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2012 IL App (3d) 100913-U

Order filed August 17, 2012

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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 12th Judicial Circuit,
Plaintiff-Appellee,	) Will County, Illinois,
	)
v.	) Appeal No. 3-10-0913
	) Circuit No. 09-CF-2086
	)
RANDALL SYLER,	) Honorable
	) Daniel J. Rozak,
Defendant-Appellant.	) Judge, Presiding.

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PRESIDING JUSTICE SCHMIDT delivered the judgment of the court.  
Justice Holdridge concurred in the judgment.  
Justice O'Brien dissented.

**ORDER**

- ¶ 1 *Held:* The trial court did not commit plain error in failing to conduct a hearing regarding defendant's fitness for sentencing where there was no evidence to create *bona fide* doubt as to defendant's fitness contained in the record. The prosecutor's alleged improper remarks during closing argument did not constitute plain error. The trial court did not err in sentencing defendant to an extended-term sentence of 20 years of imprisonment.
- ¶ 2 A Will County jury convicted defendant, Randall Syler, of residential burglary (720 ILCS 5/19-3 (West 2008)). The trial court sentenced him to 20 years in prison. Defendant

appeals, arguing: (1) his due process rights were violated after the trial court found *bona fide* doubt as to his fitness but failed to hold a fitness hearing; (2) he was denied a fair trial due to the prosecutor's improper remarks during the State's closing and rebuttal arguments; and (3) his extended-term prison sentence of 20 years was excessive. We affirm.

¶ 3

### FACTS

¶ 4 The State charged defendant with residential burglary. A jury trial commenced on April 6, 2010. The State's evidence showed that on August 21, 2009, the victim left her home at 9:15 a.m. and returned home at 1 p.m. Upon returning home, the victim found shattered glass from the patio door, a rock inside the house, her jewelry box moved, and dresser drawers disturbed. In addition, two five-gallon jars with \$3,000 had been stolen. Police recovered a fingerprint on the jewelry box that matched defendant's print. Police also obtained a deoxyribonucleic acid (DNA) profile matching defendant from a cigarette butt that was located on the patio. Defendant presented no evidence.

¶ 5 During closing arguments, the prosecutor stated:

"Th[e] fingerprint analyst \*\*\* told you she was 100 percent sure that that fingerprint taken from that jewelry box right there was the fingerprint of this defendant[.] \*\*\*

After you hear the evidence in this case and listen to the arguments of the attorneys here, I think you're going to agree. I think you're going to be 100 percent sure that this defendant is 100 percent guilty of this crime, residential burglary."

¶ 6 In her closing argument, defense counsel indicated that the State had the burden to prove that defendant committed the offense beyond a reasonable doubt. She stated:

"[I]n speaking to you they may make a mockery of the burden beyond a reasonable doubt. Some sort of analogy to diminish its importance, but it's very important. \*\*\*

That high standard of beyond a reasonable doubt exists for a reason. They may say something like, it's met every day in courtrooms across the country. What we're concerned about is here and now. Did they meet that burden today? And I submit to you they did not."

¶ 7 In rebuttal the prosecutor responded by arguing:

"[T]he State has the burden of proof to you beyond a reasonable doubt, right? And keep in mind that all the evidence you heard, the argument I'm about to make that beyond a reasonable doubt doesn't mean beyond all doubt. It doesn't mean a hundred percent. Doesn't mean beyond a shadow of a doubt, but a hundred percent beyond all doubt is exactly what we've proven."

Defense counsel objected, and the trial court overruled the objection.

¶ 8 The prosecutor continued by indicating that the State had proven defendant's guilt beyond a reasonable doubt and "exceeded" its burden of proof "a thousand fold." The prosecutor continued by discussing the fingerprint and DNA evidence. He also stated:

"[T]his is not an Agatha Christy [*sic*] novel. There's no hidden twist in the end or some secret piece of evidence that's going to be uncovered. It's all been uncovered, and every single shred of it point to [defendant].

There is no genuine issue as to his guilt. We're here doing a trial because he has right to a trial and we're giving it to him. That's it. That's the only reason we're here."

Defense counsel objected, and the trial court overruled the objection.

¶ 9 The jury found defendant guilty.

¶ 10 On May 28, 2010, defense counsel filed a "Motion for Fitness Evaluation" indicating that "based upon observations and conversations with the Defendant, Counsel for the Defendant

believes that there may be a *bona fide* doubt as to the Defendant's fitness to stand trial or otherwise plead." The trial court granted the request for a fitness evaluation. In a form order, the court indicated that it "[f]ound] that a *bona fide* doubt exists as to the defendant's fitness to stand trial" and appointed the county psychologist, Dr. Randi Zoot, to determine defendant's fitness to stand trial. The case was set for the filing of Zoot's report and fitness hearing for June 30, 2010. At the request of defendant's counsel, the case was continued until August 2, 2010, and again to August 23, 2010, for a "status on fitness[.]"

¶ 11 On August 23, 2010, defense counsel indicated that she had just received a copy of Zoot's report and requested that the case be continued for a "status date on fitness." The following discussion took place:

"THE COURT: I haven't seen [Zoot's report] yet. What was the bottom line on it? Fit?

[Defendant's counsel]: The bottom line was that she found him fit to stand trial."

The docket entry for August 23, 2010, indicated that the matter came before the court for status as to fitness, a psychological evaluation was tendered to the court, and the court found defendant fit to stand trial. At defense counsel's request, the matter was continued until September 8, 2010, "for [a] fitness hearing."

¶ 12 On September 8, 2010, defense counsel requested that defendant's "sentencing hearing" be continued until September 28, 2010. On September 28, 2010, defense counsel informed the court that the case was up for sentencing and requested continuance. On October 19, 2010, the trial court announced that the case was up for sentencing and inquired about whether any matters were pending. Defense counsel stated indicated that she believed the issue of defendant's fitness

had been resolved. The trial court stated, "Did we have a hearing on that? Yes, we did it August 23rd."

¶ 13 The presentence investigation report indicated that the 28-year-old defendant had issues with alcohol and marijuana since the age of 13 and later became addicted to cocaine. Defendant had prior felony convictions for theft (2001), robbery (2003), and residential burglary (2006). At the time of the current residential burglary offense, defendant was on mandatory supervised release (MSR) for his prior 2006 residential burglary conviction. Additionally, defendant had a pending charge of "Burglary-Forced Entry, Residential" in Indiana and pending charges of residential burglary and possession of stolen property in Illinois. At sentencing, defendant presented evidence in mitigation that, in August 2010, he completed a drug education class and a class regarding the mind, emotions, self-esteem, relationships, forgiveness, and trust.

¶ 14 The parties agreed that defendant was eligible to receive an extended-term sentence of 4 to 30 years of imprisonment. In mitigation, the trial court found that defendant did not cause or contemplate that his conduct threatened serious harm, in that no one was home at the time of the burglary. In aggravation, the trial court noted that: (1) the victim's impact statement indicated that she suffered mental anguish as a result of the offense; (2) "a lengthy sentence [was] necessary to deter others from committing the same type of crimes" in light of defendant's criminal history and the seriousness of the crime; and (3) defendant was on MSR at the time of the offense.

¶ 15 The trial court sentenced defendant to 20 years of imprisonment. Defendant appealed.

¶ 16

## ANALYSIS

¶ 17

### I. Fitness to Stand Trial

¶ 18 Defendant argues that as a result of the court finding that a *bona fide* doubt existed as to

his fitness and ordering a fitness evaluation, the court was required to conduct a fitness hearing. Defendant contends that because the trial court did not hold a fitness hearing, this court should reverse his conviction and remand this cause for a fitness hearing.

¶ 19 Defendant acknowledges that he did not object below nor did he raise the issue of the court's failure to hold a fitness hearing in a posttrial motion. See *People v. Enoch*, 122 Ill. 2d 176 (1988) (a defendant must make a contemporary objection and raise the issue in a posttrial motion to preserve the issue for review). However, defendant requests that we review the error under the plain error doctrine. See *People v. Thompson*, 238 Ill. 2d 598 (2010) (plain-error rule bypasses forfeiture principles and allows a reviewing court to consider unpreserved claims of error in specific circumstances).

¶ 20 Plain error applies to a forfeited error where a clear or obvious error occurred and: (1) 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) the error is so serious that it affected the fairness of the trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *Thompson*, 238 Ill. 2d 598. In a plain-error review, the burden of persuasion rests with the defendant. *Id.*

¶ 21 In this case, defendant does not argue, and we do not find, that the evidence in this case was closely balanced. Instead, defendant contends that "fitness for trial is a fundamental right, and therefore the plain-error doctrine permits review of fitness issues that would otherwise be waived." Thus, we examine defendant's claim under the second prong of the plain-error doctrine. As such, the issue at bar is whether the trial court's failure to conduct a fitness hearing in this case constituted a structural error that warrants a reversal.

¶ 22 Under the second prong of the plain-error doctrine, there are only a very limited class of

cases in which error has been deemed structural, such as 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. *People v. Glasper*, 234 Ill. 2d 173 (2009). Prosecuting a defendant where there is *bona fide* doubt as to his fitness renders the proceedings fundamentally unfair, and generally such a claim is reviewed under the plain error rule. *People v. Sandham*, 174 Ill. 2d 379 (1996); *People v. Eddmonds*, 143 Ill. 2d 501 (1991). However, defendant in this case must meet his burden of persuasion on the issue, and we cannot presume defendant's right to be fit for trial was violated solely on the basis of the trial court failing to conduct a fitness hearing. See *Thompson*, 238 Ill. 2d 598 (providing that it cannot be presumed that the jury was biased because the trial court erred in questioning the jury pursuant to Rule 431(b)).

¶ 23 In *Glasper*, the supreme court held that a trial court's failure to question the venire to ensure an unbiased jury pursuant to Illinois Supreme Court Rule 431(b) (eff. May 1, 1987) was not a structural error. *Glasper*, 234 Ill. 2d 173. The supreme court holding was similar in *Thompson*, 238 Ill. 2d 598, when it considered an amended version of Illinois Supreme Court Rule 431(b) (eff. May 1, 2007) and distinguished the procedural requirement of questioning the venire pursuant to Rule 431(b) to ensure an unbiased jury from the defendant's substantive fundamental right to be tried by a fair and impartial jury. The supreme court noted that a failure to comply with Rule 431(b) does not necessarily result in a biased jury or render a trial fundamentally unfair or unreliable where defendant presented no evidence that jury was biased. *Thompson*, 238 Ill. 2d 598; see also *People v. McGhee*, 2012 IL App (1st) 093403 (distinguishing between defendant's substantive right to a unanimous verdict and defendant's procedural right to poll the jury to help ensure the jury's verdict was unanimous).

¶ 24 Similarly, in this case, there are two related but distinct issues at bar—defendant's procedural right to a fitness hearing to determine his fitness to stand trial and the substantive due process right to be fit for trial. *Eddmonds*, 143 Ill. 2d 501 (due process prohibits prosecuting or sentencing a defendant who is not competent to stand trial). A defendant is unfit if, because of his mental or physical condition, he is unable to understand the nature and purpose of the proceedings against him or to assist in his defense. 725 ILCS 5/104-10 (West 2008). However, a defendant is presumed to be fit for trial, pleading, and sentencing, and bears the burden of proving there is a *bona fide* doubt of fitness. *People v. Hanson*, 212 Ill. 2d 212 (2004); 725 ILCS 5/104-10 (West 2008).

¶ 25 Under section 104-11(a) of the Code of Criminal Procedure of 1963 (Code), when a *bona fide* doubt of defendant's fitness is raised, the court must conduct a fitness hearing before proceeding further. 725 ILCS 5/104-11(a) (West 2008). Under section 104-11(b) a court can order a defendant to undergo a preliminary fitness examination to assist in the determination of whether a *bona fide* doubt of fitness exists. 725 ILCS 5/104-11(b) (West 2008). Section 104-11(a) ensures that a defendant's due process rights are not violated when the trial court has found *bona fide* doubt, while section 104-11(b) aids the trial court in deciding whether a *bona fide* doubt exists. *Hanson*, 212 Ill. 2d 212.

¶ 26 A defendant is entitled to a fitness hearing when there is a *bona fide* doubt as to his fitness to stand trial because it is a violation of due process to convict a defendant who is not fit for trial. *People v. Moore*, 408 Ill. App. 3d 706 (2011). However, in order for due process to have been violated by failing to hold a fitness hearing, the court must have first heard evidence raising a *bona fide* doubt of the defendant's fitness. *Eddmonds*, 143 Ill. 2d 501. Only if, when taken from an objective point of view, the circumstance raise a *bona fide* doubt as to defendant's

fitness—meaning a substantial and legitimate doubt of defendant's fitness—does defendant have a right to a fitness hearing. *Id.* Our supreme court has set forth several factors to consider in determining whether a *bona fide* doubt exists, including: (1) defendant's irrational behavior; (2) defendant's demeanor at trial; and (3) any prior medical opinions on defendant's competence.

¶ 27 In this case, in its written order, the court indicated that it found *bona fide* doubt existed and granted defendant's request for a fitness examination. However, defendant presented no evidence that there was a substantial and legitimate doubt regarding his fitness. Despite the written order indicating that a *bona fide* doubt existed as to defendant's fitness, the record is void of any such indication. It appears that the order was entered in accordance with section 104-11(b) of the Code to order defendant to undergo a preliminary fitness evaluation to assist the court in determining whether a *bona fide* doubt existed. There is nothing in the record to support an actual finding of *bona fide* doubt so as to necessitate a fitness hearing.

¶ 28 Moreover, on August 23, 2010, when the case was up for a fitness hearing, defense counsel indicated that the fitness examination resulted in defendant having been found fit. The trial court had previously observed defendant's behavior and demeanor throughout pretrial and trial. There is no indication in the record that defendant behaved irrationally or acted improperly at trial, did not fully understand the nature of the proceedings, or was unable to assist in his own defense. The trial court made an explicit finding that defendant was fit and then, at defendant's request, continued the matter for a fitness hearing. Subsequently, defense counsel did not pursue the issue of defendant's fitness any further, and had even indicated to the court that the issue had been resolved on August 23, 2010.

¶ 29 Thus, we conclude that although holding a fitness hearing after finding that *bona fide* doubt exists may be mandatory, it is not so fundamental so as to warrant a reversal in this case,

where there is no indication in the record that defendant was unfit for trial or sentencing. The court did receive the requested fitness evaluation showing defendant fit. Defendant did not request any additional hearings. Even on appeal, defendant does not point to any evidence that would have been presented at a fitness hearing to support a finding of unfitness. In fact, defendant does not argue that he would have been found unfit at a full fitness hearing. Consequently, defendant has failed to meet his burden of persuasion that the error affected the fairness of his trial or challenged the integrity of the judicial process. Accordingly, defendant's forfeiture of the issue cannot be excused as plain error.

¶ 30 II. Prosecutor Comments during the State's Closing and Rebuttal Arguments

¶ 31 Defendant next argues that a reversal is necessary because he was denied a fair trial due to the prosecutor's improper comments during the State's closing and rebuttal arguments. Specifically, defendant claims that the prosecutor made improper comments by expressing his opinion of defendant's guilt, attempting to define reasonable doubt, and derogating defendant's exercise of his right to a jury trial.

¶ 32 Although defendant objected during the State's rebuttal argument, he failed to object during the prosecutor's initial closing argument and failed to raise the issue in a posttrial motion, thereby forfeiting this issue. See *Enoch*, 122 Ill. 2d 176. Defendant concedes he has forfeited review of the issue but argues that plain error review is proper because the cumulative effect of the improper comments by the prosecutor substantially prejudiced him and denied him a fair trial. Before invoking the plain error exception, we must determine whether any error occurred at all. *People v. Palmer*, 382 Ill. App. 3d 1151 (2008) (citing *People v. Wade*, 131 Ill. 2d 370 (1989)).

¶ 33 Generally, the prosecution is allowed wide latitude in making its closing argument.

*People v. Wheeler*, 226 Ill. 2d 92 (2007). In reviewing the prosecutor's comments during closing arguments, a reviewing court asks whether the comments engender a substantial prejudice against a defendant so that it is impossible to determine whether a guilty verdict resulted from the comments. *Id.* If the jury could have reached a contrary verdict had the improper remarks not been made, or the reviewing court cannot say that the remarks did not contribute to the defendant's conviction, a new trial should be granted. *Id.* In determining whether a prosecutor's improper remarks are substantially prejudicial and warrant reversal, reference is made to the content and context of the language, its relation to the evidence, and its effect on the defendant's right to a fair and impartial trial. *People v. Dunsworth*, 233 Ill. App. 3d 258 (1992). A reviewing court must consider the remarks in the context of the parties' closing argument as a whole. *People v. Simms*, 192 Ill. 2d 348 (2000).

¶ 34 During the initial part of the State's closing arguments, the prosecutor referenced the fingerprint evidence, noting that the fingerprint analyst was "100 percent sure" that the fingerprint taken from that jewelry box was defendant's print and after reviewing the evidence the jury could be "100 percent sure" that defendant was "100 percent guilty." In her closing argument, defense counsel argued that the State had the burden to prove that defendant committed the offense "beyond a reasonable doubt." Defense counsel emphasized that proving defendant guilty beyond a reasonable doubt was "very important" and described the standard as a "high standard." In rebuttal, the prosecutor explained that "reasonable doubt doesn't mean beyond all doubt" and does not mean "hundred percent." The prosecutor again argued that the State had proven defendant guilty "hundred percent beyond all doubt" and "exceeded" the burden of proof.

¶ 35 Although attempts to explain the reasonable doubt standard are disfavored by courts,

both the prosecution and defense are entitled to discuss reasonable doubt, present their view of the evidence, and suggest whether the evidence supports reasonable doubt. *People v. Burney*, 2011 IL App (4th) 100343. A prosecutor may discuss the reasonable doubt standard without diminishing the State's burden or shifting the burden to the defendant. *Id.* We find no error in the prosecutor's discussion of reasonable doubt, especially in light of the comments having been made in response to defense counsel describing reasonable doubt in her closing argument. See *People v. Johnson*, 208 Ill. 2d 53 (2003) (a prosecutor may respond to comments made by defense counsel in closing argument that clearly invite a response).

¶ 36 Additionally, there was no error in the prosecutor's comments expressing his opinion that the evidence was so overwhelming that he thought the jury would be "100 percent sure" of defendant's guilt. See *People v. Bailey*, 249 Ill. App. 3d 79 (1993) (a prosecutor may express an opinion and draw inferences from the evidence). We also find no error in the prosecutor arguing that the trial was held because defendant had a right to trial and not because there was any question as to defendant's guilt based upon the evidence presented. Contrary to defendant's argument, the prosecutor's comments, when read in context, were not disparaging remarks on defendant exercising his right to trial, but were an argument that the evidence left no genuine issue as to defendant's guilt. We find no error in the prosecutor's comments.

¶ 37 III. 20-Year Sentence

¶ 38 Defendant argues that his extended-term prison sentence of 20 years was excessive in light of his "difficult upbringing and drug and alcohol problems" and his demonstrated potential for rehabilitation. The Illinois Constitution mandates that all penalties 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. The determination and imposition of a sentence

involves considerable judicial discretion, and we will not reverse a trial court's sentence unless we find that the court abused its discretion. *People v. Stacey*, 193 Ill. 2d 203 (2000). A sentence that falls within the statutory range does not amount to an abuse of discretion unless it is manifestly disproportionate to the nature of the offense. *People v. Jackson*, 375 Ill. App. 3d 796 (2007).

¶ 39 Here, the trial court did not abuse its discretion when it sentenced defendant to 20 years of imprisonment. Residential burglary is a Class 1 felony subject to 4 to 15 years of imprisonment. 720 ILCS 5/19-3(b) (West 2008); 730 ILCS 5/5-4.5-30 (West 2008). Due to defendant's criminal history, he was eligible for an extended-term sentence. 730 ILCS 5/5-5-3.2(b)(1), 5-8-2(a)(3) (West 2008). The sentencing range for an extended-term Class 1 felony is between 15 to 30 years of imprisonment. 730 ILCS 5/5-4.5-30(a) (West 2008).

¶ 40 The trial court properly considered in mitigation the fact that defendant waited until no one was in the victim's home before entering it. See 730 ILCS 5/5-5-3.1(a)(1), (a)(2) (West 2008) (providing that defendant neither causing nor threatening serious physical harm to another and not contemplating doing so shall be accorded weight in favor of withholding or minimizing a sentence of imprisonment). In aggravation, the trial court properly considered the sentence was necessary to deter others from committing the same type of crimes and defendant's past criminal history, noting that he was on MSR at the time of the offense. 730 ILCS 5/5-5-3.2(a)(3), (a)(7), (a)(12) (West 2008).

¶ 41 Defendant argues that the trial court did not give enough weight to his relative youth and his rehabilitative potential. However, the trial court was not required to give greater weight to defendant's rehabilitative potential than other circumstances of the offense. See *People v. Alexander*, 239 Ill. 2d 205 (2010). Defendant's 20-year sentence was on the lower end of the

extended-term sentencing range. We cannot say that the trial court abused its discretion by sentencing defendant to 20 years of imprisonment, especially in light of defendant's criminal history.

¶ 42

#### CONCLUSION

¶ 43 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 44 Affirmed.

2012 IL App (3d) 100913-U, People v. Randall Syler

¶ 45 JUSTICE O'BRIEN, dissenting:

¶ 46 I respectfully dissent from the majority's conclusion that the failure to hold a fitness hearing is not a fundamental due process error worthy of reversal.

¶ 47 The majority states that in order for the trial court's finding to be reversed, under the Plain Error Doctrine, there must be a showing that the trial court's error in denying a fitness hearing affected the fairness of the trial. The majority implicitly concedes it was an error not to conduct a fitness hearing after a *bona fide* doubt had been raised. Nevertheless, the majority argues that this error is not so egregious as to warrant a reversal. The majority supports its position by pointing to a lack of evidence indicating that Syler was unfit to stand trial or sentencing.

¶ 48 Section 104-11(a) of the Code of Criminal Procedure of 1963 unequivocally states that once a *bona fide* doubt of a defendant's fitness has been raised, the court must conduct a fitness hearing. 725 ILCS 5/104-11(a) (West 2008). This statute serves to protect a defendant's due process right to be fit for trial. *People v. Smith*, 353 Ill. App. 3d 236, 240, 818 N.E.2d 419, 422 (2004). Once the trial court has determined that there is a *bona fide* doubt as to the defendant's

fitness, the defendant becomes constitutionally entitled to a fitness hearing. Id.

¶ 49 The majority argues that the trial court may not have found that a *bona fide* doubt existed as to Syler's fitness. However, the trial court's order from May 28, 2010 clearly states that a *bona fide* doubt existed. The defense submitted the necessary motion for a fitness evaluation. The trial court had ample opportunity to view Syler in open court. It is highly unlikely that the trial court accidentally or inadvertently found that a *bona fide* doubt existed. Moreover, it is not the job of this court to retroactively determine whether a defendant was fit at the time of trial or sentencing. *Smith*, 353 Ill. App. 3d at 243, 818 N.E.2d at 424.

¶ 50 Statute and case law are clear: once the trial court has determined that a *bona fide* doubt exists concerning the fitness of a defendant, it is his due process right to have a fitness hearing. The trial court found a *bona fide* doubt as to Syler's fitness. Yet, a fitness hearing never occurred. This is a violation of Syler's due process right, and as such, affected the fairness of the trial.

¶ 51 For these reasons, I respectfully dissent from the majority. I would reverse and remand the case pending the necessary fitness hearing.