2016 IL App (1st) 140994-U

FOURTH DIVISION
June 16, 2016

No. 1-14-0994

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 23251
	)	
ISAAC PEREZ,	)	Honorable
	)	Evelyn B. Clay and
Defendant-Appellant.	)	James B. Linn,
	)	Judges Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's alleged failure to comply with Illinois Supreme Court Rule 431(b) was not plain error, and defendant's mandatory life sentence did not violate the Eight Amendment or proportionate penalties clause.

¶ 2 Following a jury trial, defendant, Isaac Perez, was convicted of armed robbery, and was sentenced to mandatory life imprisonment as a habitual offender. In this appeal, defendant contends that the trial court violated Illinois Supreme Court Rule 431(b) by failing to ask the prospective jurors whether they understood and accepted the principles enumerated in that rule.

Defendant further contends that the habitual criminal provision under which he was sentenced is unconstitutional as applied to him.

¶ 3 The record shows that defendant was charged with armed robbery, forcible detention and unlawful restraint in connection with an October 28, 2008, incident in which defendant was alleged to have robbed the victim, Canusca Figueroa, at knifepoint.

¶ 4 During jury selection prior to trial, Judge Evelyn B. Clay addressed the venire and stated:

> "We begin with the person accused of a crime at the beginning of the proceeding presumed to be innocent. Is there anybody here who has a disagreement or a problem with that proposition, that when a criminal trial starts, the accused is presumed to be innocent. If you have a disagreement or problem with that, please raise your hands."

One prospective juror, who was not ultimately selected, raised his hand. The court then explained how a person is charged with a crime by the filing of an indictment, information or complaint, and continued:

> "Now because a piece of paper was filed does not necessarily mean the accused did anything wrong doesn't mean anybody necessarily committed a crime or did something wrong. *** With that said, is there anybody here who is totally against this, anybody disagrees with the proposition I just explained? Would you hold it against the accused simply because someone filed a peace [*sic*] of paper in court indicating what the charges are against him? If there's a

> disagreement or possible problem with that concept, please raise your hand."

No potential jurors raised their hands.

¶ 5 The court then explained how "someone goes from the status of accused of a crime to someone who might be guilty of a crime" and stated:

> "[t]he government has the burden of proof. They have to prove the case beyond a reasonable doubt. You can't guess somebody guilty or think they're guilty, have a hunch about it. The only way somebody can be guilty in a criminal trial is if the government who brought the charge can prove guilt beyond a reasonable doubt. Is there anybody who has disagreement or problem with that? The only way somebody can be guilty in a criminal trial is if the government proves guilt beyond a reasonable doubt. Do you have a disagreement or problem with that, please raise your hand?"

No hands were raised.

¶ 6 The court then stated,

> "The last proposition I'll discuss with you is that in a criminal trial the accused does not have to prove their innocence. The accused does not have to testify. They do not have to call any witnesses on their own behalf. In a criminal trial the burden is on the government. They have to prove guilt beyond a reasonable doubt. The accused does not have to prove anything at all. Hypothetically speaking, there could be a criminal trial. The government may call

> a hundred witnesses against the accused. The accused, which is their perfect right, chooses not to testify, which is also their perfect right, chooses not to call any witnesses on their own behalf. After hearing from a hundred witnesses on one side, no one on the other, there could be a reasonable doubt in the jury's mind whether the government has met their burden of proof. That said, is there anybody here who would hold it against the accused id they did not testify or did not call witnesses in [*sic*] their own behalf, which is their perfect right not to do so. Anybody who would be prejudiced and hold it against the accused that didn't testify or didn't call witnesses in [*sic*] their own behalf. If you have a problem or disagreement with any of that, please raise your hand."

No hands were raised.

¶ 7 After the jury was selected and the trial began, Canusca Figueroa testified that on October 28, 2008, she was working at a daycare facility when she received a phone call requesting that she pick up her nine-year-old son from school because he was sick. Figueroa picked up her son, and brought him to the doctor's office. After leaving the doctor, Figueroa and her son went to Figueroa's mother's home, located on the first floor of 1931 North St. Louis Avenue in Chicago, where she intended to leave her son with her mother and return to work.

¶ 8 As Figueroa and her son arrived, she observed a man, whom she identified as defendant, pass by on a bicycle. Figueroa opened the gate to her mother's house, went up a few stairs, and rang the doorbell. At that point, Figueroa saw that defendant had "leaned his bike about two houses down" and was coming back towards her. Defendant came through the gate, and walked

up the stairs to where Figueroa and her son were standing. Defendant asked Figueroa about "someone who lived upstairs" but she did not know the person to whom he was referring.

¶ 9 Defendant then pulled out a kitchen knife, which she estimated was about 8 to 12 inches long. Defendant touched Figueroa's son and said "if you love him very much, you're going to give me everything you have" including a necklace that Figueroa was wearing. Figueroa testified that during this time, she was standing about a foot from defendant, and was looking at defendant's face and "his features."

¶ 10 Figueroa then opened her bag and gave defendant an envelope with money that she was going to use to pay bills. She also removed her necklace and gave it to defendant. Defendant took those items, and told Figueroa "not to scream or say anything because he knew where [she] lived." Defendant then grabbed his bicycle and fled. Figueroa testified that the entire incident lasted about five minutes.

¶ 11 Figueroa then went to a nearby school where someone called 911. When the police arrived, Figueroa communicated with the officers through an interpreter because Figueroa was crying and upset. Figueroa explained what had happened, and gave a description of the offender.

¶ 12 About four weeks later, Figueroa was contacted by the Chicago Police Department, and she was asked to come to the police station to view a lineup. Figueroa reviewed and signed a lineup advisory form, then viewed a lineup containing five individuals. Figueroa identified defendant "right away." She testified that she recognized defendant's "face, [and] his features" including his mouth and jaw area.

¶ 13 On cross-examination, Figueroa testified that she described the offender as "a male Puerto Rican" and that he had a hat. She denied describing the hat as a baseball cap, and testified

instead that the offender was wearing a knit hat "for the cold." Figueroa otherwise could not remember what description she gave to the responding officer.

¶ 14 When Figueroa spoke to a detective five days later, she described the offender as a Puerto Rican male, with a light complexion, and wearing a brown sweater with a design of "little squares." Figueroa testified that she had described the offender as "skinny," and later clarified that she described "his face as skinny." She thought that she may have described the offender as being 130 to 140 pounds.

¶ 15 Detective Bruce Kischner of the Chicago Police Department testified that he was assigned to investigate the October 28, 2008, robbery of Figueroa. On November 22, 2008, Detective Kischner learned that defendant had been arrested approximately a block away from where the robbery had occurred. Detective Kischner believed that defendant fit the physical description of the offender in the case he was investigating, and he contacted Figueroa to come to the station to view a lineup.

¶ 16 When Figueroa arrived, Detective Kischner spoke to her using a Spanish interpreter, and explained the lineup process. Detective Kischner read from, and provided her with, a lineup advisory form which was signed and entered into evidence at trial.

¶ 17 Upon viewing the lineup, Figueroa "immediately" identified defendant. Detective Kischner explained that there is a curtain which covers a window between Figueroa and the lineup participants, and "[t]he minute I opened the curtain she said numero quattro [*sic*]" meaning, number four in Spanish, identifying defendant who was seated fourth in the lineup.

¶ 18 On cross-examination, Detective Kischner testified that when defendant was arrested, he told the arresting officers that he was 5'11" and weighed 207 pounds. Defendant had brown hair, a medium complexion, and was 38 years old.

¶ 19 The State rested, and the defense presented a stipulation that if called, Detective Carillo would testify that:

> "he spoke to Ms. Figueroa on November 2, and that Ms. Figueroa gave a description of the offender to the detective, and the description she gave is the following: That the offender is a male Puerto Rican, 5'9"/5'10", 130/140 pounds, light complexion, skinny face, heavy stubble of [*sic*] face, over bite with teeth showing and short hair. The offender was wearing a blue baseball hat and a brown sweater with a square design."

¶ 20 The defense rested, and the parties presented closing arguments. After deliberations, the jury returned a verdict finding defendant guilty of armed robbery.

¶ 21 The matter proceeded to sentencing before Judge James B. Linn, and, in aggravation, the State called Detective Kischner to testify regarding four other armed robberies, between October 16, 2008 and November 16, 2008, in which the victims identified defendant as the offender. The State also informed the court that defendant qualified for a mandatory natural life sentence as a habitual offender, based on his 1997 and 2006 convictions for Class X armed robbery. The State also informed the court that defendant had been convicted in another case the previous year and was currently serving a mandatory natural life sentence.

¶ 22 In imposing sentence, the trial court observed that it was "not a fan of mandatory sentencing with no discretion," but under the facts of this case, "if it was my discretion, I would still do what the legislature says I must and I will sentence him to mandatory life in the penitentiary. This will run concurrent with his other life sentence already being served[.]"

¶ 23 Defendant filed a notice of appeal from that judgment, and in this court, defendant first contends the circuit court violated Supreme Court Rule 431(b) (eff. May 1, 2007), because it failed to adequately ensure that the jury understood and accepted the Rule 431(b) principles of law. Under Supreme Court Rule 431(b), a trial court must ask prospective jurors in a criminal trial whether they understand and accept the following four principles of law: (1) that defendant is presumed innocent of the charges against him; (2) that before defendant can be convicted the State must prove him guilty beyond a reasonable doubt; (3) that defendant is not required to offer any evidence on his own behalf; and (4) that if defendant does not testify, it cannot be held against him. Where an issue concerns compliance with a supreme court rule, our review is *de novo*. *People v. Ware*, 407 Ill. App. 3d 315, 341 (2011).

¶ 24 In this appeal, defendant does not argue that the trial court failed to address any particular principle. Instead, he claims that the court's language in asking whether the prospective jurors had a "disagreement" or "problem" with the 431(b) principles did not adequately establish whether they understood and accepted them. He contends that the court's language "may suffice to determine whether jurors *accept* the principles, but those inquiries do not offer any insight into whether the jurors *understand* them."

¶ 25 The State responds that defendant's claim of Rule 431(b) error is forfeited for review on appeal, and even if an error occurred, it did not rise to the level of plain error. The State also maintains that there was no error, and that the court properly admonished the potential jurors under Rule 431(b).

¶ 26 We agree that the defendant has forfeited this issue for review on appeal. See *People v. Herron*, 215 Ill. 2d 167, 175 (2005) (a defendant who fails to make a timely trial objection and include the issue in a posttrial motion forfeits the review of the issue). The record shows that

defendant did not object to the alleged failure to comply with Rule 431(b). As a result, defendant contends that we should review his claim for plain error.

¶ 27 The plain error rule is a narrow exception to the forfeiture rule which allows a reviewing court to consider unpreserved claims of error where defendant shows either that the evidence is closely balanced, or the error is so serious that it affected the fairness of his trial and challenged the integrity of the judicial process. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). Under both prongs, defendant bears the burden of persuasion, and he must first show that a clear or obvious error occurred. *Id*. If defendant fails to meet his burden, his procedural default will be honored. *Id*.

¶ 28 Defendant argues only under the first prong, maintaining that the evidence at trial was closely balanced. We disagree. The victim, Figueroa, testified unequivocally that defendant was the man who robbed her. She immediately identified defendant at the lineup and again at trial, and never wavered in her identification. Moreover, Figueroa specifically testified to her high level of attention during the incident, and that she focused specifically on defendant's face and features. She further testified that defendant was standing only a foot away from her and her son, and that she had five minutes during the offense with which to observe defendant. There was no other testimony or evidence presented which contradicted Figueroa's identification of defendant, and in these circumstances, we do not find the evidence to be closely balanced.

¶ 29 Defendant disagrees, and points to the alleged inaccuracies in the descriptions given by Figueroa to argue that the evidence was closely balanced. Defendant specifically argues that his height and weight varied from the description given by Figueroa, and that she testified at trial that the offender "was wearing a knit, winter hat" when she "previously told the police that the offender was wearing a baseball cap." Initially, we note that defendant's argument regarding his

height and weight is based on his own self-reported and unverified measurements. Nonetheless, where a witness makes a positive identification, precise accuracy in the preliminary description is not necessary. *People v. Mendoza*, 62 Ill. App. 3d 609, 616 (1978). Viewing the evidence in a commonsense manner in the context of the totality of the circumstances, we conclude that the evidence was not closely balanced. Therefore, any error in admonishing the jurors regarding Rule 431(b) principles would not be reversible under the plain error doctrine, and defendant's procedural default must be honored.

¶ 30 Defendant next contends that his sentence "violates both the federal and state constitutions because it mandates a life sentence without the possibility of parole even though no one was physically harmed during the robbery." We review the constitutionality of a statute *de novo*. *People v. Gipson*, 2015 IL App (1st) 122451, ¶ 50.

¶ 31 Under the Act, a defendant is a habitual criminal, subject to a sentence of mandatory natural life without the possibility of parole, if he is convicted of three separate Class X offenses in 20 years, excluding time in custody. 730 ILCS 5/5–4.5–95(a) (West 2010). In this case, defendant had twice been convicted of a Class X armed robbery in 1997, and in 2006. As a result of defendant's third Class X conviction for armed robbery in this case, the Act required the trial court to sentence defendant to natural life imprisonment without the possibility of parole.

¶ 32 As the State points out, our supreme court has previously upheld the constitutionality of the habitual criminal provision in the face of challenges that it violates the proportionate penalties clause of the Illinois Constitution and the Eighth Amendment of the United States Constitution. *People v. Dunigan*, 165 Ill. 2d 235, 244–48 (1995). The State argues that, in asking this court to find the habitual offender provision unconstitutional, defendant is asking this court to overrule supreme court precedent, which this court cannot do. Defendant, however, maintains that he is raising an "as applied" constitutional challenge to the habitual criminal provision, and

thus contends that *Dunigan*, in which the supreme court rejected a facial constitutional challenge, does not bind this court.

¶ 33 This court recently considered a similar, "as-applied" challenge to the habitual criminal provision in *People v. Fernandez*, 2014 IL App (1st) 120508, ¶ 1 (2014). The defendant in *Fernandez* was convicted of distributing more than 900 grams of cocaine, a Class X felony. *Id*. at ¶ 40. The defendant had two prior Class X felonies in his background, also for drug offenses involving large quantities, and, as a result, defendant was sentenced as a habitual offender to mandatory life imprisonment. *Id*. The defendant in *Fernandez* similarly challenged the constitutionality of the sentencing provision, claiming that the sentence violated the Eighth Amendment of the United States Constitution and the proportionate penalties clause of the Illinois Constitution. *Id*. at ¶ 2.

¶ 34 In rejecting the defendant's Eight Amendment challenge, this court considered *Harmelin v. Michigan*, 501 U.S. 957, 994–96 (1991), in which the United States Supreme Court held that mandatory life imprisonment for a first-time drug offender who was convicted of possessing 672 grams of cocaine, did not violate the Eight Amendment. The court compared the defendant in *Harmelin* to the *Fernandez* defendant, who had been convicted of distributing an even greater quantity of cocaine and who had two prior Class X drug offenses, also involving large quantities of drugs. *Id*. at ¶ 40. The court thus concluded under *Harmelin*, it could not say that the defendant's sentence violated the Eight Amendment. *Id*. Similar, but even stronger in this case, defendant's conviction is for armed robbery, and his two previous Class X convictions were also for armed robbery—a violent offense. Under *Harmelin* and *Fernandez*, we also conclude that defendant's mandatory life sentence does not violate the Eighth Amendment.

¶ 35 Defendant next contends that his mandatory natural life sentence violates the proportionate penalties clause because "no one was physically harmed" during the offense. He contends that "requiring that [he] die in prison for an offense that he committed while addicted to drugs and that caused no physical harm contravenes our evolving standards of decency."

¶ 36 All statutes carry a strong presumption of constitutionality. *People v. Sharpe,* 216 Ill. 2d 481, 487 (2005). Defendant has the burden to demonstrate that the statute is unconstitutional. *People v. Alcozer,* 241 Ill. 2d 248, 259 (2011). The legislature has broad discretion in setting criminal penalties and may pass statutes that prescribe mandatory sentences, even if those statutes restrict the judiciary's sentencing discretion. *People v. Taylor,* 102 Ill. 2d 201, 208 (1984); *Sharpe,* 216 Ill. 2d at 487. The legislature's power is not unlimited, however, as the sentences it prescribes must satisfy constitutional constraints. *People v. Morris,* 136 Ill. 2d 157, 161 (1990). We will not overrule the legislature's sentencing mandates, unless the penalty is clearly in excess of the general constitutional limitations. *Alcozer,* 241 Ill. 2d at 259. Our review of this question of law is *de novo. People v. Masterson,* 2011 IL 110072, ¶ 23.

¶ 37 The proportionate penalties clause states that “[a]ll penalties shall 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. A statute is unconstitutionally disproportionate if the punishment for the offense is cruel, degrading, or so wholly disproportionate to the offense as to shock the moral sense of the community. *Sharpe,* 216 Ill. 2d at 487; *People v. Miller,* 202 Ill. 2d 328, 339–41 (2002). The Illinois Supreme Court has “never defined what kind of punishment constitutes ‘cruel,’ ‘degrading,’ or ‘so wholly disproportioned to the offense as to shock the moral sense of the community.’ ” *Id.* at 339. “This is so because, as our society evolves, so too

do our concepts of elemental decency and fairness which shape the 'moral sense' of the community." *Id.*

¶ 38 We also find *Fernandez* helpful to the resolution of this issue. In *Fernandez*, the court considered a proportionate penalties challenge to the habitual criminal provision based on the nonviolent nature of the defendant's three Class X drug offenses. *Fernandez*, 2014 IL App (1st) 120508, ¶ 43-65. The court in *Fernandez* laid out the history of the habitual criminal provision, and recognized that *"Dunigan* and its progeny have uniformly upheld the Act in the face of proportionate penalties challenges, [but] none of these cases involved individuals, like defendant, whose qualifying offenses are all nonviolent, drug offenses." *Id*. at ¶ 49-50. The court thus considered "the particular question at issue in this case: whether the Act, as applied to defendant, violates the proportionate penalties clause." *Id*. at ¶ 50. The court ultimately concluded that it did not. *Id*. at ¶ 64.

¶ 39 The court noted that the legislature has broad discretion to fashion the penalties for the criminal offenses it defines, and the facts of *Fernandez* did not indicate that the Act exceeded those bounds. *Id.* at ¶ 65. Although the defendant's offenses were nonviolent, the court noted that the defendant had been convicted of drug crimes involving large quantities, and "[i]n light of the quantities of narcotics in each case, defendant has shown that he poses a significant risk to the community." *Id*. at ¶ 64.

¶ 40 As does defendant here, defendant in *Fernandez* relied on *People v. Miller*, 202 Ill. 2d 328 (2002), in support of his contention that his mandatory life-without-parole sentence violates the proportionate penalties clause. In *Miller*, the 15-year-old defendant was standing on a street corner when two others carrying guns asked him to serve as a lookout. *Id*. at 330. The defendant agreed but did not handle or touch any guns. About one minute later, the other two fired

gunshots killing two people. When he heard the gunshots, the defendant ran to his girlfriend's house. *Id*. at 331. The defendant was convicted of the murders under a theory of accountability, and under the relevant multiple-murder sentencing statute the trial court was required to impose a sentence of life in prison without parole. *Id*. at 331–32. The trial court refused to impose such a sentence on the defendant, finding that under the circumstances, applying the multiple-murder sentencing statute violated both the eighth amendment and the proportionate penalties clause.[1] Instead, the trial court sentenced the defendant to a term of 50 years' imprisonment. *Id*. at 332. The supreme court agreed, finding that the statute, as applied to defendant, a juvenile offender convicted under a theory of accountability, violated the proportionate penalties clause of the Illinois Constitution. *Id*. at 343.

¶ 41 The *Fernandez* court, however, found *Miller* distinguishable, because unlike the defendant in *Miller*, the defendant in *Fernandez* was an adult offender, was not convicted under an accomplice theory, and his participation in the offense was not a spontaneous decision. *Fernandez*, 2014 IL App (1st) 120508, ¶ 54. We too find *Miller* distinguishable from the case at bar. Here, as in *Fernandez*, defendant was an adult offender. He was not convicted under an accomplice theory, and his participation in the offense was not a spontaneous decision.

¶ 42 Although the court in *Fernandez* expressed some hesitation and called the defendant's punishment "harsh," (*Fernandez*, 2014 IL App (1st) 120508, ¶ 43) we do not have the same concerns which gave the court pause in that case. The court in *Fernandez* specifically observed

[1] We note that the sentencing judge in this case is the same judge who, with great foresight, decided the sentencing issue in *People v. Miller*, 202 Ill. 2d at 332, more than 10 years prior to the United States Supreme Court's decision in *Miller v. Alabama*, 567 U.S. ——, 132 S. Ct. 2455 (2012) which barred mandatory life sentences without parole for juveniles.

that none of the defendant's convictions involved the use or threat of violence. *Id*. at ¶ 53. In this case, by contrast, there is no doubt that defendant's offenses were violent ones. As stated previously, defendant's two prior Class X offenses for armed robbery were violent offenses, and, in this case, defendant pulled out a kitchen knife, touched Figueroa's son, and told her that "if [she] loved him very much" she would give defendant "everything [she] had." Defendant then took Figueroa's money and necklace, and fled with those possessions. We find no reason to depart from the holding in *Fernandez* in this case, and conclude that the habitual criminal provision does not violate the proportionate penalties clause as applied to defendant.

¶ 43 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 44 Affirmed.