2015 IL App (3d) 130818-U

Order filed August 26, 2015
Modified upon denial of rehearing September 22, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Tazewell County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-13-0818
v.	)	Circuit No. 12-CF-254
	)	
CHARLES W. CHENEY,	)	Honorable Kevin R. Galley,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices Carter and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's discussion of an improper factor during sentencing was error, but this error is not reversible under the second prong of the plain error doctrine.

¶ 2 Defendant, Charles W. Cheney, pled guilty to residential burglary (720 ILCS 5/19-3(a) (West 2012)) and aggravated battery (720 ILCS 5/12-3.05(d)(1) (West 2012)). The court sentenced defendant to 30 years' imprisonment for residential burglary and a consecutive term of

5 years' imprisonment for aggravated battery. On appeal, defendant argues that the court relied on an improper aggravating factor in imposing his sentence. We affirm.

¶ 3 FACTS

¶ 4 Defendant was charged by indictment with two counts of home invasion and one count each of residential burglary and aggravated battery. In exchange for defendant's plea to the residential burglary and aggravated battery charges, the State dismissed the two home invasion charges. The matter proceeded to a sentencing hearing.

¶ 5 Brandy Teague testified that, on February 18, 2012, she and defendant went to Creve Coeur to deliver cannabis to an unnamed individual. The individual told Teague and defendant that an elderly man, who had a lot of money, lived nearby and was on vacation. The elderly man was Ben Piercy. Teague and defendant went to Piercy's house with the intent to break into the residence and take Piercy's valuables. Teague knocked on the front and back doors and received no response. Defendant then broke into the house through the back door, and Teague heard someone say "what the hell is going on." Teague saw Piercy in the house and yelled for defendant to leave. Defendant punched Piercy in the head, and Piercy fell to the floor. Piercy tried to get up, and defendant struck him two additional times in the face. Teague ran into the house and told defendant to stop hitting Piercy. Defendant told Teague to get Piercy's wallet. Teague refused and started arguing with defendant. Piercy tried to get up and defendant kicked him in the face. Teague ran to the car and defendant met her a few minutes later. At the time, defendant was carrying a couple of shopping bags that contained items from Piercy's house. Defendant disposed of Piercy's cell phone, identification card, and war medals, and kept a necklace, watch, a coin bank, and cash.

¶ 6 The State called Piercy's daughter, Denise Pennington to testify. Pennington testified that, on the date of the incident, Piercy was 85 years old. Prior to the incident, Piercy was an independent individual and took care of himself. Piercy was a veteran of the United States Navy, having joined when he was 15 years old, and served during World War II.

¶ 7 On the date of the incident, Pennington found Piercy slumped over in a chair. Piercy was a "bloody mess" and did not know what had happened. At the hospital, Piercy was treated for a brain bleed, broken ribs, cuts, and abrasions. Pennington photographed Piercy's injuries on the day after the incident, and the photographs were admitted into evidence. Altogether, Piercy spent nearly 2½ weeks in the hospital.

¶ 8 After the incident, Piercy suffered from short-term memory loss and difficulty with comprehension. Piercy never regained his full physical abilities, had difficulty walking, took on a disheveled appearance, had difficulty managing his finances and had trouble driving. Piercy was unable to care for himself and was eventually placed in a nursing home. Piercy passed away on April 5, 2013.

¶ 9 In allocution, defendant apologized for his actions and said that he had changed his life and intended to get his general education diploma, and a welding certificate while incarcerated.

¶ 10 Defense counsel did not have any testimony to present in mitigation, but provided the court with letters of support from defendant's family and friends.

¶ 11 The court found that defendant had inflicted a "savage beating" which caused Piercy to suffer severe injuries. The court noted that the presentence investigation reports indicated that this behavior was not atypical for defendant as he was prone to violence. In aggravation, the court found that: (1) defendant's conduct caused serious physical harm to Piercy; (2) defendant had a lengthy prior history of delinquency and criminal activity; (3) the sentence was necessary

to deter others from committing similar offenses; and (4) the victim was over 60 years of age. The court then stated:

> "I'm profoundly struck by the fact, Mr. Cheney, this gentleman that you put in this condition on February 18, 2012, enlisted in the Navy when he was 15 years old. Was serving his country, defending his country at a time younger than the age you were when you committed these two offenses. He was overseas. He was away from his family, fighting to give all of us that which we have, that you have. You have it today.
>
> Tom Brokaw wrote a book a few years back, and I've read it. It's called, The Greatest Generation Speaks. Tom Brokaw is a retired newscaster, a historian in his own right, and what he did, Mr. Cheney, so that you know the beliefs that Mr. Piercy held, the type of attitudes that he had, the pride that he demonstrated, as described by his daughter in court, what Tom Brokaw was attempting to do was capture for all of the rest of us who didn't go through those experiences, the experiences of Mr. Piercy beginning at 15 years of age, away from home, fighting to keep what we have alive, he wanted to describe and preserve the effort, the commitment, the dedication, the perseverance, the courage, the bravery that people typified by Mr. Piercy provided for all the rest of us, and Mr. Piercy, of course, is a member of that generation that Tom Brokaw describes as the greater generation, and maybe you've never heard about this. Maybe you don't care about it, but it's something that's important.
>
> It's something that is really underlying all of the comments that Miss Pennington made to the Court in her victim impact statement, and in the book,

Tom Brokaw reports a letter that he received from an individual in Florida writing about his grandfather, someone who may typically fit the experience that Mr. Piercy went through when he was 15 years old, 16, 17, 18, and the letter from the grandson reflects that which all of us need to remember, and we're talking about an 85-year-old veteran here, honorably discharged, recognized for his service to his country.

You took part of that recognition apparently from his house. It was in the box. His medals, and they didn't have any value to you. You discarded them, threw them out. The telephone, things that didn't have any value to you, they had value to all the rest of us.

And the grandson writes about his grandfather, who he never met. A grandfather who served, died when the grandson was two years old, and the letter reads–this is the letter to Tom Brokaw, the author of this book.

The only remembrance I have from my grandfather is his old duffle bag. This is a treasure to me. It contains his Army issued clothing, toiletry bag, a few pictures, and other small items. It is the only thing I have from him, but I am so thankful to have it because of the stories you have gathered, meaning Tom Brokaw.

I feel like I know something more about my grampa by seeing the people who he likely fought along with. I can better imagine his experiences. This is the grandson now writing. I wish that more Americans today would take the time to look back and see the sacrifices these great people made for our great country. Perhaps if they did, they would appreciate more the precious freedom that we

> enjoy. I'm so proud of my grandfather. Although he's been gone for over 20 years, in a way I feel that he lives on. Because of the momentos that the grandfather received that reflected his commitment to what we all believe in.
>
> And I can understand that's how Ms. Pennington feels. That's how Mr. Piercy's son Bob feels. And that's reflected in the way Mr. Piercy conducted his life up and through February 18 of 2012, forever changed by your conduct, and as described so clearly by Mr. Piercy's two children."

Defendant did not object to the court's comments.

¶ 12 The court found that there were no mitigating factors in defendant's favor, and sentenced defendant to 30 years' imprisonment for residential burglary and a consecutive term of 5 years' imprisonment for aggravated battery.

¶ 13 Defendant filed a motion to reconsider sentence. The motion did not argue that the court considered an improper factor in sentencing defendant. The court denied the motion, and defendant appeals.

¶ 14 ANALYSIS

¶ 15 Defendant argues that the trial court erroneously based its sentencing decision on Piercy's positive personal traits and status as a World War II veteran. Defendant acknowledges that he forfeited review of this issue, but argues that it is subject to review under the second prong of the plain error doctrine.[1] The State argues that plain error review is not warranted because the record establishes that the court did not err. We find that the trial court's discussion of Piercy was error, but this error is not reversible under the second prong of the plain error doctrine.

[1]Defendant does not argue that the sentencing error is reversible under the first prong of the plain error doctrine.

¶ 16 To overcome a claim of forfeiture, we must determine whether the alleged errors can be reviewed under the plain error doctrine. The first step of plain error review is to determine whether a clear and obvious error occurred. *People v. Rippatoe*, 408 Ill. App. 3d 1061, 1066 (2011).

¶ 17 The trial court has broad discretion in imposing a defendant's sentence. *People v. Jones*, 168 Ill. 2d 367, 373 (1995). There is a strong presumption that the trial court based its sentencing determination on proper legal reasoning, and we review the trial court's sentencing decision with great deference. *People v. Dowding*, 388 Ill. App. 3d 936, 942-43 (2009). However, we cannot affirm a sentence based on an improper factor, unless we "determine from the record that the weight placed on the improperly considered aggravating factor was so insignificant that it did not lead to a greater sentence." *People v. Heider*, 231 Ill. 2d 1, 21 (2008). The issue of whether a court relied on an improper factor in imposing a sentence presents a question of law that we review *de novo*. *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 8.

¶ 18 Generally, victim impact evidence is allowed as a method of informing the court about the specific harm caused by the crime in question. *People v. Shaw*, 186 Ill. 2d 301, 352 (1998). However, the personal traits of the victim are not relevant to the determination of a defendant's sentence. *People v. Walker*, 109 Ill. 2d 484, 505 (1985). Additionally, the trial court may not rely on the victim's status in the community when determining a defendant's sentence. See *People v. Joe*, 207 Ill. App. 3d 1079, 1087 (1991) (consideration of the victim's profession and community standing was inappropriate).

¶ 19 In the instant case, between discussions of the factors in aggravation and mitigation, the court discussed at length the victim's service and contributions as a World War II veteran. While we do not disagree with the trial court's comments regarding the victim, we find that the court

could not rely or base its sentencing decision on this information. See *People v. Mauricio*, 2014 IL App (2d) 121340, ¶ 20 (trial court improperly considered the victim's status as a member of the greatest generation, a World War II veteran, as a factor in sentencing defendant). Therefore, the court erred to the extent it relied on the victim's personal traits and community status when it imposed defendant's sentences.

¶ 20 Having determined that the court erred, we must determine whether this unpreserved error is reversible under the second prong of the plain error doctrine. Under the second prong, an unpreserved error is reversible when that error is so fundamental and of such magnitude that it affected the fairness of the trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). The supreme court has equated the second prong of the plain error analysis with structural error, *i.e.*, error which erodes the integrity of the judicial process and undermines the fairness of a trial. *People v. Thompson*, 238 Ill. 2d 598, 613-14 (2010). More recently, the supreme court restated that "[i]n order to obtain relief [under the second prong of plain error], defendant must demonstrate not only that a clear or obvious error occurred [citation], but that the error was a structural error." *People v. Eppinger*, 2013 IL 114121, ¶ 19.

¶ 21 Defendant argues that reversal is required because the court's reliance on an improper factor impinged his fundamental right to a fair sentencing hearing. The "mere affecting of a substantial right," however, is not justification for review under the second prong. *People v. Arbuckle*, 2015 IL App (3d) 121014, ¶ 39 (citing *People v. Herron*, 215 Ill. 2d 167, 177 (2005)). "While any error in a criminal trial may be said to affect a 'substantial right'—the defendant's right to freedom—the supreme court has significantly narrowed the second prong by holding that only structural errors constitute plain error." *Id.* ¶ 41. Consideration of an improper factor

during sentencing does not rise to the level of structural error. See *Thompson*, 238 Ill. 2d at 609. Therefore, the trial court's consideration of an improper factor is not reversible under the second prong of the plain error doctrine, and the error is forfeited.

¶ 22 In a petition for rehearing, defendant argues that the six errors described in *Thompson* as reversible under the second prong of the plain error doctrine are not exclusive and that the error at issue is of a similar magnitude, and therefore, warrants reversal under the second prong. While we agree that the examples listed in *Thompson* are not exclusive, we do not find that the present error is reversible under the second prong of the plain error doctrine.

¶ 23 CONCLUSION

¶ 24 The judgment of the circuit court of Tazewell County is affirmed.

¶ 25 Affirmed.