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2012 IL App (3d) 100425-U

Order filed July 25, 2012
Modified Upon Denial of Rehearing August 30, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 10th Judicial Circuit,
Plaintiff-Appellee,)	Peoria County, Illinois,
)	
v.)	Appeal No. 3-10-0425
)	Circuit No. 09-CF-684
)	
WILLIAM A. MALONE,)	Honorable
)	James E. Shadid,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Justice Lytton concurred in the judgment.
Justice McDade dissented.

ORDER

- ¶ 1 *Held:* Defendant's extended-term sentence for aggravated robbery is reduced, and the DNA assessment is vacated. The judgment of the circuit court is otherwise affirmed.
- ¶ 2 On June 30, 2009, the State filed a 13-count indictment against defendant, William A. Malone. The cause proceeded to a jury trial, where defendant was found guilty of 10 of the 13 counts. The trial court sentenced defendant to concurrent prison terms of 30 years, 30 years, and

10 years, and a consecutive sentence of natural life. Defendant appeals, arguing that: (1) joining a count charging failure to register as a sex offender with 12 unrelated counts was reversible error; (2) he was denied a fair trial when the trial court advised the jury that the defense had failed to disclose its alibi evidence to the prosecution prior to trial; (3) his extended-term sentence for aggravated robbery should be reduced; and (4) the court's order that defendant submit to deoxyribonucleic acid (DNA) testing and pay a \$200 DNA analysis fee should be vacated. We reduce defendant's sentence for aggravated robbery and vacate the DNA analysis fee; the judgment of the circuit court is otherwise affirmed.

¶ 3

FACTS

¶ 4 The State filed a 13-count indictment against defendant alleging 6 counts of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(1) (West 2008)), 2 counts of home invasion (720 ILCS 5/12-11(a)(2) (West 2008)), and 1 count each of criminal sexual assault (720 ILCS 5/12-13(a)(1) (West 2008)), residential burglary (720 ILCS 5/19-3(a) (West 2008)), aggravated robbery (720 ILCS 5/18-5(a) (West 2008)), unlawful restraint (720 ILCS 5/10-3 (West 2008)), and failure to register as a sex offender (730 ILCS 150/10 (West 2008)).

¶ 5 All of the counts, except for failure to register as a sex offender, were the result of an incident that occurred on June 13, 2009, in Peoria County. On that date, a man wearing a mask, later identified as defendant by the victim and the accomplice, forcibly entered the victim's home, sexually assaulted the victim, and left after removing a number of items from the house. The failure to register as a sex offender count was the result of defendant failing to properly register in accordance with the Sex Offender Registration Act (730 ILCS 150/1 *et seq.* (West 2008)) pursuant to a conviction defendant received in 1994.

¶ 6 The cause proceeded to a jury trial. The State presented evidence that included: testimony from the victim that defendant was her attacker; testimony from defendant's accomplice that supported his convictions; and video and photographic evidence that corroborated the victim and the accomplice's testimony. Defendant testified that he did not commit the charged offenses and that at the time the offenses occurred he was with relatives at his sister's house, visiting a friend, and riding in his sister's car.

¶ 7 Prior to closing arguments and outside the presence of the jury, the State argued that the defense had failed to provide the specifics of defendant's alibi as required by Illinois Supreme Court Rule 413(d) (eff. July 1, 1982). Specifically, defendant had not informed the State of his alleged location during the time the offenses were committed. The trial court, after hearing the State and defense counsel's arguments on the matter, found that the defense had violated Rule 413(d). As a result, the court decided to provide the following instruction to the jury: "The defense did not give prior notice of an alibi defense as to the defendant's specific whereabouts and as to the specific individuals the defendant says he was with."

¶ 8 The jury found defendant guilty of criminal sexual assault, residential burglary, aggravated robbery, unlawful restraint, failure to register as a sex offender, three counts of aggravated criminal sexual assault, and two counts of home invasion. Prior to sentencing, the trial court ordered a presentence investigation report (PSI). The first page of the PSI indicated that defendant's DNA was registered. The trial court sentenced defendant to concurrent prison terms of 30 years for home invasion, an extended term of 30 years for aggravated robbery, 10 years for failure to register as a sex offender, and a consecutive sentence of natural life for aggravated criminal sexual assault. Defendant was also ordered to pay a \$200 DNA analysis fee.

Defendant appeals.

¶ 9

ANALYSIS

¶ 10 Defendant first argues that joining the count charging failure to register as a sex offender with the other 12 counts both in the indictment and at trial was reversible error pursuant to the plain-error doctrine. The first step in plain-error review is to determine whether error occurred. *People v. Cosby*, 231 Ill. 2d 262 (2008). Pursuant to section 111-4(a) of the Code of Criminal Procedure of 1963 (Code), two or more offenses may be charged in the same indictment if the offenses charged are based on the same act or two or more acts which are part of the same comprehensive transaction. 725 ILCS 5/111-4(a) (West 2008). Factors to consider in determining whether offenses are part of the same transaction include: (1) their proximity in time and location; (2) the identity of evidence to be presented; (3) similarities in the acts; and (4) whether there was a common method of operation by the perpetrator. *People v. Karraker*, 261 Ill. App. 3d 942 (1994).

¶ 11 In this case, defendant's failure to register as a sex offender related to a 1994 conviction that was in no way tied to his conduct on June 13, 2009, from which the other 12 counts originated. Therefore, it is clear that the failure to register as a sex offender count was unrelated to, and not part of the same comprehensive transaction as the other 12 counts, and it was error to join the counts in the indictment and at trial. However, defendant did not raise this issue in the trial court. Thus, in order for the issue to be reviewed by this court, we must next determine whether plain error occurred. The plain-error doctrine bypasses forfeiture principles and allows a reviewing court to consider unpreserved error when: (1) the evidence is close, regardless of the seriousness of the error; or (2) the error is serious, regardless of the closeness of the evidence.

People v. Herron, 215 Ill. 2d 167 (2005). If the error fits into either category above, the error is not only reviewable by this court but is reversible. See *Cosby*, 231 Ill. 2d 262.

¶ 12 Initially, we note that the evidence in this case was not close; therefore, we do not find reversible error based on the first prong of the plain-error doctrine. The question then becomes whether the error was serious enough to fit under the second prong of the doctrine. The Supreme Court has equated the second prong of plain-error review with structural error, *i.e.*, a systemic error which serves to erode the integrity of the judicial process and undermine the fairness of the defendant's trial. *People v. Thompson*, 238 Ill. 2d 598 (2010). The supreme court has found structural error to exist in only a limited class of cases, such as a complete denial of counsel, trial before a biased judge, racial discrimination in the selection of a grand jury, denial of self-representation at trial, denial of a public trial, and a defective reasonable doubt instruction. *Thompson*, 238 Ill. 2d 598.

¶ 13 Here, we find that the court's error in joining defendant's failure-to-register charge with the remaining criminal charges does not fit into the limited class of cases where the supreme court has found structural error. Therefore, because the error was not so serious that it affected the fairness of the defendant's trial or challenged the integrity of the judicial process, we find that it does not fit under the second prong of the plain-error doctrine. See *People v. Adams*, 2012 IL 111168 (although the prosecutor's remarks were improper, they did not amount to plain error under the fundamental-fairness prong of the plain-error doctrine); *Thompson*, 238 Ill. 2d 598, 611 (failure to provide proper Illinois Supreme Court Rule 431(b) (eff. May 1, 2007) questioning was not a basis for second prong plain-error review).

¶ 14 We note that defendant has raised an alternative issue, that counsel was ineffective for

failing to sever the charges. In order to prove ineffective assistance of counsel, defendant must show prejudice. *People v. Albanese*, 104 Ill. 2d 504 (1984). Our supreme court has held that the prejudice prong for ineffective assistance of counsel is similar to the closely balanced evidence prong of plain error review. *People v. White*, 2011 IL 109689. Therefore, when the evidence is not closely balanced, it is more difficult for defendant to show prejudice. Here, because we have found that the evidence was not closely balanced, and because evidence of defendant's prior conviction could have been admitted either when defendant testified or under section 115-7.3 of the Code (725 ILCS 5/115-7.3 (West 2010)), defendant cannot show prejudice and cannot succeed on his claim of ineffective assistance of counsel.

¶ 15 Defendant next argues that he was denied a fair trial when the trial court advised the jury that the defense had failed to disclose its alibi evidence to the prosecution prior to trial. Defendant failed to raise this issue at trial or in a posttrial motion; however, defendant argues that the waiver rule should be relaxed because the alleged error was committed by the trial court. We disagree. Recently the supreme court has found that relaxing the waiver rule is only warranted where the trial court has overstepped its authority in the presence of the jury or when counsel is effectively prevented from objecting, as any objection would have fallen on deaf ears. *People v. Hanson*, 238 Ill. 2d 74 (2010). Here, the trial court stated its intention to inform the jury of the violation outside the presence of the jury. Further, defense counsel was given time to argue the violation and the instruction. Thus, we cannot say that an objection would have fallen on deaf ears. Therefore, we find that the waiver rule should not be relaxed and the issue can only be raised on appeal if it falls under the plain-error doctrine.

¶ 16 The first step in plain-error review is to determine whether error occurred. *Cosby*, 231 Ill.

2d 262. Pursuant to Illinois Supreme Court Rule 413(d) (eff. July 1, 1982), if the defendant intends to prove an alibi, the defense must provide the State specific information as to the place where defendant maintains he was at the time of the alleged offense. In this case, defendant failed to inform the State of the place where defendant claimed to be while the crimes were committed. We find that the trial court's decision to inform the jury that defendant had violated Rule 413(d) was not prejudicial to defendant and was an acceptable approach to dealing with the violation. Therefore, we do not find that the trial court committed reversible error in its instruction to the jury.

¶ 17 Defendant's third argument is that his extended-term sentence for aggravated robbery should be reduced. A trial court may only impose an extended-term sentence for the offenses within the most serious class of offense of which the accused is convicted. 730 ILCS 5/5-8-2(a) (West 2010); *People v. Jordan*, 103 Ill. 2d 192 (1984). However, this rule only applies to offenses that are committed in a single course of conduct. *People v. Bell*, 196 Ill. 2d 343 (2001). Here, defendant was sentenced to an extended term for aggravated robbery, a Class 1 felony. He was also sentenced for aggravated criminal sexual assault and home invasion, Class X felonies. Therefore, because we find that all three offenses were committed in a single course of conduct, we reduce defendant's sentence for aggravated robbery from 30 years to 15 years, the maximum nonextended-term sentence for a Class 1 felony. 730 ILCS 5/5-4.5-30(a) (West 2010).

¶ 18 Finally, defendant argues that his DNA analysis fee should be vacated because his DNA was registered at the time of sentencing. Section 5-4-3 of the Unified Code of Corrections mandates that all individuals convicted of an offense that is classified as a felony under Illinois law after January 1, 1998, submit to the taking, analyzing, and indexing of their DNA, and the

payment of an analysis fee. 730 ILCS 5/5-4-3(a), (j) (West 2010). However, a defendant is only required to submit to and pay for the DNA assessment when he is not currently registered in the DNA database. *People v. Marshall*, 242 Ill. 2d 285 (2011). Here, as in *Marshall*, the PSI indicated that defendant's DNA was currently registered in the DNA database. Therefore, we vacate the \$200 DNA analysis fee assessed by the trial court.

¶ 19

CONCLUSION

¶ 20 Defendant's sentence for aggravated robbery is reduced to 15 years and the \$200 DNA analysis fee is vacated; the judgment of the circuit court of Peoria County is otherwise affirmed.

¶ 21 Affirmed as modified.

¶ 22 JUSTICE McDADE, dissenting.

¶ 23 The majority has rejected defendant's claim that the joinder of a charge that he failed to register as a sex offender with twelve totally unrelated charges rose to the level of plain error which would have required the reversal of his convictions. For the reasons that follow, I respectfully dissent from the decision.

¶ 24 As recited in the majority order, defendant, William Malone, was charged by the State with the commission of twelve criminal offenses stemming from a home invasion and burglary on June 13, 2009, in Peoria County. Six of the twelve counts alleged aggravated criminal sexual assault and a seventh alleged criminal sexual assault. The State joined a thirteenth count alleging failure to register as a sex offender that related to a 1994 conviction and was unrelated to the 2009 events.

¶ 25 The majority has found error because the type of joinder that occurred here is prohibited

by section 111-4(a) of the Code of Criminal Procedure of 1963. 725 ILCS 5/111-4(a) (West 2008). However, citing the supreme court's decision in *People v. Thompson*, 238 Ill. 2d 598 (2010), the majority finds that the error does not fall within the narrow category of "structural" errors and cannot, therefore, constitute "plain" error.

¶ 26 In *People v. Karraker*, 261 Ill. App. 3d 942 (1994), this court considered a situation similar to that in the instant case and concluded that the trial court committed reversible error, pursuant to the plain error doctrine, when, in contravention of law, the defendant was charged with and tried on three separate charges that were unrelated themselves and not part of the same comprehensive transaction. As in *Karraker*, defendant here was indicted and tried on counts that were completely unrelated and not part of the same comprehensive transaction. The violation of section 111-4(a) in both cases allowed the jury to hear otherwise inadmissible evidence related to defendant's other crimes or prior convictions. The *Karraker* court found:

"Given the three charges contained in the indictment were completely unrelated and not part of the same comprehensive transaction, we find it was plain error to bring these charges in a single indictment and then try those unrelated charges before a single jury. The purpose behind section 111-4(a) is to protect a defendant from the prejudicial effect of a trial on multiple unrelated charges. (Citation omitted.) In this case, the provisions of section 111-4(a) were violated, the defendant prejudiced thereby and thus denied a fair trial. Thus, the defendant's convictions must be reversed and the cause remanded." *Karraker*, 261 Ill. App. 3d

at 951.

¶ 27 Since our *Karraker* decision, the supreme court has narrowed and refined the process by which the courts determine whether an error in the circuit court that has not been properly preserved for review can constitute plain error and require a reversal of the judgment in the trial court.

¶ 28 In *People v. Herron*, 215 Ill. 2d 167 (2005), the court articulated two situations in which unpreserved error can bypass forfeiture principles and be reviewed: (1) when the evidence is close, regardless of its seriousness, and (2) when the error is serious, regardless of the closeness of the evidence. If the claimed error fits into either category it is reviewable and reversible. *People v. Cosby*, 231 Ill. 2d 262 (2008).

¶ 29 In *People v. Thompson*, 238 Ill. 2d 598 (2010), the court further clarified, in the context of the violation of supreme court rule 431(b), how plain error under the second prong should be analyzed. In fashioning its decision in the instant case, the majority explains the *Thompson* decision as follows:

"The Supreme Court has equated the second prong of plain-error review with structural error, *i.e.*, a systemic error which serves to erode the integrity of the judicial process and undermine the fairness of the defendant's trial. *People v. Thompson*, 238 Ill. 2d 598 (2010). The supreme court has found structural error to exist in only a limited class of cases, such as a complete denial of counsel, trial before a biased judge, racial discrimination in the selection of a grand jury, denial of self-representation at trial,

denial of a public trial and a defective reasonable doubt instruction.

Thompson, 238 Ill. 2d 598." *Supra*, ¶12.

¶ 30 Applying the restricted plain error analysis, the majority first finds that the evidence in the instant case was not closely balanced. I agree with that finding.

¶ 31 The majority has also found, with regard to the second prong, that:

"The error in joining defendant's failure-to-register charge with the remaining criminal charges does not fit into the limited class of cases where the supreme court has found structural error.

Therefore, because the error was not so serious that it affected the fairness of the defendant's trial or challenged the integrity of the judicial process, we find that it does not fit under the second prong of the plain-error doctrine." *Supra*, ¶13.

¶ 32 While I agree with the majority's acknowledgment that the error claimed in the instant case is not included in *Thompson's* list of structural errors previously recognized by the United States Supreme Court, I suggest -- not, however, without some trepidation -- that its conclusion reads the decision in *Thompson* too restrictively.

¶ 33 As I read that decision, it appears to say that if an error has been made and it clearly falls into one of the structural error categories, prejudice is presumed and reversal is "automatic." This inquiry was actually undertaken in section A of the court's analysis with the court concluding:

"...that the trial court's violation of the amended version of Supreme Court Rule 431(b) in this case does not fall within the

very limited category of structural errors and, thus, does not require automatic reversal of defendant's conviction." *Thompson*, 238 Ill.

2d at 611.

But the decision does not end there. After noting that the parties "also raise alternative arguments applying plain-error and harmless-error review to this case," and after analyzing a forfeiture question; the court, in section C, does an extended plain error review to determine whether the error was reversible under the second prong. The *Thompson* court stated: "A finding that defendant was tried by a biased jury would certainly satisfy the second prong of plain-error review because it would affect his right to a fair trial and challenge the integrity of the judicial system." *Thompson*, 238 Ill. 2d at 614.

¶ 34 Although it is not totally clear, the latter part of this analysis would seem to allow the possibility that there may be errors other than in the previously-recognized structural error categories that would affect a defendant's right to a fair trial and challenge the integrity of the judicial system. *Thompson*, 238 Ill. 2d at 611, 614. It is not, however, necessary for me to explore that possibility further because it seems clear to me that this defendant's case was tried to a biased jury.

¶ 35 The first issue raised by defendant in the instant case is:

"Whether William Malone was denied a fair trial by the improper joinder of the failure-to-register-as-a-sex-offender charge with the other twelve counts, all of which alleged specific crimes committed against Carrie Freeman, where the failure-to-register charge was completely unrelated to the other charges and where the jury heard

evidence introduced only because of the failure-to-register charge,
that Malone was previously convicted of criminal sexual assault."

Defendant is thus claiming, as did the defendant in *Thompson*, that he was tried by a biased jury. *Thompson* makes clear that the burden of persuasion on the contention that the jury was biased remains on the defendant at all times. If he succeeds in sustaining that burden, then prejudice in his trial is presumed and his conviction must be reversed.

¶ 36 In this case, the Peoria County State's Attorney fashioned an indictment which, *in clear violation of long-settled State law*, included a charge of failure to register as a sex offender that was not only unrelated to the other twelve counts of the indictment, but also, by its mere inclusion, advised the jury that the defendant had already committed at least one sex offense and implicitly suggested the likelihood of his guilt on the seven counts of the properly joined charges that alleged simple or aggravated criminal sexual assault. A Peoria County circuit judge allowed the case, with the illegally-included charge, to be tried to a jury.

¶ 37 This court in *Karraker* found prejudice in the simple fact that three unrelated charges were joined in violation of the statute and were all tried to a single jury. In the instant case, the prejudice which the legislature sought to enjoin by its enactment of the statute was exacerbated by the fact that the improperly joined charge related to a prior conviction of the same type of offense as those charged in seven of the twelve properly joined counts. Thus the error of which the defendant complains directly resulted in the presentation of prejudicial evidence to the jury which it may never otherwise have heard.

¶ 38 I would find that Malone has sustained his burden of showing that he was tried by a biased jury, that prejudice is presumed because trial by a biased jury would affect his right to a

fair trial and challenge the integrity of the judicial process (*Thompson*, 238 Ill. 2d at 614), and that his convictions should be reversed and the matter remanded for a new trial. Because of the result I would reach on defendant's first issue, it is necessary for me to address the other issues he has raised.

¶ 39 In his Petition for Rehearing, the defendant specifically asked the court to rule on his ineffective assistance of counsel claim. The majority has modified the order to find that, although the trial court erred in improperly joining the failure-to-register claim, there was no prejudice to the defendant by that joinder. *Supra*, ¶ 14. An absence of prejudice precludes a finding of ineffective assistance. *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Albanese*, 104 Ill. 2d 504 (1984).

¶ 40 Because I have already concluded, as did this court in *People v. Karraker*, 261 Ill. App. 3d at 951, that defendant was in fact prejudiced before the jury by the prohibited joinder of count 12 (see *Supra*, ¶¶ 35-37), I would find the prejudice prong of the *Strickland* test has been met.

¶ 41 With regard to the first prong – whether counsel's failure to object to the joinder fell below an objective standard of reasonableness – the statute at issue has been the law in Illinois since its enactment in 1963. The statute itself was "substantially a restatement and codification of former Illinois law." See Committee Comments–1963 to 725 ILCS 5/111-4 (West 2010). Allowing the jurors to be informed, without objection, that defendant has been previously convicted of the very type of offense with which he was charged in seven of the twelve properly-joined counts was prejudicial to the defendant, cannot be justified as a legitimate trial strategy, and is not excused by the failure of the prosecutor and the court to follow the law.

¶ 42 I would find both prongs of *Strickland* have been met and that this court should also find

that defendant had received ineffective assistance of trial counsel.

¶ 43 For the foregoing reasons, I would find that defendant's conviction was secured through a process (1) that affected his right to a fair trial and challenged the integrity of the judicial system because he was tried before a biased jury and (2) in which he received ineffective assistance of counsel. I, therefore, dissent from the majority decision.