

No. 1-14-3885

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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.)	Nos. 14 CR 1618
)	14 CR 824
)	
JOSEPH CALAMIA,)	Honorable
)	Paula M. Daleo,
Defendant-Appellant.)	Judge Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Gordon and Lampkin concurred in the judgment.

ORDER

Held: The circuit court's judgment is affirmed over defendant's contention that his extended-term sentence is improper; mittimus corrected.

¶ 1 Following a jury trial, defendant, Joseph Calamia, was found guilty of three counts of aggravated fleeing or attempting to elude a peace officer (625 ILCS 5/11-204.1(a), (b) (West 2012)), then sentenced to an extended-term sentence of seven years' imprisonment. On appeal, defendant contends that the trial court erred in sentencing him within the extended-term range

applicable to Class 3 felonies where he was "convicted of" a Class 4 felony, and the class was enhanced to a Class 3 felony during sentencing due to his prior conviction for the same offense. Defendant also contends that his mittimuses should be corrected to reflect the proper convictions.

¶ 2

I. BACKGROUND

¶ 3

The record shows that defendant was charged by indictment in two separate cases with six total counts of aggravated fleeing or attempting to elude a peace officer. Four of the counts stemmed from an incident which took place in Elmwood Park, Illinois on December 10, 2013, and two of the counts stemmed from an incident that took place in River Forest, Illinois, that same day. Three of the counts charged defendant with a Class 4 felony for violating section 5/11-204.1(a)(4) of the Illinois Vehicle Code (Code) (625 ILCS 5/11-204.1(a)(4) (West 2012)). The other three counts charged defendant with violating that same section of the Code, but added that "the State shall seek to sentence [defendant] as a Class 3 offender pursuant to [section 5/11-204.1(b) of the Code] in that [defendant] committed a violation of this section on one or more prior occasions." The two separate cases were joined for trial.

¶ 4

Prior to trial, the court asked the State to explain the separate charges. The State explained that the statute included a sentencing enhancement for repeat offenders, which were the charges the State wished to pursue. The State then *nolle prossed* the three counts that charged defendant with the Class 4 felony, and proceeded to trial on the three remaining counts, which were Class 4 offenses that would be capable of being enhanced to Class 3 offenses. Prior to jury selection, the parties and the court agreed that the enhancement portion of the statute would not be included in the jury's instructions, but that if defendant were found guilty then the court would take notice of the enhancement portion.

¶ 5 At trial, Elmwood Park police officer LaPenna¹ testified that on December 10, 2013, at 6:35 p.m., he was on patrol in a marked police vehicle near the 1900 block of Harlem Avenue in Elmwood Park, Illinois. While on patrol, he observed a black BMW with no front license plate driving in the opposite direction from him. He observed that the BMW had an LED light near the top of the windshield. Officer LaPenna recognized defendant as the driver of the vehicle because he had seen a photograph of him in a police bulletin. Officer LaPenna drove his marked police vehicle behind defendant's vehicle and entered the license plate number on defendant's rear license plate into the computer in his police vehicle. Officer LaPenna then activated the emergency lighting on his vehicle while behind defendant's BMW. Defendant did not stop his vehicle or pull over, but turned down another street. Officer LaPenna followed defendant who activated a "mechanized plate cover," which covered the rear license plate on the BMW with a piece of black plastic so that Officer LaPenna could not read the license plate number.

¶ 6 Officer LaPenna then observed defendant turn onto another street, continued to follow him, and activated the siren on his vehicle. Defendant still did not stop the vehicle or pull over, and Officer LaPenna observed defendant commit multiple traffic violations, including driving down the center median, driving into oncoming traffic, and ignoring traffic control devices. Defendant then drove his vehicle through a red light at a large intersection and Officer LaPenna terminated his pursuit of defendant's vehicle at the behest of his supervisor. Officer LaPenna testified that his police vehicle was equipped with a video camera that records for 30 seconds prior to him activating the emergency equipment on his vehicle and continues recording while the equipment is activated. The video of the pursuit Officer LaPenna described in his testimony was then admitted into evidence and published to the jury. On redirect examination, Officer

¹ Officer LaPenna's first name is not disclosed in the record.

LaPenna testified that the police bulletin that contained a photograph of defendant also contained a description of his vehicle, which was a black BMW with LED police lights on the windshield.

¶ 7 River Forest police officer Anthony Pluto testified that on December 10, 2013, at 6:50 p.m., he was on patrol in a fully marked police vehicle near Chicago Avenue and Lathrop Avenue in River Forest, Illinois. Officer Pluto testified that he received a radio call from the Elmwood Park police department and then observed a black BMW travelling westbound on Chicago Avenue toward Lathrop Avenue. Officer Pluto observed defendant through the BMW's windshield as the driver of the vehicle. Officer Pluto also recognized defendant and the vehicle he was driving from a police bulletin. Officer Pluto followed the vehicle and noticed that the rear license plate was blocked so that he could not read it. He then drove his vehicle behind the BMW and activated his emergency lights and siren. Defendant did not stop his vehicle, but drove through a stop sign without stopping and almost collided with another vehicle. Officer Pluto followed defendant as he drove into oncoming traffic to pass vehicles that were travelling in the other traffic lanes. At that point, Officer Pluto terminated his pursuit of defendant's vehicle.

¶ 8 Officer Pluto testified that his police vehicle was equipped with a video camera that records for 30 seconds prior to him activating the emergency equipment on his vehicle and continues recording while the equipment is activated. The video of the pursuit Officer Pluto described in his testimony was then admitted into evidence and published to the jury. Officer Pluto further testified that on December 27, 2013, he travelled to the 1300 block of North 12th Avenue in Melrose Park, Illinois, after a conversation with his sergeant. There, he observed the black BMW defendant was driving parked in the garage of the residence located at that address. Near the garage, he found clothing which contained a key for the BMW.

¶ 9 Melrose Park police investigator Leonard Bartemio testified that on December 27, 2013, at 6:30 p.m., he was working at the 1300 block of North 12th Avenue in Melrose Park, Illinois, attempting to locate defendant. As he approached the residence located at that address, he observed defendant in the backyard. He then observed defendant enter the garage and enter the passenger seat of a black BMW that was parked there. As Investigator Bartemio approached the garage, defendant made eye contact with him and asked him to not arrest him before the holidays. Defendant then ran toward Investigator Bartemio and they had a "short struggle" in the alleyway. Investigator Bartemio grabbed defendant's sweatshirt, but defendant slipped out of it and fled down the alley. Investigator Bartemio chased after defendant while communicating with other officers over his radio. Investigator Bartemio caught up to defendant and held him down until other officers arrived to arrest him.

¶ 10 Following closing argument, the jury found defendant guilty of all three counts of aggravated fleeing or attempting to elude a peace officer. At the subsequent sentencing hearing, the State reminded the court that when the jury heard the case, the enhancement portion of the statute was not presented to the jury on the court's instructions. The State noted that "defendant is *** facing sentencing on a class 3 [felony] based on a prior aggravated fleeing and eluding conviction." The State then provided the court with a certified copy of a conviction for aggravated fleeing or attempting to elude a peace officer in case number "07 C4 41169." The court stated that it "recognize[d] the certified copy of conviction which raises the class, that would normally be a class 4 to a class 3," for which defendant could be sentenced to a range between 2 and 10 years based on his background.

¶ 11 The State also tendered to the court certified copies of defendant's convictions in case number 02 CR 40380 for aggravated battery to a pregnant person, a Class 3 felony, and his 2004

convictions in case number 04 CR 41082 for aggravated battery to a peace officer, a Class 3 felony, and aggravated fleeing or attempting to elude a peace officer, a Class 4 felony. The State also introduced a certified copy of defendant's 2008 conviction for aggravated fleeing or attempting to elude a peace officer, a Class 4 felony. After considering the arguments in aggravation and mitigation, and defendant's statement in allocution, the court sentenced defendant to concurrent terms of seven years' imprisonment on each of the three counts.

¶ 12

II. ANALYSIS

¶ 13

On appeal, defendant contends that the trial court erred in sentencing him within the extended-term sentencing range applicable to Class 3 felonies because he was convicted of a Class 4 felony. He maintains that after the jury returned its verdict, the court entered judgment on that verdict, he was convicted of a Class 4 felony that was later enhanced to a Class 3 felony at sentencing, and the extended-term sentencing statute provides for an extended-term sentence only for the most serious offense of which defendant was convicted. The State responds that defendant was convicted of a Class 3 felony based on his prior conviction for aggravated fleeing or attempting to elude a peace officer and was also subject to extended-term sentencing based on his prior criminal history. The State asserts, therefore, that the trial court did not err in sentencing him in the extended-term range applicable to Class 3 felonies.

¶ 14

We initially observe, and defendant concedes, that defendant failed to preserve this issue for review. In order to preserve an issue for review, defendant must specifically object at trial and raise the specific issue again in a posttrial motion. *People v. Woods*, 214 Ill. 2d 455, 470 (2005). In this case, defendant did not object at trial, and, although he filed a motion to reconsider his sentence, he did not raise the issue he asserts on appeal. Nonetheless, defendant

contends that we may review this issue under the plain error doctrine, or, in the alternative, that his counsel was ineffective for failing to preserve this issue.

¶ 15 We first examine defendant's argument through the lens of plain error review. The plain error doctrine allows a reviewing court to consider unpreserved claims of error regardless of forfeiture. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). Plain error applies when there is a clear or obvious error and the evidence is so closely balanced that the error would change the outcome of the case, or when there is a clear or obvious error that is so serious that it affected the fairness of defendant's trial. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). The first consideration in addressing defendant's plain error argument is determining whether an error occurred, which requires a "substantive look" at the issue. *People v. Hudson*, 228 Ill. 2d 181, 191 (2008).

¶ 16 The record shows that the jury found defendant guilty of aggravated fleeing or attempting to elude a peace officer. The statute provides that an offender's first violation of the statute is a Class 4 felony, but that any person "convicted of a second or subsequent violation of this section shall be guilty of a Class 3 felony." 625 ILCS 5/11-204.1(a), (b) (West 2012). In this case, the parties agreed that the certified copy of defendant's previous conviction for aggravated fleeing or attempting to elude a peace officer would not be presented to the jury. Accordingly, prior to sentencing, and after the jury returned its guilty verdict, the State introduced a certified copy of defendant's prior conviction for aggravated fleeing or attempting to elude a peace officer. The court found that because of defendant's prior conviction, he was eligible to be sentenced in the range for a Class 3 felony, and was also subject to extended-term sentencing because of his criminal background, which the State established by introducing certified copies of three different convictions. Accordingly, the court sentenced defendant to seven years' imprisonment,

which was within the Class 3 extended-term sentencing range of 5 to 10 years. 730 ILCS 5/5-4.5-40(a) (West 2012).

¶ 17 Defendant contends, however, that because the State never introduced a certified copy of his conviction for aggravated fleeing or attempting to elude a peace officer to the jury, before the jury entered its verdict, he was "convicted" of a Class 4 felony. Defendant asserts that because he was convicted of a Class 4 offense, he was not eligible to be sentenced within the range applicable to extended-term sentencing for Class 3 felonies. In support of this proposition, defendant relies on *People v. Taylor*, 221 Ill. 2d 157 (2006), and places a great deal of emphasis on when he was "convicted" for purposes of sentencing. Specifically, defendant relies on the supreme court's determination in *Taylor* that a conviction has two parts, both of which must be satisfied for a conviction to take place. *Id.* at 164. "The first clause requires a judgment or sentence entered upon a plea of guilty or upon a verdict or finding of guilty of an offense. The second clause requires that any verdict or finding of guilty must be rendered by a jury or a court authorized to try the case without a jury." *Id.* Defendant asserts that both of the parts identified in *Taylor* were satisfied before his sentencing hearing. Defendant thus contends that he was convicted of a Class 4 felony before the court enhanced his conviction to a Class 3 felony during the sentencing hearing and it was therefore improper for the court to sentence him within the extended-term range applicable to Class 3 felonies.

¶ 18 In making this assertion, defendant relies on the plain language of the extended-term sentencing statute, which provides that the court shall not sentence an offender to a term of imprisonment that exceeds the maximum sentence authorized by the statute "within the class of the most serious offense of which the offender was convicted." 730 ILCS 5/5-8-2(a) (West 2010). Defendant asserts that because he was convicted of a Class 4 felony, he could not be

sentenced in the extended-term range applicable to Class 3 felonies. He contends that the court's subsequent elevation of his conviction to a Class 3 offense was an improper enhancement of his sentence, rather than a different form of the same offense, which the court then improperly extended. In support of this proposition, he contends, citing *People v. Burns*, 2015 IL 117387, ¶¶ 23-24, that the different classes of aggravated fleeing and attempting to elude a peace officer are not different "forms" of the offense, but are penalty enhancements that only come into play after defendant is found guilty.

¶ 19 We agree with defendant and the supreme court's holding in *Burns* that penalty enhancements are not elements of the offense, but come into play only after the defendant is found guilty. *Burns*, 2015 IL 117387, ¶ 24. Generally, where a statute initially sets forth the elements of an offense and separately provides sentencing classifications based on other factors, the enhancing factors do not create a new offense, but serve only to enhance the punishment. *People v. Van Schoyck*, 232 Ill. 2d 330, 337 (2009).

¶ 20 In this case, the enhancement of defendant's conviction from a Class 4 offense to a Class 3 offense was not a function of the court's authority, but was based on the clearly expressed intent of the legislature. The plain language of the statute shows that the legislature expressed the intent to elevate the class of felony and the resulting penalty upon some aspect of the crime; in this case, where the offender has a previous conviction for the same offense. *People v. Powell*, 2012 IL App (1st) 102363, ¶ 11; see also 625 ILCS 5/11-204.1(b) (West 2012) ("Any person convicted of a second or subsequent violation of this Section shall be guilty of a Class 3 felony.").

¶ 21 Here, the court considered the express language of the statute and defendant's previous conviction for the same offense in determining that defendant was subject to Class 3 felony

sentencing. "The flaw in defendant's reasoning is that the sentencing court did not determine that defendant committed a Class [3] felony; the General Assembly made that determination in enacting section" 5/11-204.1(b) of the Code. *Powell*, 2012 IL App (1st) 102363, ¶ 12; see also, *People v. Easley*, 2014 IL 115581, ¶¶ 26, 29-30. Defendant's prior conviction elevated his commission of aggravated fleeing or attempting to elude a peace officer from a Class 4 felony to a Class 3 felony, and left the trial court with no option, but to sentence defendant as a Class 3 felon. *Powell*, 2012 IL App (1st) 102363, ¶ 12. Then, following the State's introduction of certified copies of three of defendant's previous convictions, the court correctly determined that defendant was eligible for extended-term sentencing in the range applicable to Class 3 felonies, 5 to 10 years. 730 ILCS 5/5-5-3.2(b)(1) (West 2012); 730 ILCS 5/5-4.5-40(a) (West 2012).

¶ 22 Therefore, defendant was consistently charged with a Class 3 offense, found guilty of a Class 3 offense, and sentenced as a Class 3 offender. *Easley*, 2014 IL 115581, ¶ 26. Thus, the trial court did not err in imposing the extended-term sentence applicable to Class 3 felonies since different and separate convictions were relied upon to enhance the classification of his offense and to increase the length of his prison term, and such enhancement was explicitly contemplated by the legislature. See *People v. Hicks*, 164 Ill. 2d 218, 228 (1995); *Powell*, 2012 IL App (1st) 102363, ¶ 11. Accordingly, we find that defendant's seven-year sentence was authorized under the applicable statutory scheme and well within the mandated range.² We thus find no error

² In the alternative, we find that defendant should be estopped from asserting that because the evidence of his prior conviction was not submitted to the jury, then the jury could find him guilty of only a Class 4 felony and not the Class 3 felony provision of the statute. *People v. Satterfield*, 195 Ill. App. 3d 1087, 1100-01 (1990). Here, prior to trial, the parties agreed to withhold from the jury the certified copy of defendant's previous conviction for aggravated fleeing or attempting to elude a peace officer. The certified copy of the conviction was offered and accepted by the court prior to sentencing, although not shown to the jury. Counsel and the court were all aware that proof of the prior conviction was an element of the enhancement subsection of the statute that needed to be proved, yet all concurred in not introducing the evidence to the jury.

Under the circumstances, we conclude that defendant is estopped from asserting that the jury did not find him guilty of a Class 3 felony because the evidence of his prior conviction was not presented to the jury. *Id.* at 1101. Essentially, all parties were in agreement that should the jury find defendant guilty, he would be subject to

necessitating plain error review. Because we find no error occurred, any claim of ineffective assistance of counsel would be without merit. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶ 23 Defendant next contends that his mittimuses should be corrected to reflect the proper number of convictions. The record shows that defendant was convicted of three counts of aggravated fleeing or attempting to elude a peace officer, but his mittimuses reflect six such convictions, four in case number 14 CR 824 and two in case number 14 CR 1618. The State agrees that defendant's mittimuses should be corrected to reflect two convictions for aggravated fleeing or attempting to elude a peace officer in case number 14 CR 824 and one in case number 14 CR 1618. We agree that defendant is entitled to corrected mittimuses reflecting the proper convictions in each case and order the clerk of the circuit court of Cook County to correct it in that manner (*People v. Magee*, 374 Ill. App. 3d 1024, 1035-36 (2007)).

¶ 24 III. Conclusion

¶ 25 Accordingly, we order that defendant's mittimuses be corrected in accordance with this order, and affirm the judgment of the circuit court of Cook County in all other respects.

¶ 26 Affirmed; mittimuses corrected.

sentencing as a Class 3 felon based on his prior conviction for the same offense. Thus, when the jury entered its guilty verdict, the parties and the court understood that defendant would be sentenced as a Class 3 felon as provided by the statute despite the fact that the evidence of his prior conviction was never introduced to the jury. Then, when the State introduced the certified copies of three of defendant's other prior convictions, defendant became eligible for extended-term sentencing within the range applicable for Class 3 felonies.