

NOTICE

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FILED
September 25, 2019
Carla Bender
4th District Appellate
Court, IL

2019 IL App (4th) 170159-U

NO. 4-17-0159

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
DEOANTE TAVION JORDAN,)	No. 14CF1567
Defendant-Appellant.)	
)	Honorable
)	Scott D. Drazewski,
)	Judge Presiding.

JUSTICE CAVANAGH delivered the judgment of the court.
Justices Knecht and DeArmond concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The evidence demonstrated defendant committed armed robbery and, during the commission of the offense, he personally discharged a firearm that proximately caused great bodily harm to another person.

(2) The trial court did not abuse its discretion in sentencing defendant to an enhanced term of 36 years on his armed robbery conviction.

¶ 2 In October 2016, after a bench trial, the trial court found defendant, Deoante Tavion Jordan, guilty of attempt (murder), armed robbery, and aggravated battery with a firearm. In this direct appeal, defendant contends the court erred in imposing a 28-year firearm-enhancement to defendant’s armed robbery sentence, when defendant did not personally discharge a firearm or cause great bodily harm until after the armed robbery offense was complete. He also challenges his armed robbery sentence as excessive. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On January 7, 2015, the State filed a nine-count indictment, charging defendant with (1) four counts of attempt (murder) (720 ILCS 5/8-4 (West 2014)), alleging he knowingly, with the intent to kill, pointed a firearm at Joshua Corbert and fired three times striking Corbert in the torso (count I), specifically, once in the lung (count IV), once in the liver (count V), and once in the kidney (count VI), causing great bodily harm; (2) one count of armed robbery (720 ILCS 5/18-2(a)(4) (West 2014)), alleging defendant knowingly took money from Corbert's person and, during the commission of the offense, personally discharged a firearm striking Corbert in the torso causing great bodily harm (count II); and (3) four counts of aggravated battery with a firearm (720 ILCS 5/12-3.05(e)(1) (West 2014)), alleging defendant, while committing a battery, knowingly discharged a firearm, striking Corbert in the torso (count III), specifically, once in the liver (count VII), once in the lung (count VIII), and once in the kidney (count IX), causing great bodily harm. The State dismissed the aggravated-battery-with-a-firearm counts (counts VII, VIII, and IX), leaving the remaining charges for a bench trial, which began in September 2016.

¶ 5 The evidence presented at trial described the events of the evening of December 21, 2014, as follows. According to the victim, Joshua Corbert, defendant and two other men played dice with Corbert at his house. Defendant ran out of money. He left the residence, stating he would return with more. When defendant returned, he pulled out a firearm and ordered Corbert to give him everything. Corbert gave defendant money. Defendant then ordered Corbert to the kitchen floor, stating he would kill Corbert if he looked at him. Defendant went into the living room and unplugged Corbert's video game system. As he did, Corbert ran for the kitchen door to exit the home. Defendant shot Corbert as he tried to exit the home. Corbert ran around

the house toward the street. As Corbert approached the street, defendant shot him again. As Corbert got up to run, defendant shot him a third time.

¶ 6 The parties stipulated that if called as witnesses, medical personnel would testify that Corbert suffered gunshot wounds and resulting injuries to his lung, liver, and kidney. The trial court found defendant guilty of all charges and specifically found Corbert suffered great bodily harm and severe bodily injury.

¶ 7 On October 17, 2016, defendant filed a motion for a judgment of acquittal or, in the alternative, a new trial, claiming the trial court made numerous evidentiary errors. The court denied defendant's motion and sentenced him to consecutive prison terms of 38 years for attempt (murder) (count I) and 36 years for armed robbery (count II), with the remaining charges merging into those two counts. The court denied defendant's motion to reconsider his sentence, in which defendant argued his sentence was (1) excessive, (2) violative of the proportionate penalties clause, and (3) violative of the prohibition against sentencing youthful offenders to a *de facto* life sentence.

¶ 8 This appeal followed.

¶ 9 II. ANALYSIS

¶ 10 A. Firearm Enhancement

¶ 11 Defendant claims the trial court erred in adding a 28-year firearm-enhancement to his armed robbery sentence when the armed robbery offense was complete before defendant fired at Corbert and caused great bodily harm. He claims the court should have added only a 15-year term because defendant was *armed* with a firearm, but did not personally *discharge* a firearm, during the armed robbery. He claims the shots were not fired until after he had robbed

Corbert. He asks this court to reduce the firearm-enhancement sentence to 15 years and vacate the trial court's finding of great bodily harm.

¶ 12 Initially, we note defendant concedes he has forfeited review of his claim by not raising it during the trial court proceedings or in his posttrial motions. However, he asks this court to consider the issue as plain error. That is, under the plain error doctrine, a reviewing court may consider a forfeited error under two circumstances: where (1) the evidence at trial was closely balanced such that the error improperly tipped the scales of justice or (2) the error was so serious that it affected the trial's fairness or threatened the integrity and reputation of the judicial process. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). Defendant submits that a second-prong analysis would be appropriate because the error was "sufficiently grave that it denied [him] a fair sentencing hearing." The first step in the plain error analysis is determining whether clear or obvious error occurred. See *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). The burden of establishing a clear or obvious error is on defendant. *People v. Reese*, 2017 IL 120011, ¶ 72.

¶ 13 Relying on this court's decision in *Bates*, the State argues the plain error doctrine does not apply where defendant not only forfeited the issue but affirmatively acquiesced to what he now claims is error. See *People v. Bates*, 2018 IL App (4th) 160255, ¶ 74, appeal allowed, 116 N.E.3d 958 (2019) (table). In *Bates*, we explained that the plain error doctrine only applies in cases involving procedural default, not to those involving defendant's affirmative acquiescence. *Id.* (citing *People v. McGuire*, 2017 IL App (4th) 150695, ¶ 29). "That means that, when defense counsel affirmatively acquiesces to actions taken by the trial court, any potential claim of error on appeal is waived and defendant's only available challenge is to allege that he

received ineffective assistance of counsel.” *Id.* (citing *People v. Young*, 2013 IL App (4th) 120228, ¶¶ 25-26).

¶ 14 At sentencing, defendant’s counsel agreed with the prosecutor that the potential range of sentencing for both offenses was a consecutive term totaling between 62 years and natural life. Counsel stated: “Your Honor, by the way the statute is written, I would acknowledge that that appears to be the range.” Counsel then began his sentencing recommendation as follows:

“The sentence on that—on count I with the gun add-on, will start at 31. The armed robbery similarly situated starts out at 31. I would like to argue that count II would be merged into count I. It’s the same gunfire and so forth that we start examining our notions upon that one crime and things being used as double enhancement to stack on things. Is 25 to life being used twice to extend sentences twice?”

¶ 15 Based on counsel’s representations and arguments to the court, it is clear he did not merely waive the argument defendant poses in this appeal. Instead, he argued in direct contradiction of that argument. He acknowledged the “same gunfire” would be applied to both counts and that Corbert suffered great bodily harm as a result of that gunfire. Based on counsel’s acquiescence, as this court stated in *Bates*, defendant’s only available challenge is to allege that he received ineffective assistance of counsel. *Bates*, 2018 IL App (4th) 160255, ¶ 74.

¶ 16 Indeed, defendant alternatively claims his counsel was ineffective for not raising these issues below. Ineffective assistance of counsel claims are analyzed under the two-prong *Strickland* test. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). First, a defendant must show that his counsel’s performance was deficient, falling below an objective standard of

reasonableness. Next, he must show he was prejudiced, meaning there is a reasonable probability that absent counsel's error, the result of the proceeding would have been different. *Id.* The failure to satisfy either prong is fatal to the claim. See *People v. Givens*, 237 Ill. 2d 311, 331 (2010). Courts may decide the issue beginning with the prejudice prong, which "necessitates a showing of actual prejudice, not simply speculation that defendant may have been prejudiced." *People v. Patterson*, 2014 IL 115102, ¶ 81.

¶ 17 Defendant claims trial counsel was ineffective at the sentencing hearing for agreeing with the State that defendant's sentence for armed robbery should have at least a 25-year enhancement attached. He claims counsel should have argued that because defendant did not personally discharge a firearm and cause great bodily harm during the commission of the armed robbery, the firearm enhancement and the 85% truth-in-sentencing provisions do not apply. We disagree.

¶ 18 At trial, the trial court specifically held:

"But there is testimony to support that—more specifically, that U.S. currency in excess of \$300 was taken from [Corbert] while a firearm was employed and that that firearm was personally discharged by the individual who committed the armed robbery.

And, again, the court has previously indicated that a finding of great bodily harm as well as severe bodily injury are well established by the evidence."

¶ 19 The evidence presented at trial indicated that defendant held Corbert at gunpoint while Corbert handed defendant money from his pocket. Corbert laid on the kitchen floor as defendant had instructed while defendant went into the living room to get Corbert's video game system. Corbert heard defendant say " 'Oh shit, Xbox. I need this too.' " When defendant re-

entered the kitchen and saw Corbert attempting to escape out the kitchen door, defendant shot him in the torso. As Corbert continued to run away, defendant shot him twice more. These shots pierced his lung, liver, and kidney.

¶ 20 A victim's escape from an armed robbery constitutes the continuance of the armed robbery as long as force is being used. On this topic, our supreme court has stated:

“Neither flight from pursuing victims nor escape is included as an element in the statutory definition of robbery. See 720 ILCS 5/18-1(a) (West 1994). Thus, consistent with *Smith* [(*People v. Smith*, 78 Ill. 2d 298, 302-03 (1980))], the offense of armed robbery is complete when force or threat of force causes the victim to part with possession or custody of property against his will. Although the force which occurs simultaneously with flight or an escape may be viewed as continuing the commission of the offense [citations], it is the force, not escape, which is the essence and constitutes an element of the offense. The commission of an armed robbery ends when force and taking, the elements which constitute the offense, have ceased.” *People v. Dennis*, 181 Ill. 2d 87, 103 (1998).

¶ 21 Here, as explained in *Dennis*, the armed robbery offense continued until the force used by defendant (his personal discharge of a firearm) ceased. Thus, the trial court appropriately found during the guilt phase of the trial, based upon the evidence presented, that defendant committed an armed robbery and, during the commission of the offense, personally discharged a firearm that proximately caused great bodily harm to Corbert. See 720 ILCS 5/18-2(a)(4) (West 2014).

¶ 22 Having found no error, we accordingly find defendant cannot sustain an ineffective-assistance-of-counsel claim when he cannot demonstrate prejudice. In other words,

defendant was not prejudiced by counsel's conduct in failing to argue against the firearm enhancement when the trial court's decision (1) was clearly supported by the trial evidence and (2) would not have been affected by counsel's argument challenging the decision. Because defendant is unable to demonstrate that both (1) counsel's conduct was objectively unreasonable and (2) there is a reasonable likelihood the result of the proceedings would have been different, defendant cannot sustain his burden as to either prong of the *Strickland* test.

¶ 23

B. Sentence

¶ 24 Defendant next contends his 36-year sentence for armed robbery was excessive considering his youth, lack of criminal history, and circumstances of the offense. He challenges both his base sentence of 8 years and his enhanced sentence of 28 years as independently and cumulatively excessive. We disagree.

¶ 25

The trial court has great discretion in imposing a sentence within the proper statutory limits, as it is in the best position to weigh the evidence and assess the credibility of the witnesses. *People v. Perruquet*, 68 Ill. 2d 149, 156 (1977). The court's sentencing determination shall be based "on the particular circumstances of each case, considering such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age." *People v. Fern*, 189 Ill. 2d 48, 53 (1999). "Although the legislature has prescribed the permissible ranges of sentences, great discretion still resides in the trial judge in each case to fashion an appropriate sentence within the statutory limits." *Id.* The reviewing court must not substitute its judgment for that of the trial court merely because it would have weighed the factors differently. *Id.* We review the trial court's sentencing determination for an abuse of discretion. *People v. O'Neal*, 125 Ill. 2d 291, 297-98 (1988).

¶ 26 A defendant convicted of armed robbery when, during the commission of the offense, the defendant personally discharges a firearm that proximately causes great bodily harm is sentenced as a Class X felon (between 6 and 30 years) and then at least 25 years up to a term of natural life “shall be added to the term of imprisonment” imposed by the trial court. 720 ILCS 5/18-2(a)(4), (b) (West 2014). Because defendant’s conviction of attempt (murder) was also a Class X felony, his sentences for both offenses were mandatory consecutive. See 730 ILCS 5/5-8-4(d)(1) (West 2014).

¶ 27 When imposing defendant’s sentence, the trial court first “acknowledge[d] the defendant’s young age [a]nd the fact that he is capable of being rehabilitated.” The court also noted that defendant had been awarded “consideration previously” upon his prior conviction of armed robbery. He was sentenced to a term of probation but, not “even three months later[,] he committed these senseless and violent acts.” The court also noted that defendant now faced a mandatory minimum sentence of 62 years. Considering defendant’s criminal history, the nature of the crime, and the importance of deterring this type of crime, the court imposed 10 years and 8 years for the attempt (murder) and armed robbery offenses, respectively. The court added a firearm enhancement of 28 years to each sentence and ordered them to run consecutively. It is apparent from the record the court carefully considered the presentence investigation report, the evidence presented at trial, the nature of the crime, defendant’s use of a firearm during the commission of the offenses, the extent of harm suffered by the victim, and the importance of deterring future similar conduct before imposing defendant’s sentence. Further, the sentence imposed was within the permissible range. Therefore, on this record, we cannot say the court abused its discretion or that defendant is entitled to a new sentencing hearing.

¶ 28

III. CONCLUSION

¶ 29 For the reasons stated, we affirm the trial court's judgment.

¶ 30 Affirmed.