2018 IL App (1st) 161229-U
No. 1-16-1229
Order filed July 17, 2018

Second Division

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. 14 CR 2278
	)	
JULIAN ALEQUIN,	)	Honorable
	)	Earl B. Hoffenberg,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HYMAN delivered the judgment of the court.
Presiding Justice Mason and Justice Walker concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm defendant's sentence. Defendant forfeited two of his arguments on appeal and the plain error doctrine does not apply. Further, the trial court did not abuse its discretion when it sentenced defendant to 18 years' imprisonment.

¶ 2 After a bench trial, the trial court convicted defendant Julian Alequin of attempt first-degree murder, three counts of aggravated battery, and three counts of aggravated domestic battery. The court sentenced him to four concurrent terms of 18 years' imprisonment. On appeal, Alequin contends that the trial court abused its discretion in sentencing him.

¶ 3 We affirm, finding that Alequin has not satisfied his burden to establish plain error regarding his claims that the trial court (i) improperly considered a factor inherent in the offense or (ii) improperly imposed a higher sentence as a result of Alequin's admission of guilt in his allocution. In addition, the record rebuts Alequin's claim that the trial court failed to adequately consider his rehabilitative potential.

¶ 4 Background

¶ 5 Alequin was charged with attempt first degree murder and three counts each of aggravated battery and aggravated domestic battery for grabbing and striking J.A., his infant daughter, about the body and causing her great bodily harm, permanent disfigurement, and permanent disability.

¶ 6 At trial, Melanie Oyola testified that she had a prior relationship with Alequin, and they had one child together, J.A., who was born on January 6, 2013. On January 12, 2014, Oyola and Alequin lived together in an apartment with J.A. and Oyola's two other children. Earlier that day, while Alequin and Oyola drove home from Oyola's mother's house, Alequin was upset and aggravated when Oyola confronted him about the way he spoke to her mother. By the time they arrived home, he had calmed down. Oyola put the children to bed and then smoked marijuana on the back porch with her best friend and Alequin. When Oyola and her friend went inside, Alequin stayed outside to finish smoking the marijuana. Five to ten minutes later, Oyola was in the living room and heard Alequin turn on the bathroom shower. She heard him loudly yelling "fuck" and "no" as if he was talking to someone. Oyola went to the door and asked if he was okay, and Alequin "just kept saying, no, and kept on yelling like, no, no, no."

¶ 7 Oyola pried open the locked bathroom door and saw Alequin crying, sitting naked on the edge of the bathtub. Alequin grabbed Oyola and said that he had "seen that he died without" her and said, "please don't leave me." Oyola tried calming him down but he continued to yell and punched a mirror. She was eventually able to help Alequin get dressed and walked him to the bedroom, where she continued to soothe him.

¶ 8 Alequin told Oyola he was going to the kitchen for some food. Oyola, concerned with the way Alequin acted in the bathroom, followed him into the kitchen. She was making Alequin something to eat when he looked at family photos on the refrigerator and started yelling "no" repeatedly. He kept yelling that he was "going to die" and Oyola reassured him that he was not going to die. Alequin then looked at Oyola "dead serious" and said, "You're right. I'm not going to die. You're going to die." He punched Oyola in her face with a closed fist. He held her as she struggled, ripping her shirt, and punched her in her face again, knocking her to the ground. When Oyola fell to the floor, Alequin ran into the bedroom where J.A. was sleeping in her crib. Oyola followed him.

¶ 9 As Oyola approached the bedroom, she heard J.A. scream and then heard a "bang." When Oyola got to the bedroom, she saw Alequin holding J.A. "up in the air" by her ankles and then "letting go" of J.A.'s ankles. J.A. fell to the hardwood floor with Alequin leaning over her. Oyola "grabbed" J.A., who was unresponsive and had swelling around her entire head. She cradled J.A. against her chest and ran out of the apartment. Alequin ran behind them, pushed Oyola down the stairs, and said, "Everyone was going to die." Oyola stumbled from Alequin's push, but did not fall completely and did not drop J.A. She began banging on apartment doors for help. A neighbor

let Oyola and J.A. into his apartment to wait for the police. Once paramedics arrived, Oyola handed J.A. to them. J.A. threw up blood. Oyola spoke with police and then went to the hospital.

¶ 10 Oyola identified photographs of J.A.'s physical injuries. Before the incident, J.A. was a happy baby and had no health problems. J.A. now was physically disabled, having lost functioning and strength to the right side of her body, including use of her right arm and leg. She required physical, occupational, speech, and developmental therapy four times a week.

¶ 11 Dr. Norell Rosado testified that, on January 13, 2014, he was attending physician J.A., who was in the intensive care unit and was intubated, on a breathing machine, had a "collar" around her neck, and had a lot of tubes put into her veins for medication, hydration, and blood drawing. Rosado observed swelling to the left side of J.A.'s head from the forehead to the back of her head, bruising and swelling to her left eye, and swelling to her right eye. J.A. failed to respond to any form of stimulus. An MRI showed brain matter coming out of J.A.'s skull. Rosado stated that loss of brain matter always results in complete loss of that portion of the brain and permanent disability.

¶ 12 A CT scan of J.A. showed multiple fractures and types of hemorrhaging around her skull. Dr. Rosado opined the multiple fractures were likely caused by two separate blunt traumas to the head. Both traumas were acute, meaning they took place within the last three days, and could have happened "essentially simultaneously."

¶ 13 According to Dr. Rosado, J.A.'s injuries had been caused by some form of acceleration and deceleration force, and similar injuries could lead to permanent disability, including weakness or the inability to use one's limbs. Fractures similar to J.A.'s usually occur in motor vehicle crashes with unrestrained passengers who fly out of a window or into the windshield.

Rosado did not believe J.A.'s injuries indicated a fall; rather, they were consistent with someone picking up the child by her ankles and swinging her extremely hard into a hard floor.

¶ 14 The court denied Alequin's motion for a directed finding and later found him guilty on all seven counts. The court denied Alequin's motion for new trial or to set aside judgment.

¶ 15 At the sentencing hearing, defense counsel established that Alequin had no criminal history. The presentence investigation report (PSI) showed that Alequin had a close relationship with his family. He graduated high school on time and completed two years of college. Alequin reported working as a teacher's aide for six months before his arrest and as a camp counselor for three years before that. He denied having any street gang affiliation. He also reported that he had never been diagnosed with a mental health disorder.

¶ 16 Oyola testified in aggravation. She provided a victim impact statement detailing Alequin's attack. J.A. was in critical condition for the first three days with no signs of movement. Three weeks after the attack, the Department of Children and Family Services removed all of Oyola's children from her custody. She was not allowed to visit J.A. in the hospital and was not allowed to see her other two children. After several court hearings, Oyola obtained limited visitation. She said it was a "devastating eight months" until she was allowed unsupervised visitation. It took one year and 10 months to regain custody of her children.

¶ 17 Oyola stated that the trauma impacted all of her children and her family in many ways. Her nine-year-old daughter had to transfer schools and needed psychiatric therapy to help cope. Oyola's mother also suffered by having to foster parent, which drastically changed her daily routine. Oyola had to take six weeks off work due to her emotional state.

¶ 18 At the time of sentencing, J.A. was only able to function at 20% of her capacity. Oyola stated that J.A. often tripped and fell over her own feet and had lost all strength on her right side. She stated that J.A. required her full undivided attention and yet she had to balance work with caring for her three other children. Three-year-old J.A. approached the bench and showed the court her injuries from the attack, her limp, cranial scars, and inability to use her right arm.

¶ 19 In mitigation, defense counsel submitted letters from friends, family members, and former teachers on Alequin's behalf. The court acknowledged that it read each letter multiple times. Defense counsel argued that Alequin had no prior criminal record, finished two years of college, was gainfully employed, and had support from his family. Counsel also argued that the people who wrote letters on Alequin's behalf wrote about the person they knew—someone who went 22 years "with no involvement with police." Counsel noted there was no evidence that Alequin abused J.A. or Oyola up until that night.

¶ 20 In allocution, Alequin stated, "I take full responsibility for my actions," and expressed his desire to change. He stated, "I know I am not all I was made out to be in this courtroom, but I also know that many people were hurt throughout this ordeal, my daughter, my mother, my sister, my brother, and loved ones * * * And although I may never forgive myself, I pray one day they can all forgive me." Alequin acknowledged that there were things he could have done differently and he asked the court for "a second chance to prove" himself. He informed the court that, while incarcerated, he received a certificate for completing a mental health program, began his "relationship with God," and started looking for jobs and programs to help him on his release. He shared his desire to finish college and would like to "show others how one fatal mistake, one small drug cannot only change your life but everyone's around you."

¶ 21 In considering sentence, the court told Alequin:

"I read over your letters that your family has sent me, and I read them three or four times. I am totally taken back by what happened to you. The person who everybody thought was—you counseled people, you helped people one-on-one, you were good with your brother who has a disability, you were good with your family. And yet the events of that night are so horrific that it just breaks my heart to see all the families that are destroyed here.

And honestly right now, I still have not decided what I'm going to give you yet because I am still mulling over the whole situation, but I am so bothered by the fact that your life is ruined right now, your family's life is ruined right now and so is the witness and so are the parents. Everybody's life is really not ever going to be repaired.

It's just unfortunate, but I have to look at the totality of the circumstances to determine exactly what I have to do.

Now, as you are well-aware, 6 years is the bottom and 30 is the top. Based upon mitigating factors, and again the State has kind of put away many mitigating factors in your behalf, but those are only part of what I consider.

I consider other things in your favor, your past not having a record, you're a counselor, of course your family members who are here all the time, the letters that I received. Those are mitigating factors to me. Seeing that automatically takes me off the top of 30 because, to be honest, but for the grace of God, this child could be dead today and that would be putting you in a huge, huge amount of time for that little child.

I know, as you are probably well-aware, it's not even close to placing the minimum with you because the aggravating factors are so huge here."

¶ 22 The court merged the aggravated domestic battery convictions and sentenced Alequin to 18-year terms of imprisonment on the attempt murder and three aggravated battery convictions, to be served concurrently, and three years of mandatory supervised release. It told Alequin:

"As the State was presenting evidence, I was going back and forth actually considering closer to 30 years, but I listened carefully to what you said. I listened carefully. I read all the letters.

I think that hopefully that will give you the opportunity when you get out to readjust your life, but it also is a kind of sentence you have to realize you can't—facing responsibility means you have to get a higher sentence which I felt you had to get, so as I indicated, you are going to have an 18-year sentence.

* * *

I have to be very direct with you, too, your presentation today has affected me, and it made me consider giving you less time because I hadn't heard from you before. I think that and the fact that your family is very important to me, but it still hurts me to see that little girl sitting there right now."

¶ 23 At the hearing on Alequin's motion to reconsider sentence, the trial court told Alequin "to be very direct with you, I was actually considering giving you more time after listening and everything," but that he "saved [himself] some time" when he acknowledged that he was in a bad situation. The trial court stated it gave Alequin a break on the attempted murder, but it then realized it had mixed up Alequin's case with another case it had that day. The court subsequently

denied Alequin's motion to reconsider sentence. (The trial court also corrected defendant's sentence to reflect the proper 4-year MSR term and 10-year registration requirement. The corrections are reflected in the revised mittimis dated March 28, 2016.)

¶ 24 Defendant filed a notice of appeal on February 5, 2016, and filed a motion to reconsider sentence on February 25, 2016. The trial court denied the motion on March 28, 2016. Defendant filed a timely motion for leave to file a late notice of appeal on October 13, 2016. See Ill. S. Ct. R. 606(c) (reviewing court may grant leave to appeal when motion is filed within six months of the expiration of 30-day period for filing notice of appeal). We granted defendant leave to file a late notice of appeal.

¶ 25 Analysis

¶ 26 Alequin contends the trial court erred in imposing the 18-year sentence because it failed to adequately consider Alequin's rehabilitative potential, improperly used a factor in aggravation inherent in the offenses, and gave Alequin a longer sentence due to his having admitted fault in his sentencing allocution.

¶ 27 As an initial matter, the State alleges that Alequin has forfeited his sentencing claims for review by failing to object during sentencing and failing to raise the issues with specificity in his motion to reconsider. See *People v. Woods*, 214 Ill. 2d 455, 470 (2005) (failure to both specifically object at trial and raise specific issue again in posttrial motion forfeits issue for review). Alequin contends that he preserved his claims in his postsentencing motion, as well as through significant argument and discussion regarding the sentencing factors during the hearing on the motion.

¶ 28 We find that Alequin's postsentencing motion sufficiently preserved only one of his three claims. In his motion, Alequin challenged his sentences, alleging he had no criminal background, was a high school graduate with some college, was employed, and actively participated in various civic organizations. This preserved his claim that the court failed to adequately consider his rehabilitation potential. But, Alequin did not argue in the postsentencing motion or before the trial court that the trial court improperly considered a factor inherent in the offense or improperly imposed a higher sentence as a result of Alequin's admission of guilt in his allocution. Accordingly, these two claims are forfeited.

¶ 29 Forfeited Claims Under Plain Error Doctrine

¶ 30 Alequin argues we may review the forfeited claims under the plain error doctrine. In the sentencing context, the plain error doctrine allows us to consider unpreserved claims of error where the defendant shows a "clear or obvious error" occurred and either (i) the evidence at sentencing was 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 (ii) the error was so serious that it affected the integrity of the judicial process and the fairness of the defendant's trial, regardless of the closeness of the evidence. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008). The burden of persuasion remains with the defendant under both prongs of the doctrine. *Id*.

¶ 31 The first step looks at whether there was a clear or obvious error at all. *People v. Eppinger*, 2013 IL 114121, ¶ 19. Absent any error, no plain error exists and defendant's forfeiture will be honored. *Id.* We find Alequin fails to establish that the court improperly considered either a factor inherent in the offense or Alequin's admission of guilt in aggravation at sentencing, and, thus, Alequin has not satisfied his burden to establish plain error.

¶ 32 We review a trial court's sentencing decision for an abuse of discretion. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). A sentence is considered to be an abuse of discretion where it is " 'greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense.' " *Id.* The trial court has broad discretion when imposing a sentence, and its sentencing decisions are given great deference because the trial judge, having observed the defendant and the proceedings, is in a better position to consider the defendant's credibility, demeanor, moral character, mentality, social environment, habits, and age. *Id*. at 212-13.

¶ 33 A sentence should reflect the "seriousness of the offense" and "the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11; *People v. Jones*, 2015 IL App (1st) 142597, ¶ 38. But, the most important factor in sentencing involves the seriousness of an offense, and not mitigating evidence. *People v. Harmon*, 2015 IL App (1st) 122345, ¶ 123. We presume the trial court considers "all relevant factors and any mitigation evidence presented" (*People v. Jackson*, 2014 IL App (1st) 123258, ¶ 48), but "has no obligation to recite and assign value to each factor" (*People v. Perkins*, 408 Ill. App. 3d 752, 763 (2011)). Rather, a defendant "must make an affirmative showing the sentencing court did not consider the relevant factors" where it is essentially argued that the trial court failed to take factors into consideration. *People v. Burton*, 2015 IL App (1st) 131600, ¶ 38.

¶ 34 Alequin's 18-year sentences fall well within the statutory sentencing range for his Class X felony attempt first-degree murder (720 ILCS 5/8-4(a), (c) (West 2014), 720 ILCS 5/9-1(a)(1) (West 2014)) and aggravated battery (720 ILCS 5/12-3.05(b)(1), (h) (West 2014)) convictions. See *People v. Knox*, 2014 IL App (1st) 120349, ¶ 46; 730 ILCS 5/5-4.5-25(a) (West 2014) (Class

X sentencing ranges from 6 to 30 years). But, if the trial court relied on improper factors in aggravation at sentencing, then it abused its discretion in sentencing. *Harmon*, 2015 IL App (1st) 122345, ¶ 124.

¶ 35 Alequin contends the trial court improperly considered the serious harm to the victim when sentencing him because the attempt murder and aggravated battery offenses "inherently involve the threat or action of serious bodily harm." Generally, a factor inherent in the offense should not be considered as a factor in aggravation at sentencing. *People v. Sanders*, 2016 IL App. (3d) 130511, ¶ 13. Public policy, however, dictates that a sentence should be varied according to the individual circumstances of the offense. *Id.* "In determining the exact length of a particular sentence within the sentencing range for a given crime, the trial court may consider as an aggravating factor the degree of harm caused to a victim, even where serious bodily harm is arguably implicit in the offense of which the defendant is convicted." *People v. Dowding*, 388 Ill. App 3d 936, 943.

¶ 36 The experienced and able trial court thoroughly explained the reasons for the sentence imposed, including the egregious harm inflicted on J.A. and its permanent impact on her life and that of her family. It was well within the trial court's authority to consider all circumstances of the offense. *Id.* So the trial court did not err in considering the harm to J. A. in imposing sentence, and Alequin's claim is not reviewable as plain error.

¶ 37 Similarly, Alequin's claim that the trial court improperly imposed a higher sentence because Alequin took responsibility for his actions in his allocution is not reviewable as plain error as the record belies this contention. As Alequin points out, a defendant should not be "left with a Hobson's choice of remaining silent and risking a higher sentence or admitting fault in

allocution and facing the consequences of admitting his fault, as occurred here." See *People v. Pace*, 2015 IL App (1st) 110415, ¶ 100. But, when Alequin waived his right to remain silent and admitted fault, the record does not show that he received a higher sentence because of it.

¶ 38 The trial court considered Alequin's allocution, in which he took responsibility for his actions, and, actually, reduced the sentence it was originally considering. At the sentencing hearing, trial court stated:

> "As the State was presenting evidence, I was going back and forth actually considering closer to 30 years, but I listened carefully to what you said. I listened carefully. I read all the letters.
>
> I think that hopefully that will give you the opportunity when you get out to readjust your life, but it also is a kind of sentence you have to realize you can't—facing responsibility means you have to get a higher sentence which I felt you had to get, so as I indicated, you are going to have an 18-year sentence."

The trial court specifically told Alequin, "Your presentation today has affected me and made me consider giving you less time because I hadn't heard from you before." In the hearing on the postsentencing motion, the trial court reinforced that it gave Alequin less time based on his allocution telling him he "saved [himself] some time" when he acknowledged his situation.

¶ 39 Reading the court's comments in their entirety, after hearing Alequin's allocution, the court gave him a lower sentence than it was originally considering, and not a higher sentence, as Alequin claims. There is no basis for Alequin's claim of error, and no plain error. As the trial court did not improperly consider the harm to J.A. or Alequin's admission of guilt in sentencing, we honor Alequin's procedural default of these claims.

¶ 40 Rehabilitative Potential

¶ 41 Turning to Alequin's preserved claim, we find the record rebuts his assertion that the trial court failed to adequately consider his rehabilitation potential. Rehabilitation potential is one of the mitigation factors the trial court must consider at sentencing. *Jackson*, 2014 IL App (1st) 123258, ¶ 53 (sentencing judges are constitutionally mandated to consider defendant's rehabilitative potential). Alequin claims that the court failed to mention his rehabilitative potential, while mentioning that he had no prior criminal record, worked as a counselor, and his family members, who were present, had written favorable letters. Among other factors Alequin claims the trial court had not given adequate consideration to are (i) his being only 21 years' old at the time of the offense, (ii) his lack of any involvement with gangs, (iii) his having completed two years of college, (iv) his "financial difficulties" from being raised by his mother in a single parent household, and (v) his employment as a teacher's aide and YMCA camp counselor.

¶ 42 Alequin's contentions are affirmatively rebutted by the record. Evidence regarding each of these factors was presented to the trial court, either through argument by defense counsel or through the PSI; and therefore, we presume the trial court considered it. *Jackson*, 2014 IL App (1st) 123258, ¶ 53 (where mitigation evidence is presented, we presume sentencing court considered it); *People v. Sauseda*, 2016 IL App (1st) 140134, ¶ 20 (we presume trial court considered information presented in PSI). Further, the trial court's statements to Alequin reflect it considered his rehabilitation potential. The trial court specifically referenced Alequin's lack of a criminal record, that he was a counselor, his family's presence in court "all the time," and the letters it received. The trial court then told Alequin it was giving him an 18-year sentence rather than a sentence at the top of the sentencing range because "I think that hopefully that will give

you the opportunity when you get out to readjust your life." Hence, the trial court considered Alequin's rehabilitation potential in sentencing him, and Alequin has not affirmatively shown otherwise.

¶ 43 Moreover, the weight given to mitigating factors depends on the individual circumstances of the particular case and the existence of mitigating factors does not require a trial court to impose the minimum sentence. *People v. Garibay*, 366 Ill. App. 3d 1103, 1109 (2006). The seriousness of the offense is considered the most important factor in determining a sentence, and a sentencing court is not required to give greater weight to a defendant's rehabilitative potential than to the seriousness of the offense. *Jackson*, 2014 IL App (1st) 123258, ¶ 53. The trial court could reasonably find that the seriousness of Alequin's offense, his unprovoked attack on a 12-month old infant, slamming her headfirst into the floor and causing her permanent debilitating injuries, outweighed his rehabilitative potential.

¶ 44 Alequin has not affirmatively shown that the trial court failed to adequately consider the mitigating factors in sentencing, and we will not substitute our judgment for that of the trial court by reweighing them on review. See *Jones*, 2015 IL App (1st) 142597, ¶ 40.

¶ 45 Affirmed.