2018 IL App (5th) 140577-U

NO. 5-14-0577

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Jackson County.
	)	
v.	)	No. 14-CF-94
	)	
MARQUIS J. SUTTON,	)	Honorable
	)	William G. Schwartz,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Justices Goldenhersh and Chapman concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's convictions for home invasion and robbery are upheld under plain error review even though there may have been violations of the *Zehr* principles when the evidence was not closely balanced. There was also no plain error in sentencing defendant to an extended-term sentence on the conviction for home invasion based on brutal and heinous behavior, but the court did err in imposing an extended sentence for the lesser offense of robbery.

¶ 2 Defendant, Marquis J. Sutton, along with two other people, Richard Nelson and Ariel Mix, were charged with home invasion, robbery, and aggravated battery in connection with an incident that occurred on March 14, 2014. All three were tried together in the circuit court of Jackson County, each with their own counsel, but with

only one jury. Defendant and Nelson were found guilty of all three charges. Mix was found guilty of home invasion and robbery only. Defendant was sentenced to the maximum extended-term sentence of 60 years for home invasion and the maximum extended-term sentence of 14 years for robbery. Defendant appeals his convictions and sentences.

¶ 3 On March 14, 2014, several officers were dispatched to room 245 of the Campus Inn in Carbondale to investigate a disturbance. Both the motel door and the window to room 245 were locked and undamaged, suggesting that there had been no forced entry into the room. Once the manager of the Inn let the officers into the room, they found a man on the floor who was barely conscious, and barely breathing. His face and lips were swollen and he had marks from a shoe on his face and neck. Blood was on the carpet next to his face, and blood splatter was observed on a dresser, the wall, and on the television, which was on the floor. The room was a mess.

¶ 4 The record reveals that the victim, Alphonso Slaughter, had been staying in room 245 at the Inn. Slaughter came to the Inn to sell heroin. Although he lived in Chicago, people in the area were generally aware that Slaughter was in Carbondale to sell heroin, and customers came to his room to make their purchases. The record reveals that Slaughter's intended stay in Carbondale was undetermined, but he had not brought a large quantity of drugs with him, suggesting that he did not plan on staying for a long time. Around midnight on March 14, Slaughter locked his motel room door and went to bed. The next thing he remembered was waking up in a hospital in St. Louis. Slaughter stayed in the hospital for a month because of his injuries, and still suffers from various

problems with the left side of his body. He also has memory issues and residual lightheadedness.

¶ 5 An individual who lived at the Campus Inn, Roquecce Benjamin, was at a party that same evening in room 239. He saw two men standing outside room 245, one of whom he recognized to be the codefendant, Nelson. About an hour after returning from a liquor store, Benjamin saw two men run out of room 245 and get into a silver car located in the parking lot next door to the Inn. Benjamin again recognized Nelson, and told the police he thought the second man he saw running from room 245 was DaShonn Howard. Several months later, when shown a photo of defendant at trial, side by side to that of Howard, Benjamin commented that they looked "a lot alike," and that his identification of Howard as the second man was a mistake.

¶ 6 The evidence further revealed that Mix was dating defendant at the time of the incident involving Slaughter. Mix lived in an apartment with a woman named Roberta Pemberton. Pemberton was addicted to heroin, and on the morning of March 14, 2014, she and Mix obtained heroin from Slaughter. The two women then returned home to use the drugs together. Pemberton heard Mix tell defendant that the guy who sold them the heroin was handicapped, alone and unarmed, and they could rob him. Mix and defendant left the apartment and returned later with Nelson. Pemberton heard them say that the drug dealer would not open the door for them. Later that evening, another woman, Ashley Kaemmerer, came by the apartment and drove Mix, Pemberton, Nelson, and defendant back to the Inn. Mix gave Slaughter's room number to Pemberton, and instructed her to knock on the door, and say a certain word. Pemberton got out of the car alone, and

knocked on the motel room door, as instructed. The man let her in, and sold her a bag of heroin. As Pemberton exited room 245, defendant and Nelson, who were waiting outside the door, ran through the open door, and into the room. Pemberton ran back to the car.

¶ 7 When defendant and Nelson returned to the car a short time later, both "were bloody." Kaemmerer drove them back to the apartment, where Nelson and defendant tried to wash off the blood. Afterwards, Kaemmerer decided to drive Nelson to a liquor store. As they were leaving the apartment, Nelson handed Kaemmerer a plastic bag containing a pair of tennis shoes. Nelson asked Kaemmerer to take the bag to his girlfriend's house. Kaemmerer took Nelson to the liquor store, but forgot about the shoes, leaving them in her car.

¶ 8 On March 17, 2014, the police arrested Mix, Nelson, and defendant in connection with the beating of Slaughter, and charged each of them with home invasion, robbery, and aggravated battery. Defendant denied having any involvement in the robbery at the Inn. Before being told, however, that heroin was involved in the robbery, three police officers indicated they heard defendant say that people should not sell heroin.

¶ 9 On March 17, Kaemmerer's car was impounded by the police. At that point, she still had not gotten rid of Nelson's bag containing the tennis shoes he had given her. Kaemmerer identified the shoes and the bag that were removed from her car. The shoes contained a DNA profile that matched Slaughter, but did not match defendant or Nelson. The inside of the shoes contained a mixture of at least three people's DNA that was not suitable for a comparison. In Nelson's taped jail calls, however, Nelson referred to the plastic bag containing shoes that had blood on them.

¶ 10 As previously stated, the jury found both defendant and Nelson guilty of aggravated battery, robbery and home invasion in connection with the beating of Slaughter. Defendant appeals his convictions and sentences.

¶ 11 Defendant first argues on appeal that the trial court failed to properly question the jurors on the *Zehr* principles, and because the evidence was closely balanced, his convictions should be vacated. Illinois Supreme Court Rule 431(b) imposes a duty upon trial courts to ask all potential jurors whether they both "understand" and "accept" four fundamental principles of criminal law: that the defendant is presumed innocent, that the State bears the burden to prove the defendant guilty beyond a reasonable doubt, that the defendant has no obligation to present evidence, and that the defendant's choice not to testify cannot be held against him. Ill. S. Ct. R. 431(b) (eff. July 1, 2012). These four principles are commonly referred to as the *Zehr* principles. See *People v. Zehr*, 103 Ill. 2d 472, 469 N.E.2d 1062 (1984); *People v. Johnson*, 2012 IL App (1st) 091730, ¶ 40, 993 N.E.2d 1. The purpose of Rule 431(b) is to ensure that any potential juror who is prejudiced against these principles of criminal law be identified and disqualified from serving on the jury. *People v. Thompson*, 238 Ill. 2d 598, 609, 939 N.E.2d 403, 411 (2010). Again, Rule 431(b) requires that a trial judge ask all potential jurors whether they both "understand" and "accept" the four principles. *People v. McGuire*, 2017 IL App (4th) 150695, ¶ 27, 92 N.E.3d 494. Here, during jury selection, the trial court questioned each of the prospective jurors individually. The court inquired about each of the four principles of law required by Rule 431(b), but allegedly did not ask each of the prospective jurors whether they both "understood" and "accepted" each of the principles.

The failure to inquire into either understanding or acceptance as to even one of the principles constitutes noncompliance. *Thompson*, 238 Ill. 2d at 607. Defendant, however, neglected to raise what defendant claims to be noncompliance with Rule 431(b) during trial and posttrial. To preserve a purported error, a defendant must object to the error at trial and raise the error in a posttrial motion. Failure to do either results in forfeiture. *People v. Belknap*, 2014 IL 117094, ¶ 66, 23 N.E.3d 325.

¶ 12 Despite defendant's failure to raise the alleged *Zehr* violation either during trial or in a posttrial motion, defendant believes we should reverse the jury's verdict under the plain error doctrine. Pursuant to this doctrine, we may consider unpreserved error "when (1) a clear or obvious error occurs and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurs and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410-11 (2007). Defendant believes that the evidence of his involvement was closely balanced, and therefore argues that the trial court's noncompliance with Rule 431(b) was reversible error. See *People v. Sebby*, 2017 IL 119445, ¶ 51, 89 N.E.3d 675. We note that a Rule 431(b) violation is not cognizable under the second prong of the plain error doctrine. See *People v. Wilmington*, 2013 IL 112938, ¶ 33, 983 N.E.2d 1015. Therefore, we look only to the closeness of the evidence to determine whether the error severely threatened to tip the scales of justice. *Sebby*, 2017 IL 119445, ¶ 51. In support of his argument, defendant points to the fact that Benjamin

identified Nelson outside of Slaughter's room, but identified the other individual with Nelson, as DaShonn Howard. Benjamin also selected Howard from a photo array. But, when Benjamin eventually identified defendant, the identification was from a single photograph.

¶ 13 Defendant also believes the testimony of Pemberton was not reliable. Pemberton testified that she was angry with Nelson because he used her to get into Slaughter's room, but refused to give her any of the money taken from Slaughter. She was also angry with Mix, who did not allow Pemberton out of their home for several days after the robbery. According to defendant, because of Pemberton's anger at the codefendants, she had a motive to lie about their actions. Defendant, however, had no explanation for discrediting Kaemmerer's testimony, other than she was a drug user. Kaemmerer's testimony corroborated Pemberton's testimony as to what transpired the night of March 14. And both women were candid about their drug usage and lifestyles. Defendant's attempts to discredit their testimonies are not persuasive.

¶ 14 In addition, codefendant Mix, the person who suggested robbing the handicapped drug dealer alone in his motel room, was defendant's girlfriend. There was no evidence of any connection between Mix and Howard. There is also defendant's own statement that people should not sell heroin, a statement which he uttered prior to his being told by the officers that Slaughter was selling heroin.

¶ 15 In determining whether the evidence adduced at trial was closely balanced, we, as a reviewing court, must evaluate the totality of the evidence and conduct a qualitative assessment of it within the context of the case. *Sebby*, 2017 IL 119445, ¶ 53; *Belknap*,

2014 IL 117094, ¶ 50. In our view, the evidence presented implicating defendant outweighs any evidence possibly pointing to him being innocent. Given that the evidence is not closely balanced in this instance, there is no plain error justifying reversal of defendant's convictions.

¶ 16 Defendant also contends the State failed to prove a necessary element of home invasion, namely that defendant entered the "dwelling place" of Slaughter. Defendant admits a motel room can be a dwelling place, but argues that, in this instance, Slaughter used the room as a temporary store to sell heroin. Therefore, the room was not a dwelling place for purposes of the crime of home invasion. Defendant asserts that to prove he was guilty of the crime of home invasion, the State was required to show that the structure defendant entered was one "in which the owners or occupants actually reside, or, if absent, intend within a reasonable period of time to reside." *People v. Bales*, 108 Ill. 2d 182, 191, 483 N.E.2d 517, 521 (1985). It is the purpose for which the structure is used, rather than the nature of the structure which determines whether it is a dwelling place. *People v. Frisby*, 160 Ill. App. 3d 19, 29, 512 N.E.2d 1337, 1343 (1987). Defendant points out that Slaughter lived in Chicago and came to the area to sell drugs. He knew no one in Carbondale, and intended to stay only as long as it took to sell his supply of drugs. Defendant therefore believes that the motel room was not a dwelling place, but rather a temporary "pop-up" store. Defendant further points out that the State must carry the burden of proving beyond a reasonable doubt each element of the crime. See *People v. Olivieri*, 2016 IL App (1st) 152137, ¶ 27, 61 N.E.3d 169. He therefore concludes that his

conviction for home invasion should be reversed and his case remanded for resentencing on the remaining convictions.

¶ 17 The relevant question here is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Nitz*, 143 Ill. 2d 82, 95-96, 572 N.E.2d 895, 901 (1991). Through the testimony of Pemberton, the State established that defendant knowingly entered the room of another in that defendant pushed her aside and ran into the motel room, as she tried to exit. The room was a dwelling in that it was a part of a building, used and intended to be used, for human habitation. Slaughter slept in the room, and intended to stay for an indeterminate amount of time. The fact that he also used the room to conduct business does not mean that the room lost its intended use as a dwelling. Therefore, we conclude that at the time defendant entered Slaughter's motel room, that room was a "dwelling," and that defendant committed the crime of home invasion in that he entered Slaughter's motel room without authority, with the knowledge that someone was in the motel room, and intentionally inflicted injury upon that person.

¶ 18 Defendant also argues the trial court committed plain error in sentencing him to the maximum extended-term sentences available, based on brutal and heinous behavior indicative of wanton cruelty. Defendant points out that the trial court began its pronouncement of a sentence by calling him a thug and a punk, and stating that he had no business being out in society. The trial court merged the count of aggravated battery into the home invasion count and then sentenced defendant to an extended-term sentence of 60 years for the home invasion, after finding defendant's behavior to have been

exceptionally brutal or heinous. The trial court then sentenced defendant to an extended-term sentence of 14 years for the robbery offense. The court further imposed the sentences consecutively, for the protection of the public. And, after finding that defendant caused great bodily harm in the commission of the home invasion, the trial court ordered that defendant serve 85% of the sentence imposed.

¶ 19 Defendant does not believe the evidence against him supports a conclusion that his behavior was brutal or heinous, especially when *Apprendi* requires that all facts necessary to establish the statutory sentencing range must be proven to a jury beyond a reasonable doubt. See *People v. Swift*, 202 Ill. 2d 378, 383, 781 N.E.2d 292, 295 (2002). He points out that his more culpable codefendant, Nelson, was given a nonextended sentence. Defendant believes the disparity in sentencing stems from a video shown to the trial court at the time of sentencing. The video depicts defendant in jail, taunting other prisoners, and refusing to comply with a lock down order. The video shows defendant kicked another inmate, then armed himself with a plunger, and hit the window of the door in front of the guards. Defendant did not back down until the guards brought a canine into the cellblock. Other than the video, the State presented no other evidence at sentencing. It is defendant's position that the trial court was motivated to impose an extended-term sentence based on conduct not presented to the jury, and irrelevant to the crimes of which he was convicted.

¶ 20 We first address the trial court's imposition of the extended-term sentence of 14 years' imprisonment for robbery, a Class 2 felony (720 ILCS 5/18-1 (West 2014)). When a defendant has been convicted of multiple offenses of differing classes, an extended-

term sentence may only be imposed for the conviction with the most serious class. See *People v. Jordan*, 103 Ill. 2d 192, 206, 469 N.E.2d 569, 575 (1984). Defendant was convicted of both robbery, a Class 2 felony, and home invasion, a Class X felony, for which he received an extended-term sentence of 60 years' imprisonment. Because robbery is a lesser offense than the Class X felony of home invasion, defendant should not have been given an extended-term sentence for the robbery conviction. See *People v. Thompson*, 209 Ill. 2d 19, 23-24, 805 N.E.2d 1200, 1202-03 (2004). Therefore, the imposition of the extended-term sentence of 14 years' imprisonment for robbery was error, a fact which the State concedes. The usual sentence for a Class 2 felony is not less than three years' and not more than seven years' imprisonment. 730 ILCS 5/5-4.5-35(a) (West 2014). Pursuant to Illinois Supreme Court Rule 615(b)(4), we reduce defendant's sentence of 14 years' imprisonment for the robbery conviction to 7 years' imprisonment, the maximum term statutorily authorized. *Jordan*, 103 Ill. 2d at 215.

¶ 21 Turning to defendant's conviction for home invasion, we reiterate that the crime of home invasion is a Class X felony. See 720 ILCS 5/19-6 (West 2014). For a Class X felony, the sentence of imprisonment ranges from 6 to 30 years, and for an extended-term Class X felony, 30 years to 60 years. 730 ILCS 5/5-4.5-25(a) (West 2014). When a defendant is convicted of any felony, and the court finds the offense to be accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty, the court may impose an extended-term sentence. 730 ILCS 5/5-5-3.2(b)(2) (West 2014). Any fact other than a prior conviction that elevates the range of a defendant's punishment beyond the statutory maximum must be submitted to the trier of fact and proved beyond a reasonable

doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *Swift*, 202 Ill. 2d at 392. Defendant, however, failed to object at the sentencing hearing, and thereby waived review of this issue. *People v. Nitz*, 219 Ill. 2d 400, 411, 848 N.E.2d 982, 989 (2006); *People v. Smith*, 257 Ill. App. 3d 252, 254, 628 N.E.2d 960, 961 (1993). The question then becomes whether the *Apprendi* violation constitutes plain error. *People v. Colin*, 344 Ill App. 3d 119, 134, 799 N.E.2d 451, 464 (2003). An *Apprendi* violation does not constitute plain error if there is "no doubt that a jury, presented with [the facts of the case], would have found that the crime was committed in a brutal and heinous manner." *People v. Crespo*, 203 Ill. 2d 335, 348-49, 788 N.E.2d 1117, 1124-25 (2001). There is little doubt that under the facts presented, the jury would have found that the crimes committed here were done so in a brutal and heinous manner. Defendant purposefully targeted a handicapped, unarmed man, albeit a drug dealer, who was alone in his motel room. The beating of Slaughter was severe enough to put him in the hospital for a month, and left him with permanent, debilitating injuries. Defendant failed to show that the sentencing error here was prejudicial. Accordingly, we conclude the trial court did not commit plain error when sentencing defendant to an extended term for his conviction of home invasion.

¶ 22 For the foregoing reasons, we affirm defendant's convictions and his sentence for home invasion. We vacate defendant's 14-year sentence for robbery, and remand the cause back to the circuit court of Jackson County for the imposition of a sentence of 7 years' imprisonment.

¶ 23 Affirmed in part, and vacated and remanded in part for reduction of sentence.