2017 IL App (1st) 143184-U

FIRST DIVISION
May 22, 2017

No. 1-14-3184

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 CR 15896
	)	
NIJOLE RACKAUSKIENE,	)	Honorable
	)	John Joseph Hynes,
Defendant-Appellant.	)	Judge presiding.

JUSTICE MIKVA delivered the judgment of the court.
Presiding Justice Connors and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's jury waiver was knowingly and understandingly made; sentence vacated where trial court improperly considered a pending charge in sentencing.

¶ 2 Following a bench trial, defendant Nijole Rackauskiene was found guilty of the aggravated battery of an individual over the age of 60 and was sentenced to four years in prison.

On appeal, Ms. Rackauskiene contends the record fails to show that her waiver of her right to a jury trial was knowingly and understandingly made. Ms. Rackauskiene also contends that the trial court improperly considered her separately pending, unproven, criminal charge as an aggravating factor at her sentencing hearing. We affirm the circuit court's finding of guilt but vacate the sentence imposed.

¶ 3 BACKGROUND

¶ 4 In connection with events occurring on August 9, 2012, Ms. Rackauskiene was charged with three counts of aggravated battery against 88-year-old Elizabeth Adamo, a person whom Ms. Rackauskiene knew was older than 60 years of age.

¶ 5 After the court ruled on pretrial motions, defense counsel stated: "I think we are ready to set it down for a bench trial." Ms. Rackauskiene made no objection. On the day of trial, the following exchange occurred:

> "THE COURT: All right. Counsel, we do have the Lithuanian interpreter present with us.
>
> MR. PETRAKIS [defense counsel]: We do, your Honor.
>
> THE COURT: And your client is asking for a trial before the Court here?
>
> MR. PETRAKIS: Yes, sir.
>
> THE COURT: Is that correct?
>
> MR. PETRAKIS: Yes. I am tendering an executed jury waiver to your Honor. We're prepared to proceed to a bench trial.
>
> THE COURT: All right. This is on case number 12 CR 15896; that's the elected case, correct State?
>
> MS. PALERMO [assistant State's Attorney]: Yes.

MR. PETRAKIS: Yes.

THE COURT: Let me go through this with you now, Miss Rackauskiene. Your attorney has indicated that you wish to give up your right to a jury trial and have this case heard before myself as a Judge by way of a bench trial. Is that what you want to do?

MS. RACKAUSKIENE (through Interpreter): Yes.

THE COURT: Do you understand what a jury trial is?

MS. RACKAUSKIENE (through Interpreter): Yes, I do.

THE COURT: All right. I have before me a written jury waiver. Is that your signature on this document?

MS. RACKAUSKIENE (through Interpreter): Yes, it's my signature.

THE COURT: And by signing this you understand that you're giving up your right to a jury trial in this case, correct?

MS. RACKAUSKIENE (through Interpreter): Yes, I understand.

THE COURT: All right. Very good."

The record contains the signed written jury waiver executed by Ms. Rackauskiene.

¶ 6 The evidence at trial established that on August 9, 2012, Elizabeth Adamo was 88 years old. She and Ms. Rackauskiene lived in the same apartment building in Oak Lawn. Ms. Adamo lived on the second floor, Ms. Rackauskiene lived beneath her on the first floor, and the laundry room was in the basement beneath Ms. Rackauskiene's apartment.

¶ 7 Ms. Adamo testified that she went to the laundry room in the basement at about 6 a.m. to do laundry in the two washing machines, started the cycles, and went back up to her apartment. When she returned to the basement, she noticed both washing machines had stopped running and the lids had been opened. Ms. Rackauskiene came into the laundry room and began yelling at

Ms. Adamo for doing her laundry so early. Ms. Rackauskiene approached Ms. Adamo and shoved her into a folding table, then began hitting and kicking her. Ms. Adamo pointed to a washing schedule posted on the wall and told Ms. Rackauskiene it was her day and time to do laundry. Ms. Rackauskiene tore the schedule off the wall and threw it on the floor. Ms. Adamo went back to her apartment, but 20 minutes later she returned to the laundry room to dry her clothes. She grabbed a mop to defend herself in the event Ms. Rackauskiene came back. Ms. Rackauskiene did return and grabbed the mop, telling Ms. Adamo, "I kill you. I kill you." Ms. Rackauskiene put the mop down and went to the washing machines, took out some wet clothes, and began "swishing them all over the place." She struck Ms. Adamo with the clothes, getting Ms. Adamo soaking wet. Ms. Adamo left the basement. Later that morning she went to the police station where photos were taken of bruises on her neck and arm. Ms. Adamo identified Ms. Rackauskiene in a lineup. Later that day she went to the hospital to receive medical attention for her swollen left hand. The State introduced photographs depicting Ms. Rackauskiene in a lineup and showing injuries to Ms. Adamo's neck, arm, and left hand.

¶ 8 Ms. Rackauskiene testified through a Lithuanian interpreter. She was born in 1954 and came to the United States in 2002. On August 9, 2012, she lived in the same apartment building as Ms. Adamo. Ms. Rackauskiene had worked the previous evening as the caretaker for an elderly lady. She was exhausted when she came home and did not get to bed until 11 or 11:15 that night. At about 6 a.m. she was awakened by the noise of the machines in the laundry room under her bedroom. She tried to go back to sleep but about 20 minutes later she went to the basement. When she got to the basement she saw Ms. Adamo sitting on one of the two exercise bicycles that were down there. She asked Ms. Adamo if she could do her laundry later because Ms. Rackauskiene was unable to sleep, but Ms. Adamo said it was her time to do laundry and

started to laugh at Ms. Rackauskiene. Then Ms. Rackauskiene opened the lids of the washing machines and the machines stopped. Ms. Adamo got off the exercise bicycle very quickly, grabbed a broom, and said, "I'll show you." Ms. Adamo started hitting Ms. Rackauskiene on her shoulder with the broom. Ms. Rackauskiene was able to grab the broom away from Ms. Adamo within 15 or 20 seconds. She did not notice making contact with Ms. Adamo's hands or wrists. She denied pushing Ms. Adamo against a table, kicking her, punching her, and hitting her with anything. She denied holding the broom in the air and saying, "I'll kill you." As Ms. Adamo was hitting her with the broom, Ms. Rackauskiene said to Ms. Adamo, "If I would hit you like that, you know, that way I could kill you." After grabbing the broom, Ms. Rackauskiene threw it down. She was very upset. Ms. Rackauskiene took clothing from the washer and threw it down on the floor. Ms. Adamo went upstairs and Ms. Rackauskiene put the clothing back in the washing machine.

¶ 9 After reviewing the testimony, the trial court concluded that the testimony of Ms. Adamo was more credible than that of Ms. Rackauskiene. The court found Ms. Rackauskiene guilty on count 1, aggravated battery of a person she knew to be 60 years of age or older, a charge with a sentencing range of two to five years (730 ILCS 5/5-4.5-40(a) (West 2012)). Ms. Rackauskiene's motion for a new trial was denied.

¶ 10 On January 13, 2013, while on bond in this case, Ms. Rackauskiene was arrested and charged in case number 13 C5 50087 with aggravated battery of a person 60 years of age or older and criminal abuse of an elderly person by a caregiver. The trial judge in the present case was aware of the new charge because the new case was also assigned to him.

¶ 11 At Ms. Rackauskiene's sentencing hearing, the prosecutor read into the record the victim-impact statement of Ms. Adamo. In that statement, Ms. Adamo stated that she "did not

wish to portray herself as having sustained long-term injury because of this same assault." However, she concluded: "How many others may suffer even more seriously if this woman is given a light sentence and allowed to roam freely in our community? I shudder to think of it. Please consider this as you hand down your sentence. Keep my assailant from harming others." The prosecutor also stated that, in aggravation, the State would rely on the information presented at the "extensive 402 conference on the other case."

¶ 12 In mitigation, defense counsel argued that Ms. Rackauskiene was almost sixty years old and that her only criminal history was for a 2011 charge of driving while intoxicated (DUI) in which she had pled guilty and had been given, and successfully completed, one year of supervision. Counsel argued that Ms. Rackauskiene had recently come to believe that she had an alcohol addiction problem and had voluntarily sought treatment and completed a 72-hour outpatient program. This was verified as part of the "Probation Department Investigative Report." Counsel pointed out that Ms. Rackauskiene had been gainfully employed since she had arrived in the United States in 2002. He argued that, but for the fact that the victim was 88 years old, this would have been a misdemeanor. Defense counsel argued that Ms. Rackauskiene was a good candidate for probation but, because the court had already indicated it would not grant probation, urged the court to give Ms. Rackauskiene close to the minimum sentence of two years in prison. Counsel also informed the court that the Immigration and Naturalization Service (INS) was seeking to deport Ms. Rackauskiene due to her arrest in this case and the recent expiration of her green card.

¶ 13 At the court's invitation, Ms. Rackauskiene addressed the court in allocution. Although a Lithuanian translator was provided, she chose to address the court in English. She told the court "I feel really sorry for anything that has happened. I do blame for everything—" The court then

asked her to speak up and this was the remainder of her statement:

> "I just wanted, when I came back home, and I was sleeping, and the noise was—I shouldn't have gone downstairs, I shouldn't go to the basement, washing. And I didn't kick your leg, I just tried to grab the broom, and I opened the washer. She grab the broom and she hit me. I grab the broom and then I took –I said oh, and I left the room, and then I just realize, and I am so sorry.
>
> I am just so very very sorry. I not come down from work. I'm so sorry."

¶ 14 The trial court responded:

> "All right. I have had an opportunity to hear the factors in aggravation and mitigation in this matter. First of all, I ruled on the credibility of the witnesses here. I ruled that Ms. Adamo was more credible than [Ms. Rackauskiene] during the course of the testimony. Ms. Rackauskiene has showed no remorse with regards to what occurred here. She has apologized but still seems to blame Ms. Adamo for what happened to her.
>
> Ms. Adamo was eighty-eight years old at the time, clearly an elderly lady as she appeared here, and that is a fact that the Court can consider in aggravation and a fact the Court does consider in aggravation.
>
> Clearly her ability for rehabilitation, although counsel indicates that she is remorseful and has spoken about that here, while this case was pending, she was arrested and charged with another case involving a ninety-three years old victim right around the time that this case was set for court here.
>
> And she shows no remorse and no ability to be rehabilitated. Consequently, it will be the sentence of this Court that [Ms. Rackauskiene] be sentenced to five years in the Illinois Department of Corrections, to be given credit for nine days in custody, time

served."

¶ 15 In addition to the five-year prison sentence, the trial court also imposed a one-year period of mandatory supervised release (MSR) and mandatory fees and costs and, in what the trial court believed was its discretion, refused to give Mr. Rackauskiene credit for the fifty-six days she had spent on home detention.

¶ 16 Defense counsel filed a written motion to reconsider the sentence. The motion stated in part: "The Court specifically found it aggravating that while on bond in the present case, [Ms. Rackauskiene] was arrested and charged under case 13 C5 50087." The motion concluded: "Further, and perhaps most importantly, [Ms. Rackauskiene] did not have a history of prior criminal activity. In fact the extent of [Ms. Rackauskiene's] prior criminal background was a sentence of Court Supervision for a misdemeanor DUI charge. Therefore the trial court failed to consider the fact that this 59-year old woman had absolutely no prior felony or misdemeanor convictions prior to sentencing." The motion also pointed out that the trial court was required to give Ms. Rackauskiene credit for the time spent on home detention, except in specific circumstances that were not present in her case.

¶ 17 During the hearing on the motion to reconsider, the trial court confirmed with defense counsel that Ms. Rackauskiene wished to withdraw her plea of not guilty in the 2013 case and to enter a plea of guilty to count 1 in exchange for the court's recommendation of a period of three years in the Illinois Department of Corrections, with credit for time served in custody and a one-year term of MSR, the sentence to be consecutive to her sentence in the 2012 case. The court then granted the motion to reconsider to the extent that it reduced Ms. Rackauskiene's prison sentence on the 2012 case from five years to four years and awarded Ms. Rackauskiene credit for the fifty-six days that she spent on home detention. Immediately following the imposition of the

new sentence, the trial court accepted Ms. Rackauskiene's guilty plea in the 2013 case, was provided the factual basis for that plea and a stipulation by defense counsel to those facts, and imposed a three-year consecutive sentence on Ms. Rackauskiene for that case.

¶ 18 JURISDICTION

¶ 19 The trial court imposed a reduced prison sentence of four years on Ms. Rackauskiene on September 25, 2014. Ms. Rackauskiene timely filed her notice of appeal on September 26, 2014. Accordingly, this court has jurisdiction pursuant to article VI, section 6 of the Illinois Constitution (Ill. Const. 1970, art. VI, § 6), and Illinois Supreme Court Rules 603 and 606, governing appeals from a final judgment of conviction in a criminal case (Ill. S. Ct. Rs. 603, 606 (eff. Feb. 6, 2013)).

¶ 20 ANALYSIS

¶ 21 A. Jury Waiver

¶ 22 On appeal, Ms. Rackauskiene first contends that the trial court erroneously accepted her jury waiver, without ensuring that the waiver was knowingly and understandingly made. The State argues that Ms. Rackauskiene forfeited her challenge to the jury waiver by failing to object at trial or include the error in a posttrial motion. Ms. Rackauskiene concedes that she did not address or argue the validity of her jury waiver at trial or in her written posttrial motion. Consequently, this issue is procedurally forfeited. *People v. Bannister*, 232 Ill. 2d 52, 64-65 (2008). However, Ms. Rackauskiene requests that we review the unpreserved error under the plain-error doctrine.

¶ 23 Whether a defendant's right to a jury trial has been violated is a matter that may be considered under the plain-error rule. *People v. Bracey*, 213 Ill. 2d 265, 270 (2004). Plain-error review is a narrow and limited exception to the general rule of procedural default. *People.v.*

Naylor, 229 Ill. 2d 584, 593 (2008). The plain-error rule allows a reviewing court to consider unpreserved error where the error is clear or obvious and (1) the evidence is so closely balanced that the error threatens 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 affects the fairness of the defendant's trial and challenges the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). The first step of plain-error review is to determine whether any error occurred. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 24 The right to a trial by jury is a fundamental right afforded to criminal defendants. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, §§ 8, 13. Section 103-6 of the Code of Criminal Procedure of 1963 (Code) provides that every person accused of an offense shall have the right to a trial by jury unless that right is understandingly waived by the defendant in open court. 725 ILCS 5/103-6 (West 2014). To be valid, however, the waiver must be made knowingly and voluntarily. *Bannister*, 232 Ill. 2d at 65. A defendant challenging a jury waiver bears the burden of establishing that the waiver was invalid. *People v. Parker*, 2016 IL App (1st) 141597, ¶ 47; *People v. Gibson*, 304 Ill. App. 3d 923, 929-30 (1999). A trial court has the duty to ensure that a defendant waives the right to a jury trial expressly and understandingly. *Banister* 232 Ill. 2d at 66. A determination of whether a jury waiver is valid cannot rest on any precise formula but depends on the facts and circumstances of each case. *In re R.A.B.*, 197 Ill. 2d 358, 364 (2001).

¶ 25 No specific advice or admonition is required before an effective jury waiver may be made. *Bracey*, 213 Ill. 2d at 270. Generally, a jury waiver is valid if it is made by defense counsel in a defendant's presence in open court, without an objection by the defendant. *Id.* Section 115-1 of the Code mandates that "[a]ll prosecutions except on a plea of guilty or guilty but mentally ill shall be tried by the court and a jury unless the defendant waives a jury trial in

writing." 725 ILCS 5/115-1 (West 2014). However, a written jury waiver merely memorializes the defendant's decision, allowing a court to review the record to ascertain whether a defendant's jury waiver was understandingly made. *People v. Tooles*, 177 Ill. 2d 462, 468 (1997). In the present case, because the facts are not in dispute, the issue is a question of law and our review is *de novo*. See *Bracey*, 213 Ill. 2d at 270.

¶ 26 We initially address the State's argument that Ms. Rackauskiene, unlike the defendant in *People v. Phuong*, 287 Ill. App. 3d 988, 995-96 (1997), a case that Ms. Rackasukiene relies on, had previous experience with the criminal justice system because she pled guilty to a DUI charge in 2011. Although we have recognized that a court can sometimes infer that the defendant understood the concept of a jury waiver based on that defendant's prior experience with the criminal justice system (see, *e.g.*, *People v. Marquez*, 324 Ill. App. 3d 711, 722 (2001) (distinguishing *Phuong* where the "defendant's previous conviction demonstrated prior experience with the American judicial system")), we have hesitated to draw this inference from the bare fact of a guilty plea in a prior case (see *People v. Parker*, 2016 IL App (1st) 141597, ¶ 48 (contrasting a defendant's single guilty plea in an untried case with the experiences of other defendants who had multiple prior convictions or who had clearly indicated a knowing waiver of the right to a trial by jury on the record in previous cases)). The bare fact that Ms. Rackauskiene once pled guilty in a DUI case tells us little about what she understood her rights to be. We are far more persuaded that Ms. Rackauskiene knowingly and voluntarily waived her right to a jury trial based on her exchange with the trial court in this case.

¶ 27 Ms. Rackauskiene asserts that the court failed to explain either the concept of a jury trial or the difference between a bench trial and a jury trial, and failed to ask her whether she understood what her right to a jury trial entailed. She alleges that her jury waiver was not

knowingly and understandingly made because she was a citizen of Lithuania who spoke little English and had limited experience with the American criminal justice system.

¶ 28 Ms. Rackauskiene argues that her exchange with the trial court resembles that found insufficient in *Phuong*. That case held that a jury waiver was invalid where, although the defendant signed a translated jury waiver form, she was a Chinese speaker who had only recently immigrated to the United States, spoke very little English, and it was unclear whether she understood what a jury was. *Phuong*, 287 Ill. App. 3d at 996. In *Phuong*, an interpreter translated the defendant's jury waiver form, the defendant signed the form before trial, and the trial court informed the defendant that she had the right to trial by jury or judge without any additional explanation. *Id.* at 991.

¶ 29 Unlike the proceedings in *Phuong*, in the present case the trial court asked Ms. Rackauskiene whether she understood what a jury trial was and she responded, through the interpreter, "Yes, I do." She also acknowledged her signature on the jury waiver form. Significantly, in response to a question by the court, Ms. Rackauskiene acknowledged that she wished to give up her right to a jury trial and have the case heard by the judge by way of a bench trial. "When a defendant waives the right to a jury trial, the pivotal knowledge that the defendant must understand—with its attendant consequences—is that the facts of the case will be determined by a judge and not a jury." *Bannister*, 232 Ill. 2d at 69. The record demonstrates that Ms. Rackauskiene understood that critical difference. In addition, the extreme circumstances present in *Phuong* do not appear to be present here. Unlike the defendant in *Phuong*, Ms. Rackauskiene had been in this country over ten years and spoke enough English that some of her interactions with the court, such as her allocution at sentencing, were in English despite the presence of a translator.

¶ 1 Ms. Rackauskiene also relies on *People v. Sebag*, 110 Ill. App. 3d 821, 822 (1982). However that case is clearly different since the defendant there waived his right to a jury without the benefit of an attorney at any stage of the proceedings. In addition, the trial court did not ask the defendant whether he understood what a jury trial was; it told the defendant only that by waiving a jury at that time the defendant could not reinstate it later. *Id.* at 828-29. Importantly, although the defendant in *Sebag* was charged with both battery and public indecency, the trial court's discussion with him about his jury waiver took place only in the context of his battery charge. *Id.* The appellate court concluded that, "[t]aken as a whole," the record did not establish a valid waiver of the defendant's right to a jury trial on the charge of public indecency. *Id.* at 829. In contrast, Ms. Rackauskiene was represented by counsel and tried only on charges of aggravated battery.

¶ 30 In short, here, Ms. Rackauskiene told the court she understood what a jury trial was, signed a written jury waiver, and stated she understood the waiver meant that she was giving up her right to a jury trial and that a judge would decide her case. We conclude that Ms. Rackauskiene knowingly and understandingly waived her right to a jury trial. Because we do not believe there was an error, there is no need to consider Ms. Rackauskiene's contention under a plain-error analysis. *People v. Willhite*, 399 Ill. App. 3d 1191, 1197 (2010).

¶ 31 B. Sentencing

¶ 32 Ms. Rackauskiene's second argument on appeal is that, during the sentencing hearing for the 2012 charge, the trial court improperly considered the pending 2013 charge, on which no evidence had been presented. Ms. Rackauskiene argues that this was improper because mere arrests and pending charges, with no evidence in support of them, may not be considered in aggravation at sentencing.

¶ 33 The State does not really dispute that the trial court took into account Ms. Rackauskiene's pending 2013 charge when it sentenced her in this case. The court specifically commented:

> "Clearly [Ms. Rackauskiene's] ability for rehabilitation, although counsel indicates that she is remorseful and has spoken about that here, while this case was pending she was arrested and charged with another case involving a ninety-three years old victim right around the time that this case was set for court here.
>
> And she shows no remorse and no ability to be rehabilitated."

¶ 34 We are mindful that the trial court has broad discretionary powers to fashion an appropriate sentence within the statutory limits prescribed by the legislature. *People v. Arze*, 2016 IL App (1st) 131959, ¶ 120 (citing *People v. Fern*, 189 Ill. 2d 48, 53 (1999)). A court is not bound by the usual rules of evidence in determining a sentence, but may search anywhere within reasonable bounds for other facts which may serve to aggravate or mitigate the offense. *Id.* But when a trial court considers an improper factor in aggravation, the court abuses its discretion. *People v. Minter*, 2015 IL App (1st) 120958, ¶ 147. The question of whether a court relied on an improper factor in imposing a sentence ultimately presents a question of law to be reviewed *de novo*. *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 8.

¶ 35 In *People v. La Pointe*, 88 Ill. 2d 482, 498-99 (1981), our supreme court held that it is permissible to consider evidence of other criminal acts that do not result in conviction where that evidence is both relevant and reliable. However, this court has since repeatedly held that a sentencing court may not rely on bare arrests or pending charges as aggravating factors in sentencing. See, *e.g.*, *People v. Minter*, 2015 IL App (1st) 120958 ¶ 148 (improper to consider pending possession of contraband and aggravated battery charges as aggravating factors); *People v. Johnson*, 347 Ill. App. 3d 570, 575-76 (2004) (impermissible to consider fact that defendant

had been arrested for a sexual assault in Arkansas as an aggravating factor); *People v. Wallace*, 145 Ill. App. 3d 247, 256 (1986) (improper to consider pending rape charge as an aggravating factor); *People v. Thomas*, 111 Ill. App. 3d 451, 454 (1983) ("[M]ere listing of prior arrests, not resulting in convictions, in a presentence report does not satisfy the accuracy requirement of *La Pointe.* We therefore hold that mere arrests, standing alone, without further proof of the conduct alleged, are inadmissible in the sentencing determination."). As these cases make clear, a bare arrest, even if "relevant," cannot be considered at sentencing because, not having resulted in a conviction, it lacks the requisite reliability as evidence of criminal conduct to be considered as an aggravating factor. *Wallace*, 145 Ill App. 3d at 255-56; *Johnson*, 347 Ill. App. 3d at 575. See also *La Pointe*, 88 Ill 2d at 498 (the "important" questions are the "relevancy *and accuracy* of the information submitted" (emphasis added)).

¶ 36 The State relies on *People v. Hunzicker*, 308 Ill. App 3d 961, 966 (1999), for the proposition that, in assessing a defendant's ability for rehabilitation, a trial court may consider a defendant's arrest while on bond—not as evidence of the underlying criminal conduct—but as evidence that the defendant violated the conditions of his or her bond. As we have recently noted, however, the defendant in *Hunzicker* did not challenge the trial court's ability to consider the bare fact of an arrest while on bond as an aggravating factor. *Minter*, 2015 IL App (1st) 120958 ¶ 151. Rather, the defendant's argument on appeal, which this court rejected, was that the sentence ultimately imposed in that case was excessive. *Id.* (citing *Hunzicker*, 308 Ill. App. 3d at 966)). As we did in *Minter*, we reject the notion that *Hunzicker* should broadly be read to condone the consideration of bare charges or arrests as aggravating circumstances. *Id.* We explained in *Minter* that concerns regarding the reliability, and not the relevance, of such evidence drive this result:

> "In order to find that defendant was likely to commit more offenses based upon his pending charges, the trial court necessarily had to assume that defendant actually committed those unproven offenses. Yet the trial court heard no evidence at the sentencing hearing from which he could determine whether defendant actually committed a battery or possessed contraband in jail. The reason that bare charges—as opposed to convictions—should not be considered is that the underlying facts have not yet been proven." *Id.* ¶ 150.

Thus, regardless of whether Ms. Rackauskiene's 2013 arrest was relevant to her sentencing on the 2012 charge, it lacked reliability and should not have been considered by the trial court.

¶ 37 The State argues that this issue was not properly preserved for appellate review. Although Ms. Rackauskiene appears to concede this point and again invokes the plain-error doctrine to avoid forfeiture, it is far from clear that plain error review is required in this case. In the motion to reconsider, defense counsel referenced the fact that the court specifically found it to be an aggravating factor that, "while on bond in the present case, [Ms. Rackauskiene] was arrested and charged under case 13 C5 50087." The motion concluded that "the trial court failed to consider the fact that this 59-year old woman had absolutely no prior felony or misdemeanor convictions prior to sentencing." While a party must raise an *issue* in the trial court in order to preserve that issue for our review, our supreme court has stated that a party is not required to limit its *arguments* on appeal to those that were made below. *Brunton v. Kruger*, 2015 IL 117663, ¶ 76, *reh'g denied* (May 26, 2015). Ms. Rackauskiene clearly raised the issue that the trial court did not properly take her criminal history into account upon sentencing. This is the same issue that is before us on appeal, albeit the focus of this issue now is the specific argument that the trial court should not have considered her 2013 arrest. Because this is not a new issue, but only a new

argument, Ms. Rackauskiene properly preserved the issue for our review.

¶ 38 Even assuming that Ms. Rackauskiene did not properly preserve her sentencing issue, we find that she has demonstrated the trial court's consideration of her 2013 arrest rises to the level of plain error. To demonstrate plain error in the sentencing context, a defendant must show that a clear and obvious error occurred and that either (1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010).

¶ 39 Here, Ms. Rackauskiene has demonstrated that the evidence at the sentencing hearing regarding her potential for rehabilitation was closely balanced because, apart from her arrest while on bond, which we conclude should not have been considered, there was no basis for the court's conclusion that she showed "no remorse and no ability to be rehabilitated." The only history with the criminal justice system that it was appropriate for the court to consider was a term of court supervision that had been successfully completed. Under Illinois law, "[d]ischarge and dismissal upon a successful conclusion of a disposition of supervision shall be deemed without adjudication of guilt and shall not be termed a conviction for purposes of disqualification or disabilities imposed by law upon conviction of a crime." 730 ILCS 5/5-6-3.1(f) (West 2014). Thus Ms. Rackauskiene was, in effect, a first time offender. Ms. Rackauskiene also had a good employment history, had voluntarily entered an intensive outpatient program to address her alcoholism, and, as pointed out by defense counsel, showed up reliably for all court proceedings. And although the trial court was surely entitled to take into account the victim's extreme age, it is true that, absent this aggravating factor, the offense would have been charged as a misdemeanor. We find this evidence presented at sentencing to be closely balanced with respect to the trial court's conclusion that Ms. Rackauskiene showed no remorse or ability to be

rehabilitated. Thus, even if Ms. Rackauskiene must demonstrate plain error, she has done so and the trial court's consideration of her 2013 arrest was improper.

¶ 40 Although we acknowledge both that Ms. Rackauskiene pled guilty to the 2013 charge immediately after she was resentenced in this case and, according to the State, an "extensive 402 conference" occurred on the 2013 case, these facts did not alter our conclusion. The plea, with its stipulated factual basis, was entered *after* the initial sentence of 5 years was imposed in this case, and also after Ms. Rackauskiene was resentenced to 4 years, and therefore cannot serve as a factual predicate for this sentence. Moreover, as Ms. Rackauskiene points out in her opening brief, the 402 conference was held off the record and nothing on the record suggests that evidence supporting the 2013 charge was presented at that conference. Thus, there was simply no evidence about the 2013 charges before the trial court at the time it imposed sentence on Ms. Rackauskiene in this case.

¶ 41 CONCLUSION

¶ 42 For these reasons we affirm the trial court's finding of guilt but vacate the sentence imposed and remand for resentencing, with a proper assessment of Ms. Rackauskiene's criminal history at the time of this conviction and which therefore does not give any weight to Ms. Rackauskiene's arrest on the 2013 charge.

¶ 43 Affirmed in part, vacated in part; remanded with directions.