or *** can't be squeezed or change shape." Dr. Davis testified that anal beads are "firm, rigid objects. And they also have the potential for transferring other diseases." When Dr. Davis examined Nathan in 2005, he discovered that Nathan had two anal fissures, which can be caused by the insertion of anal beads. Dr. Davis testified on cross-examination that insertion of a penis or a finger into the anus can also cause anal fissures. When Dr. Davis examined Nathan, he could not determine what caused the anal fissures.

¶ 7 In allocution, defendant stated: "I still just wish to state that this didn't happen, that I'm not guilty of these charges that I obviously have been convicted of."

¶ 8 In sentencing defendant, the court noted Dr. Davis's testimony that the use of anal beads has a "higher chance of causing injuries due to the hard nature of these objects ***. They are hard, plastic objects that do not move and can cause injury, can cause and transfer infections, and can cause traumatic injuries." The court also noted that, although Dr. Davis could not say whether the anal beads did cause the anal fissures observed in Nathan, Dr. Davis did indicate that "a hard plastic

object can cause more of a traumatic injury than something that has some flexibility in it such as a finger or a penis." The court concluded: "So the court finds that there is now evidence presented that these anal beads could or did—could have caused serious harm to this victim." Thereafter the court sentenced defendant as follows:

> "And so when the court looks at it, of course, I am sentencing the defendant on a Class 1 felony. The sentencing range is 4 to 15 years. The court did not sentence the defendant to an extended period of time in this particular count. The court previously sentenced the defendant to ten years, and there were many things that the court considered, not just the fact of the anal beads.
>
> And the court considered all the factors in aggravation and mitigation. I considered that the defendant's conduct did cause or threatened serious harm. I considered the—that this sentence was necessary to deter others from committing this crime. I considered the facts and circumstances surrounding the nature of this offense but did not increase the sentence in this case because of factors and facts that were inherent in the offense itself.
>
> The court does find that a sentence of ten years in the department of corrections is an appropriate sentence for this offense, and the court is going to sentence the defendant to ten years in the department of corrections."

¶ 9 Defendant filed a motion for reconsideration of his sentence, arguing that his sentence was excessive. At the hearing on the motion, defense counsel argued: "There was testimony regarding anal beads and what they are made out of could cause additional harm. However, there was no comparison made to the other objects used in this case as to whether or not they would cause the same harm that the beads would cause." The court rejected defendant's argument, stating: "The

testimony was that that can, in fact, cause additional harm due to the nature of the objects itself." Following denial of his motion, defendant timely appealed.

¶ 10 II. ANALYSIS

¶ 11 Defendant argues that the court abused its discretion in reimposing a 10-year sentence under count III of the indictment, because the court again relied on an aggravating factor not supported by the evidence.

¶ 12 As an initial matter, we note that, although defendant did file a motion for reconsideration of his sentence, he did not raise in the written motion the precise issue that he raises on appeal. (Defendant did raise the issue orally during the hearing on the motion.) Arguably the issue has been forfeited. See *People v. Hillier*, 237 Ill. 2d 539, 544 (2010) (to preserve a claim of sentencing error, the defendant must object at the sentencing hearing and raise the objection in a postsentencing motion). The State made no objection below and makes no argument on appeal that the issue has been forfeited. See *People v. De La Paz*, 204 Ill. 2d 426, 433 (2003) (State may forfeit forfeiture). In any event, defendant maintains that, if the issue is forfeited, plain-error review is warranted. See *People v. Hillier*, 237 Ill. 2d 537, 545 (2010) (forfeited arguments related to sentencing issues may be properly reviewed for plain error). To obtain relief under the plain-error rule, a defendant must first show that reversible error occurred. *People v. Naylor*, 229 Ill. 2d 584, 602 (2008). If the error complained of is not reversible, a reviewing court need not go any further, because, without reversible error, the defendant cannot invoke the plain-error rule. *Id.* On the other hand, if reversible error is identified, the defendant may obtain relief if the error complained of meets either prong of the plain-error rule. *Id.* That is, in the sentencing context, the defendant must 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. Whether the issue is forfeited or not, defendant is not entitled to relief, because defendant has failed to establish that the trial court committed reversible error.

¶ 13 Our constitution requires that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. A reviewing court will not disturb a sentence that is within the applicable sentencing range unless the trial court abused its discretion. *People v. Stacey*, 193 Ill. 2d 203, 209-10 (2000). The sentencing range for criminal sexual assault (a Class 1 felony) is 4 to 15 years. See 730 ILCS 5/5-8-1(a)(4) (West 2004). In sentencing a defendant for criminal sexual assault, a court may consider in aggravation the degree of threatened serious harm to the victim. See 730 ILCS 5/5-5-3.2(a)(1) (West 2004); *People v. Hardeman*, 203 Ill. App. 3d 482, 491-92 (1990). As our supreme court has stated:

> "[T]he commission of any offense, regardless of whether the offense itself deals with harm, can have varying degrees of harm or threatened harm. The legislature clearly and unequivocally intended that this varying quantum of harm may constitute an aggravating factor. While the classification of a crime determines the sentencing range, the severity of the sentence depends upon the *degree of harm* caused to the victim and as such may be considered as an aggravating factor in determining the exact length of a particular sentence." (Emphasis in original.) *People v. Saldivar*, 113 Ill. 2d 256, 269 (1986).

So long as the trial court " 'does not consider incompetent evidence, improper aggravating factors, or ignore pertinent mitigating factors, it has wide latitude in sentencing a defendant to any term

within the statutory range prescribed for the offense.' " *People v. Bosley*, 233 Ill. App. 3d 132, 139 (1992) (quoting *People v. Hernandez*, 204 Ill. App. 3d 732, 740 (1990)).

¶ 14 In sentencing defendant, the court stated that "a hard plastic object can cause more of a traumatic injury than something that has some flexibility in it such as a finger or a penis." The crux of defendant's argument is that, because there was no testimony from Dr. Davis that directly compared the risk of injury from inserting an inanimate object such as anal beads into a person's anus with the risk of injury from inserting a penis or finger into a person's anus, there was no satisfactory basis upon which the court could conclude that the use of anal beads put Nathan at a greater risk of harm. We find that the court's conclusion was proper. At the outset of his testimony, Dr. Davis was asked whether he had experience examining children who had been victims of anal penetration by both "objects" and "body parts." Immediately thereafter, he was shown the anal beads and asked questions concerning the injuries that could be caused by anal beads. Although Dr. Davis never expressly stated that the anal beads "can cause more of a traumatic injury than *** a finger or a penis," he did testify that "[i]njuries with inanimate objects like this that are hard or firm have a higher chance of causing mucosal tears, injury to the lining of the rectum, injury to the lining of the anal canal." It is only logical to conclude that, when Dr. Davis testified that the insertion of hard inanimate objects has a "higher chance" of causing injury to the anus, the clear inference to be drawn is that the comparison he was making was to other types of objects, which did not fall within that description, or body parts. Further, Dr. Davis described the anal beads as "nondeformable," meaning "not pliable or *** can't be squeezed or change shape." This description distinguishes the anal beads from a penis or a finger, which, as the trial court noted, "has some flexibility." Accordingly,

we find that Dr. Davis's testimony on remand was sufficient to support the court's consideration in aggravation that defendant's use of the anal beads threatened a greater degree of harm to Nathan.

¶ 15 III. CONCLUSION

¶ 16 Based on the foregoing, we affirm the judgment of the circuit court of Winnebago County.

¶ 17 Affirmed.