2014 IL App (2d) 130462-U
No. 2-13-0462
Order filed December 10, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JOSE VELAZQUEZ, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 11-CF-236 Honorable Susan Clancy Boles, Judge, Presiding.

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

ORDER

¶ 1 *Held*: (1) Defendant showed no reversible plain error in the trial court's consideration of an improper aggravating factor: although such consideration was clear error, the court gave it such minimal weight that defendant was not denied a fair sentencing hearing; (2) as defendant's convictions of robbery and domestic battery violated the one-act, one-crime rule, we vacated the latter.

¶ 2 Defendant, Jose Velazquez, appeals from a judgment of the circuit court of Kane County convicting him of robbery (720 ILCS 5/18-1(a) (West 2010)) and domestic battery (720 ILCS 5/12-3.2(a)(2) (West 2010)) and sentencing him to eight years' imprisonment on the robbery conviction. Because he forfeited the issue of whether the trial court relied on an improper

aggravating factor, and because plain error-review does not apply, we do not reach that issue. Because defendant's convictions violated the one-act, one-crime rule, however, we vacate the less serious conviction of domestic battery.

¶ 3 I. BACKGROUND

¶ 4 Defendant was indicted on one count of robbery based on his having taken currency by force from the presence of his father, who was over 60 years old (720 ILCS 5/18-1(b) (West 2010)), and one count of domestic battery based on his having pushed his father during the robbery (720 ILCS 5/12-3.2(a)(2) (West 2010)).

¶ 5 The evidence at the jury trial established, among other things, that defendant went to his parents' pool hall to obtain money. After initially asking for $15, defendant pushed his father and took $5,000 from the back room. Defendant did not use any other force or threat of force against his father or anyone else during the incident. The jury found defendant guilty of both robbery and domestic battery.

¶ 6 At the sentencing hearing, the State identified three statutory aggravating factors: defendant's significant criminal history (730 ILCS 5/5-5-3.2(a)(3) (West 2010)), which included two burglary convictions, an armed-robbery conviction, and a conviction of domestic battery; the need to deter others (730 ILCS 5/5-5-3.2(a)(7) (West 2010)); and defendant's receipt of the proceeds from the robbery as compensation for committing that offense (730 ILCS 5/5-5-3.2(a)(2) (West 2010)). The State also argued that there was minimal, if any, mitigating evidence.

¶ 7 In orally pronouncing sentence, the trial court found that there were no mitigating factors. As for aggravating factors, the court found that subsections (a)(2), (a)(3), and (a)(7) all applied. The court emphasized that defendant had a "history of burglarizing, robbing, and stealing." It

noted that defendant had taken no responsibility for, and had victimized his own family in committing, the crimes. The court did not otherwise mention subsection (a)(2) or that defendant was compensated for having committed the robbery.

¶ 8 The court orally sentenced defendant to 8 years in prison on the robbery conviction, to be served consecutively with a 10-year prison sentence in another case. The court did not orally impose a sentence on the domestic-battery conviction. The written judgment stated that defendant had been found guilty of both offenses and showed that a judgment had been entered on "conviction and sentence." The mittimus showed that defendant was convicted of, and sentenced on, only robbery. Defendant did not file any postsentencing motion and filed this timely appeal.

¶ 9 II. ANALYSIS

¶ 10 On appeal, defendant contends that his sentence for robbery should be vacated, because the trial court erred in finding that he received compensation to commit the offense. Alternatively, he asserts that his conviction of domestic battery should be vacated as violating the one-act, one-crime rule.

¶ 11 Defendant neither objected to the court's finding regarding compensation nor raised the issue in a postsentencing motion. Therefore, he forfeited the issue. See *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). Acknowledging the forfeiture, he contends that we should review the error under the plain-error doctrine.

¶ 12 The plain-error doctrine is a narrow and limited exception to forfeiture. *Hillier*, 237 Ill. 2d at 545. To obtain relief under plain error, a defendant must first show that the asserted error was clear or obvious. *Hillier*, 237 Ill. 2d at 545. Additionally, in the sentencing context, a defendant must show that either: (1) the evidence at the sentencing hearing was closely balanced;

or (2) the error was so egregious that he was denied a fair sentencing hearing. *Hillier*, 237 Ill. 2d at 545. Under either prong, a defendant has the burden of persuasion, and, if he fails to meet that burden, the procedural default will be applied. *Hillier*, 237 Ill. 2d at 545.

¶ 13 In this case, there is no question that the trial court's ruling, that defendant received compensation for purposes of subsection (a)(2), was clear and obvious error. That is so because compensation within the meaning of subsection (a)(2) may be considered an aggravating factor only when the defendant was paid to commit the offense. *People v. Vue*, 353 Ill. App. 3d 774, 782 (2004) (citing *People v. Conover*, 84 Ill. 2d 400, 404-05 (1981)). Therefore, in a crime such as robbery, the mere proceeds of that offense do not constitute compensation under section (a)(2). *Vue*, 353 Ill. App. 3d at 782-83. Thus, defendant has satisfied the threshold element of plain error.

¶ 14 Defendant contends that the error qualifies for review under the second prong of plain error. We disagree.

¶ 15 After arguing that defendant should receive a more severe sentence, because he had a significant criminal history (see 730 ILCS 5/5-5-3.2(a)(3) (West 2010)), there was a need to deter others (see 730 ILCS 5/5-5-3.2(a)(7) (West 2010)), and there were no mitigating factors, the State added that defendant's sentence was aggravated because the proceeds of the robbery constituted compensation for having committed that offense (see 730 ILCS 5/5-5-3.2(a)(2) (West 2010)). Although the State raised compensation as an aggravating factor, it offered little argument in that regard. On the other hand, it emphasized the other two aggravating factors, particularly defendant's criminal history, and focused on the lack of mitigating evidence.

¶ 16 Moreover, in pronouncing sentence, although the trial court found that subsections (a)(2), (a)(3), and (a)(7) all applied in aggravation, the court emphasized that defendant had failed to

take responsibility for his actions, that he had victimized his own family, and that he had a "history of burglarizing, robbing, and stealing." The court did not further comment on defendant's having received compensation for committing the robbery. The court clearly placed relatively little, if any, weight on compensation as an aggravating factor.

¶ 17 Not only did the trial court pay minimal attention to compensation as one of the aggravating factors, it emphasized the lack of mitigating evidence. Therefore, any weight given to compensation as an aggravating factor was outweighed by the absence of mitigating evidence.

¶ 18 When we consider the compelling reasons to have sentenced defendant to eight years in prison, and the minimal weight given to the improper factor, we conclude that the error was not so egregious as to have denied defendant a fair sentencing hearing. Therefore, he has not persuaded us that he is entitled to relief under the plain-error doctrine.

¶ 19 Even if we were to reach the issue and decide that the court improperly considered that factor, we would not remand for resentencing. Where it can be determined from the record that the weight placed on an improper aggravating factor was so insignificant that it did not lead to a greater sentence, the reviewing court need not remand. *People v. Bourke*, 96 Ill. 2d 327, 332 (1983). In making that assessment, courts have considered helpful such things as whether the trial court made any dismissive or emphatic comments regarding the aggravating factor and whether the sentence imposed was substantially less than the statutory maximum. *People v. Dowding*, 388 Ill. App. 3d 936, 945 (2009) (citing *Bourke*, 96 Ill. 2d at 330).

¶ 20 Here, although the State argued that subsection (a)(2) applied, it did so with little elaboration. In the context of its overall argument, including its emphasis on defendant's criminal history, the need for deterrence, and the lack of mitigating evidence, its reliance on section (a)(2) was minimal at best.

¶ 21 More importantly, the trial court certainly did not emphasize subsection (a)(2) or its ruling that defendant received compensation for committing the robbery. Rather, the court barely mentioned it. See *People v. Hollen*, 187 Ill. App. 3d 675, 688-89 (1989); see also *Bourke*, 96 Ill. 2d at 330 (trial court referred to improper aggravating factor " 'in passing' "). When the court did mention the factor, it did so along with the other two aggravating factors and did not refer to it thereafter.

¶ 22 Moreover, although the State asked for a sentence of 20 years' imprisonment, defendant received an 8-year prison sentence. That was only 2 years above the statutory minimum and significantly less than the maximum of 30 years in prison. See 730 ILCS 5/5-4.5-25 (West 2010).

¶ 23 In light of the minimal, if any, weight given to the aggravating factor under subsection (a)(2), and the substantially-below-the-maximum sentence imposed, even if we were to reach the issue under plain error, we would not remand for resentencing.

¶ 24 Although defendant relies heavily on *People v. Abdelhadi*, 2012 IL App (2d) 111053, in arguing that this case should be remanded for resentencing, that case is distinguishable from ours. In *Abdelhadi*, the defendant, who faced a sentencing range of 6 to 30 years in prison, received a sentence of 10 years' imprisonment. *Abdelhadi*, 2012 IL App (2d) 111053, ¶¶ 3, 5. Additionally, the court could not determine from the trial court's comments how much weight it placed on the improper factor. *Abdelhadi*, 2012 IL App (2d) 111053, ¶ 19. Here, on the other hand, the sentence was lighter and the record clearly indicates that the trial court gave little, if any, consideration to the factor.

¶ 25 We next address defendant's contention that his domestic-battery conviction should be vacated as violating the one-act, one-crime rule. The State concedes that it should be vacated, as

both convictions were based on the same physical act of defendant shoving his father. See *People v. Harvey*, 366 Ill. App. 3d 119, 122 (2006) (citing *People v. King*, 66 Ill. 2d 551, 566 (1977)). Therefore, we vacate the domestic-battery conviction as the less serious. See *People v. Garcia*, 179 Ill. 2d 55, 71 (1997).[1]

¶ 26 III. CONCLUSION

¶ 27 For the reasons stated, we affirm defendant's sentence for robbery and vacate his conviction of domestic battery.

¶ 28 Affirmed in part and vacated in part.

[1] To the extent that the State contends that the judgment should be corrected to reflect that defendant was sentenced on only the robbery conviction, we read the judgment as indicating that the trial court imposed a sentence on only that offense. Even if the judgment could be read as indicating that the court imposed a sentence on the domestic battery conviction as well, any such sentence would be nullified by our having vacated the domestic battery conviction. Likewise, we need not, as defendant contends, correct the judgment to reflect a conviction only for robbery.