2018 IL App (2d) 170685-U
No. 2-17-0685
Order filed May 3, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. CORY R. BARBEE, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Carroll County. Nos. 17-CM-70 17-CM-71 Honorable John F. Joyce, Judge, Presiding.

PRESIDING JUSTICE HUDSON delivered the judgment of the court.
Justices Schostok and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant showed first-prong plain error in the trial court's consideration at sentencing of harm to the victim, an inherent factor in defendant's offense of battery; we vacated the sentence and remanded for resentencing.

¶ 2 Following a jury trial, defendant, Cory R. Barbee, was convicted of misdemeanor battery (720 ILCS 5/12-3(a)(1), (b) (West 2016)) and resisting a peace officer (720 ILCS 5/31-1(a) (West 2016)). In imposing concurrent terms of 364 days' imprisonment, the court noted three times that defendant, in committing the battery, "harm[ed]" the victim or "hurt him." Although defendant moved the court to reconsider his sentence, he did not claim that the court erred in

considering a factor inherent in the offense in fashioning a sentence for the battery. However, defendant argues now, among other things, that his sentence should be vacated and a sentence for time served should be imposed. For the reasons that follow, we vacate defendant's sentence but remand this cause for a new sentencing hearing.

¶ 3 I. BACKGROUND

¶ 4 Evidence presented at trial established that defendant was in Betty's Bar in Savanna on the evening of May 30, 2017, drinking and gambling. The bartender indicated that defendant was drinking before he got to the bar, and defendant stated that he had six or seven beers while at Betty's. At some point that night, defendant sat next to Shane Miller and began talking to him. When, according to defendant, Miller indicated that he wanted to be left alone, defendant became offended. Defendant stood up behind Miller, and according to the bartender, he punched Miller, who was still seated, in the mouth. Defendant testified that he struck Miller only after Miller pushed him. Defendant, who stated that he knew he was "in the wrong," left the bar after being told to do so, and Miller called the police. As a result of the punch, Miller's lip was swollen; he had a small cut on the inside of his mouth; and according to one officer, Miller's teeth were bleeding.[1]

¶ 5 The police eventually located defendant at his brother's house, which was not far from the bar. Because, according to the officers, defendant would not comply with their orders, he was tased three times.

[1] This court has reviewed the photographs taken of Miller's injuries, which show that Miller sustained a cut to the inside of his left upper lip and that his left upper lip was swollen. Miller's teeth are intact, and none of the pictures show any bleeding from Miller's teeth.

¶ 6 After the jury found defendant guilty of misdemeanor battery and resisting a peace officer, the court held a sentencing hearing. At that hearing, the State made a proffer of defendant's criminal record. This included at least 24 convictions of offenses ranging from public intoxication to aggravated battery of a peace officer. When defendant testified at the sentencing hearing, he expressed remorse, offered to pay restitution, and indicated that he "[thought] alcohol is kind of at the root of a lot of [his] criminal record."

¶ 7 Before imposing the sentence, the court said:

> "Okay. Number One, the Defendant does have a history of criminality. The [State] is right, it's one of the worst records I've seen.
>
> [Defendant's] conduct *did cause harm*. I don't know if—I haven't heard any amount of restitution. There's nothing before the Court on that, but at the same point I saw—at the jury trial I saw a picture of—of the person who was hit in the bar with swollen lips. He was bleeding, you know. It *did cause harm*.
>
> [Defendant], he did testify to the jury as he testified to today his interpretation of what happened at the bar. I also remember the testimony of the bartender and when she was up there she said she saw [defendant] come in, play some slots for a half hour, came over, sat down next to the gentleman. They had a couple of words. He got up and kind of walked behind a little and popped him. According to [the bartender], the guy never saw it coming. So it wasn't like it [*sic*] was defending himself or that this was a mutual fight and aggression by both parties. This was premeditated. [Defendant] was going to hit him and he did and *he hurt him*.
>
> ***

I've heard absolutely nothing that would mitigate any sentences and a lot that are in aggravation for [defendant]. Consequently, I'm going to—I agree with the State. I'm going to sentence him to 364 days. I'll give you credit for time served.

I believe day-for-day—I mean, does it apply; does it not?" (Emphases added.)

¶ 8 After the court was advised that day-for-day credit did not apply for the battery conviction but did for the resisting conviction, the court did not modify the sentence for battery.

¶ 9 Defendant moved the court to reconsider the battery sentence, claiming that, because the court believed that day-for-day credit applied, the court should impose a sentence of 182 days. In denying the motion to reconsider, the court stated:

"Well, number one, I did inquire if day-for-day did apply to this, but when I was informed that it did not it did not sway me from changing—enough to go back and modify that and make it a hundred and eighty some days so he would get out at the same time as the other one.

I was appalled really by [defendant's] record. He has a history of drinking and violence and the fact that this gentleman I felt didn't do anything. He was just sitting at the bar and was hit not knowing it was even coming. He had no chance to defend himself. It was, you know, I think it was lucky that he didn't lose half his mouth—half his teeth."

¶ 10 This timely appeal followed.

¶ 11 II. ANALYSIS

¶ 12 At issue in this appeal is whether the court considered an improper factor at sentencing. "[A] factor necessarily implicit in a crime should not be used as an aggravating factor when sentencing for that crime." *People v. Pierce*, 223 Ill. App. 3d 423, 441 (1991). This is because

the legislature has presumably already considered the elements of the offense in setting the sentencing range. *People v. Morgan*, 301 Ill. App. 3d 1026, 1033 (1998). However, " '[t]he rule that a court may not consider a factor inherent in the offense is not meant to be applied rigidly, because sound public policy dictates that a sentence be varied in accordance with the circumstances of the offense.' " *People v. Spicer*, 379 Ill. App. 3d 441, 468 (2007) (quoting *People v. Cain*, 221 Ill. App. 3d 574, 575 (1991)). We review *de novo* whether the trial court improperly considered a factor inherent in the offense in imposing a sentence. See *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 8.

¶ 13 The State contends that defendant forfeited this issue, because he did not raise it in the trial court. See *People v. McDade*, 345 Ill. App. 3d 912, 914 (2004). In his reply brief, defendant argues that this court should consider the issue under the plain-error doctrine. Although defendant never raised plain error in his initial brief, that does not prevent us from considering his claim, as a defendant may raise plain error in his reply brief in response to the State's forfeiture argument. See *People v. Ramsey*, 239 Ill. 2d 342, 412 (2010). Accordingly, we review the issue for plain error.

¶ 14 The plain-error doctrine allows courts to consider forfeited sentencing issues when (1) the evidence is closely balanced or (2) the error is so serious that the defendant was denied a fair sentencing hearing. *People v. Belmont*, 2018 IL App (2d) 150886, ¶ 9. Although defendant contends that whether the court improperly considered a factor inherent in the offense falls within either category, his argument is that the error might have affected his sentence. This is an argument under the first category. *People v. Johnson*, 2017 IL App (2d) 141241, ¶ 53 n.1. In deciding whether plain error occurred, we must first determine whether any error occurred. *People v. Johnson*, 347 Ill. App. 3d 570, 574 (2004).

¶ 15 The initial step in determining whether any error occurred is to consider whether the factor at issue is actually a factor inherent in the offense. See *People v. Johnson*, 2017 IL App (4th) 160922, ¶¶ 46-49. Harm inflicted on a victim is a factor inherent in every battery like the one with which defendant was charged. See 720 ILCS 5/12-3(a)(1) (West 2016) ("A person commits battery if he or she knowingly without legal justification by any means *** causes bodily harm to an individual."). Here, it cannot be denied that the court, before it imposed the sentence, mentioned three times that defendant "harm[ed]" or "hurt" Miller. The question becomes whether mention of that harm was improper. That is, we must decide whether the court used the mere fact that Miller was harmed to arrive at the sentence it chose to impose. See *People v. Saldivar*, 113 Ill. 2d 256, 271-72 (1986).

¶ 16 "In determining whether a sentence was improperly imposed, a reviewing court should not focus on a few words or statements of the trial judge." *People v. Dal Collo*, 294 Ill. App. 3d 893, 897 (1998). Rather, "it should consider the record as a whole." *Id.* When a factor inherent in the offense was the only factor considered in aggravation or otherwise played a large role in aggravating the sentence, a remand for resentencing is appropriate. See, *e.g.*, *People v. Martin*, 119 Ill. 2d 453, 461 (1988); *Pierce*, 223 Ill. App. 3d at 442. The burden is on the defendant to establish that the court improperly considered an inherent factor. *People v. Dowding*, 388 Ill. App. 3d 936, 943 (2009).

¶ 17 After considering the record as a whole, we conclude that the court improperly considered an inherent factor in imposing the sentence for battery. Instructive on that point is *People v. Johnson*, 2017 IL App (4th) 160920. There, the defendant pleaded guilty to two counts of unlawful delivery of a controlled substance within 1000 feet of a church. *Id.* ¶ 3. In imposing the sentence, the court noted that the defendant received compensation and that his conduct

harmed society, which were factors inherent in the offense. *Id.* ¶¶ 3-4, 46, 47-48. The defendant appealed, arguing for the first time that the court should not have considered factors inherent in the offense in imposing the sentence. *Id.* ¶ 44. The appellate court agreed. *Id.* ¶¶ 45, 55. In so concluding, the court observed that, in deciding whether inherent factors were improperly considered, the court should consider " '(1) whether the trial court made any dismissive or emphatic comments in reciting the improper factor[ ] and (2) whether the sentence received was substantially less than the maximum sentence permissible by statute.' " *Id.* ¶ 49 (quoting *Abdelhadi*, 2012 IL App (2d) 111053, ¶ 18). Although the defendant's sentence was less than the maximum and the cap to which the parties agreed and the trial court "did not specifically elaborate on compensation or threat of harm, instead simply enumerating them among other aggravating factors," the court determined that the record was "unclear whether or how much weight was afforded to the improper aggravating factors." *Id.* ¶¶ 50-51. Thus, the court vacated the sentence under the plain-error rule and remanded the cause for a new sentencing hearing. *Id.* ¶¶ 51, 55.

¶ 18 In some respects, this case is more egregious than *Johnson*. Although the court here, unlike in *Johnson*, mentioned only the "harm" caused to Miller and not any other inherent factors, it mentioned that harm three different times in a very short ruling. In doing so, the court simply stated that Miller was harmed or hurt. Added to that, however, is the fact that defendant's sentence of 364 days' imprisonment is the maximum sentence that can be imposed. See 720 ILCS 5/12-3(b) (West 2016) (battery is a Class A misdemeanor); 730 ILCS 5/5-4.5-55(a) (West 2016) (sentence for Class A misdemeanor shall be less than one year). Although the court mentioned other aggravating factors before sentencing defendant, namely defendant's criminal history, it found lacking any mitigating factors despite the fact that mitigation evidence,

including defendant's realization immediately after the incident that he was wrong, was presented to the court. At the hearing on the motion to reconsider, the court again mentioned defendant's criminal history, commented on defendant's history of drinking and violence, and considered more the degree of harm to Miller than just the fact that Miller was injured. However, in considering the degree of harm, the court's speculation that Miller was lucky his teeth were not knocked out was not supported by the evidence. The pictures revealed that Miller's injuries, which were sustained from only one punch, were really quite minor. Given all of this, we conclude that defendant's sentence might have been affected by the weight the court placed on the mere fact that Miller was harmed. Thus, we must vacate defendant's sentence pursuant to the first prong of the plain-error rule and remand this cause for a new sentencing hearing. See *Johnson*, 2017 IL App (2d) 141241, ¶ 53 n.1.

¶ 19 In reaching our conclusion, we find the State's reliance on *People v. Beals*, 162 Ill. 2d 497 (1994), misplaced. There, the defendant was sentenced to an extended term of 80 years for murder. *Id.* at 508. As the trial court went through the enumerated aggravating factors that a court should consider in imposing a sentence, the court commented with regard to the first such guideline that the defendant's " 'conduct caused the ultimate harm' " in that his actions led to the " 'loss of a human life.' " *Id.* at 509. Our supreme court found that the court did not improperly consider a factor inherent in murder. *Id.* Rather, the supreme court determined that "the trial court's statement was simply a general passing comment based on the consequences of the defendant's actions." *Id.* Moreover, the supreme court noted that, even if the trial court had considered a factor inherent in the offense, the record revealed that, in light of many other aggravating factors, the court put little, if any, weight on that improper factor. *Id.* at 509-10.

¶ 20 Here, unlike in *Beals*, the trial court was not addressing each of the factors in aggravation when it mentioned that Miller was harmed or hurt. Rather, after mentioning "[n]umber one" that defendant had a history of criminality, a factor in aggravation (see 730 ILCS 5/5-5-3.2(a)(3) (West 2016)), the court immediately thereafter asserted simply that "[defendant's] conduct caused harm." At a minimum, that, coupled with the other references to the harm caused, makes it unclear whether the harm caused was a factor that the court improperly considered in aggravation. Moreover, unlike in *Beals*, the court here did not consider many other factors in aggravation before imposing the sentence.

¶ 21 Because we conclude that this cause must be remanded, as the court improperly considered an aggravating factor in imposing the sentence for battery, we need not consider the other issues raised.[2]

¶ 22 III. CONCLUSION

¶ 23 For the reasons stated, we vacate defendant's sentence for misdemeanor battery and remand this cause for a new sentencing hearing.

¶ 24 Vacated and remanded with directions.

[2] In remanding this case, we are well aware of defendant's request that we vacate his sentence and impose a sentence of time served. Although we have the authority to do this (see Ill. S. Ct. R. 615(b)(4) (eff. Jan 1, 1967))), we decline to do so, as the trial court is in a much better position to evaluate what a proper sentence is in this case.