2019 IL App (1st) 161981-U
Order filed: July 19, 2019

FIRST DISTRICT
Fifth Division

No. 1-16-1981

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 16 CR 2036
	)	
PARIS ARNOLD,	)	Honorable
	)	Stanley J. Sacks,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hoffman and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm defendant's burglary conviction and 8-year prison sentence, where defendant's assertions of error in jury selection and jury instruction, as well as his contention that the trial court abused its discretion in sentencing, were unfounded.

¶ 2 Following a jury trial, defendant-appellant, Paris Arnold, was convicted of burglary and sentenced to an eight-year term of imprisonment. For the following reasons, we affirm both defendant's conviction and his sentence.[1]

¶ 3 I. BACKGROUND

[1] In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order stating with specificity why no substantial question is presented.

¶ 4 On February 5, 2016, defendant was charged by information with a single count of burglary. The information generally alleged that, on January 17, 2016, defendant knowingly and unlawfully entered Johnny's Food and Liquor (Johnny's), located on south Ashland Avenue in Chicago, Illinois, with the intent to commit therein a theft. A jury trial on this charge was held in March 2016, at which defendant—after being properly admonished—represented himself, *pro se*.

¶ 5 Prior to jury selection, the trial court advised defendant with respect to the procedure for selecting and striking prospective jurors, and the following colloquy occurred:

> "THE COURT: All right. The way we do jury selection, Mr. Arnold, we do it according to statute. After I question the jurors, if you want to question the jurors you can do that ***.
>
> After that is done, we'll go back into chambers, obviously you will come with us, since you [are] going *pro se*, you'll come with us, the State will come with us[,] the reporter will be with us as well, we'll talk about jury challenges at that point. You get seven challenges for the jury, Mr. Arnold, and you get two for the alternates. So we're going to pick 14 jurors all together which means seven jurors you can get excuse seven jurors. *** You have 7 challenges for the 14 jurors—or the 12 jurors and one each for alternates. Two extra jurors would be 13 and 14. You only use seven for the jury, you cannot carry those over for the alternates. So seven for the jury, if they are not or not used and one per alternate. Do you understand me so far?
>
> DEFENDANT: Yes."

¶ 6 The trial court then questioned defendant with respect to certain questions the jury would be asked pursuant to Illinois Supreme Court Rule 431(b) (eff. July 1, 2012), and the following colloquy occurred:

> "THE COURT: If you want me to ask the jurors any questions about the possibility that you might not testify, I will tell the jurors if you do not choose to testify they cannot hold it against you in anyway [*sic*]. If you want to testify, you can testify, if you don't want to, you don't have to. Do you want me to ask the jurors the question on whether you testify or not or just leave it alone?
>
> DEFENDANT: Leave it alone."

¶ 7 After the first 14-member panel of prospective jurors was questioned, the parties and the trial court retired to chambers to discuss juror challenges. Defendant used three of his peremptory challenges with respect to the first panel, with a total of eight jurors selected from the initial panel. During that process, defendant exhibited some difficultly remembering the name of one of the prospective jurors he wanted to challenge, prompting the following colloquy:

> "THE COURT: You don't have a pen and paper?
>
> DEFENDANT: No, they don't allow me to do that.
>
> THE COURT: During the trial we will let you use a pen or pencil to take notes."

¶ 8 After the second 14-member panel was questioned, the parties again retired to chambers to discuss juror challenges. At that time, the trial court informed defendant that both the remaining six jurors and the two alternates would be selected from the second panel, and defendant could therefore use all of his six remaining challenges with respect to this panel. One member of the panel was excused for cause, and defendant used four peremptory challenges. The second panel was tendered to the State and, noting that nine prospective jurors remained, the trial

court further observed that if the State excused three or fewer prospective jurors, "we have a jury." The State exercised only two challenges.

¶ 9 The trial court then indicated its understanding that the 12 jurors and 2 alternates would be comprised of the 8 jurors selected from the first panel and the 6 remaining jurors from the second panel. While the State agreed, defendant disagreed and noted that he would like to exercise one of his remaining two challenges on one of the female members of the second panel; *i.e.*, defendant attempted to back-strike a juror after the second panel was tendered to the State. The trial court refused to allow defendant to do so, explaining:

> "THE COURT: The jurors picked we picked are the jurors we picked. You already had your chance to excuse anybody you wanted to excuse. She is on the jury at this point. We had eight from earlier, these are the final six. The other eight jurors are excused."

¶ 10 At trial, Jihad Abuzir testified that he owned Johnny's. On January 16, 2016, he closed his store and turned on an alarm. Early the next morning he received a telephone call indicating the alarm had activated. He called the police and went to the store. There he met police officers and observed that the rear door had been pried open. Inside the store, a motion sensor had been pried off the wall, a hole had been made in a wall, and a large hammer was on the floor. Mr. Abuzir did not give defendant permission to be inside the store.

¶ 11 Officer Anaastasios Mavropoulos testified that he and his partner arrived at Johnny's early in the morning of January 17, 2016. A rear door to the store had been pried open, and there was a hole in an interior brick wall. After noises were heard beyond the hole, Officer Mavropoulos ordered whoever was inside to come out. Defendant was one of two persons to come out of the wall, and he was subsequently arrested.

¶ 12 The State rested, and defendant indicated he did not intend to testify. The trial court then instructed the State to prepare an instruction for defendant "about the fact that the jurors cannot hold the fact against you in any way that you did not testify."

¶ 13 During the subsequent jury instruction conference, held prior to defendant resting his case in front of the jury, the following colloquy occurred:

> "THE COURT: The next one, Mr. Arnold, is 204, I.P.I. Criminal 2.04. That's an instruction only you can ask for not the State. If you want that instruction you're entitled to have it, which is the fact that if you do not testify the jurors cannot consider that in any way in reaching their verdict. It's your instruction. If you want it, you can have it. The fact that you did not testify cannot be considered by the jurors in any way while reaching their verdict. If you want that instruction, you can have it.
>
> DEFENDANT: No.
>
> THE COURT: You don't want it?
>
> DEFENDANT: No.
>
> THE COURT: All right. Not offered, okay."

¶ 14 The defendant then rested without presenting any evidence, and the jury was instructed and retired to deliberate. The jury found defendant guilty, and the trial court granted defendant's request that counsel be appointed to represent him for posttrial proceedings.

¶ 15 A posttrial and a subsequent amended posttrial motion for a new trial or for judgment notwithstanding the verdict were filed by counsel. The amended motion was denied by the trial court, and following a subsequent sentencing hearing defendant was sentenced to an eight-year term of imprisonment. Defendant's motion to reconsider this sentence was denied, and he timely appealed.

¶ 16 II. ANALYSIS

¶ 17 On appeal, we first consider defendant's assertions of error in jury selection and jury instruction, before considering his contention that the trial court abused its discretion in sentencing.

¶ 18 A. Trial Error

¶ 19 On appeal, defendant contends that the trial court committed error in the following four ways: (1) failing to provide defendant "with writing materials even after it discovered that courtroom personnel had denied him access to pen and paper, and he was conducting jury selection from memory," (2) "with no prior notice that it was altering the procedures for picking a jury, the trial court denied [defendant] the use of one of his remaining peremptory challenges to back strike a juror that he initially forgot to strike because he was not permitted writing materials during jury selection," (3) inducing defendant to decline having the prospective jurors asked the fourth question contained in Illinois Supreme Court Rule 431(b) (eff. July 1, 2012), which probes the prospective jurors regarding their understanding and acceptance of the proposition "that if a defendant does not testify it cannot be held against him or her," and (4) inducing defendant to decline having the jury instructed, pursuant to Illinois Pattern Jury Instructions, Criminal, No. 2.04 (4th ed. 2000) (hereinafter IPI Criminal 4th), that the fact defendant did not testify must not be considered by jurors in any way in arriving at a verdict, and in failing to provide this instruction over defendant's declination.

¶ 20 Defendant contends that these errors, either individually or taken together, amounted to structural error that deprived defendant of his right to a fair and impartial jury. He also contends they demonstrated the trial court's hostility and bias towards defendant, such that this matter should be remanded for a new trial before another judge.

¶ 21 However, as defendant himself acknowledges on appeal, he failed to timely object to *any* of these purported errors at trial. Nevertheless, defendant contends that three of these purported errors—all but defendant's assertion of error regarding questioning the jury pursuant to Illinois Supreme Court Rule 431(b)—were properly preserved for appellate review because they were raised in the amended posttrial motion filed below. We disagree.

¶ 22 It is well established that to preserve an issue for review, a defendant must raise an objection *both* at trial and in a written posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 119 (1988); *People v. Bannister*, 232 Ill. 2d 52, 65 (2008); *People v. Reese*, 2017 IL 120011, ¶ 60. Thus, because defendant raised no timely objections, these four purported errors may be reviewed only for plain error.

¶ 23 The plain error doctrine "bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error." *People v. Herron*, 215 Ill. 2d 167, 186 (2005). The plain-error doctrine is applied where "(1) a clear or obvious error occurred and the evidence is 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 (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). In either circumstance, the burden of persuasion remains with the defendant. *Herron*, 215 Ill. 2d at 182. Where there is no error, there can be no plain error. *People v. Wright*, 2017 IL 119561, ¶ 87. On appeal, defendant—who has not otherwise challenged the sufficiency of the evidence at trial—asserts plain error only under the second prong.

¶ 24 We begin by considering defendant's first two assertions of error: that the trial court failed to provide defendant "with writing materials even after it discovered that courtroom

personnel had denied him access to pen and paper, and he was conducting jury selection from memory," and that "with no prior notice that it was altering the procedures for picking a jury, the trial court denied [defendant] the use of one of his remaining peremptory challenges to back strike a juror." Defendant contends that—either individually or taken together—these two errors deprived him of his constitutional right to a fair and impartial jury, and thus require an automatic reversal.

¶ 25 Fundamentally, defendant's arguments hinge upon his contention that the trial court's ultimate decision to preclude defendant from back-striking a prospective juror violated Illinois Supreme Court Rule 434(d) (eff. Feb. 6, 2013), which outlines the procedure for peremptory challenges. However, both the United States and Illinois Supreme Courts have rejected the argument that any violation of this rule constitutes a *per se* violation of the constitutional right to a fair and impartial jury, requiring an automatic reversal. *People v. Rivera*, 227 Ill. 2d 1, 20, (2007), *aff'd*, *Rivera v. Illinois*, 556 U.S. 148, 160-61 (2009); *People v. Glasper*, 234 Ill. 2d 173, 193-94 (2009). As such, we reject any contention that these purported errors constitute plain error under the second prong.

¶ 26 We also reject defendant's contention that the trial court's "refusal" to provide him with pen and paper during jury selection denied him of due process. The record reflects that defendant *never* made a request to the trial court for pen and paper, either before or after the trial court *sua sponte* inquired as to whether defendant in fact had those supplies. Indeed, this failure to make such a request or object to his lack of such supplies at trial is exactly why defendant is forced to assert plain error on appeal. As such, the trial court was never in a position to refuse or deny defendant access to pen and paper during jury selection.

¶ 27 Turning to defendant's contention that the trial court improperly induced defendant to decline having the prospective jurors asked the fourth question contained in Illinois Supreme Court Rule 431(b), our supreme court has clearly held that a "Rule 431(b) violation is not cognizable under the second prong of the plain error doctrine, absent evidence that the violation produced a biased jury." *People v. Sebby*, 2017 IL 119445, ¶ 52 (collecting cases). Defendant has not presented any evidence of bias in the jury, and certainly no evidence of bias produced by any possible violation of Rule 431(b). As such, defendant has not demonstrated plain error with respect to this issue.

¶ 28 Finally, we consider defendant's contention that the trial court improperly induced him to decline having the jury instructed pursuant to IPI Criminal, No. 2.04. That instruction informs the jury that "[t]he fact that [(a) (the)] defendant[s] did not testify must not be considered by you in any way in arriving at your verdict." IPI Criminal 4th, No. 2.04. However, the record belies any assertion that the trial court induced defendant to decline this instruction. It is clear that it was the trial court that ordered the State to prepare this instruction for defendant's possible use in the first instance. The trial court then explained that this instruction would only be given if it was requested by defendant. The trial court *twice* asked defendant if he would like this instruction given to the jury, and both times defendant declined.

¶ 29 Moreover, it is also clear that the trial court correctly asked defendant if he wanted this instruction to be given, and did not commit any error by failing to provide this instruction over defendant's declination. The committee comments to IPI Criminal 4th, No. 2.04 specifically provide: "This instruction should be given *only* at the defendant's request." (Emphasis in original.) *Id*.

¶ 30 For all the above reasons, we reject defendant's contention that the trial court committed plain error in jury selection and jury instruction.

¶ 31 B. Sentencing

¶ 32 We next consider defendant's challenge to his eight-year sentence.

¶ 33 The trial court has broad discretion in imposing an appropriate sentence, and a sentence falling within the statutory range will not be disturbed on review absent an abuse of discretion. *People v. Jones*, 168 Ill. 2d 367, 373-74 (1995). An abuse of discretion exists where a sentence is at great variance with the spirit and purpose of the law, or is manifestly disproportionate to the nature of the offense. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010).

¶ 34 When balancing the retributive and rehabilitative aspects of a sentence, a trial court must consider all factors in aggravation and mitigation including, *inter alia*, defendant's age, criminal history, character, education, and environment, as well as the nature and circumstances of the crime and the defendant's actions in the commission of that crime. *People v. Raymond*, 404 Ill. App. 3d 1028, 1069 (2010). However, a reviewing court "may not substitute its judgment for that of the trial court simply because it would have weighed those factors differently." *People v. Fern*, 189 Ill. 2d 48, 53 (1999).

¶ 35 Defendant was convicted of a burglary committed in a building, a Class 2 felony. 720 ILCS 5/19-1(b) (West 2016). In light of his prior felony conviction for aggravated vehicular hijacking, defendant was eligible for an extended term of imprisonment. 730 ILCS 5/5-8-2(a) (West 2016); 730 ILCS 5/5-5-3.2(a)(3) (West 2016). The sentence of imprisonment for an extended-term, Class 2 felony shall be a term not less than 7 years and not more than 14 years. 730 ILCS 5/5-4.5-35(a) (West 2016). The eight-year sentence imposed on defendant falls within

this statutory range, and we therefore presume it is proper. *People v. Wilson*, 2016 IL App (1st) 141063, ¶ 12.

¶ 36 Nevertheless, on appeal defendant contends that his eight-year sentence represents an abuse of discretion, because the harm committed in the burglary—a property crime—was minimal, the trial court improperly considered the elements of the offense in aggravation and gave undue weight to defendant's criminal history, and the sentence did not support penological goals.

¶ 37 However, after reviewing the record, we conclude that the trial court clearly weighed all the relevant sentencing factors in reaching a sentence within—and at the lower end—of the extended-term sentencing range for which defendant was eligible. Defendant's argument on appeal plainly asks this court to improperly substitute our judgment for that of the trial court, simply because we would have weighed those factors differently. *Fern*, 189 Ill. 2d at 53. Moreover, we do not find that the trial court improperly considered the elements of the offense in aggravation. Rather, the record reflects that the trial court properly considered the nature and circumstances of the crime and defendant's actions in the commission of that crime (*Raymond*, 404 Ill. App. 3d at 1069), and did so in specific response to defense counsel's argument that a lower sentence was warranted because this matter involved an "economic crime" and not physical violence to a person.

¶ 38 On this record, we conclude that the trial court did not abuse its discretion in imposing an eight-year sentence.

¶ 39 III. CONCLUSION

¶ 40 For the foregoing reasons, we affirm defendant's conviction and sentence.

¶ 41 Affirmed.