

NOTICE
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2019 IL App (5th) 170104-U

NO. 5-17-0104

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Jackson County.
)	
v.)	No. 16-CF-229
)	
TYRONE C. WEBB,)	Honorable
)	Ralph R. Bloodworth III,
Defendant-Appellant.)	Judge, presiding.

JUSTICE BARBERIS delivered the judgment of the court.
Justices Chapman and Moore concurred in the judgment.

ORDER

- ¶ 1 *Held:* The defendant's sentence is affirmed where he failed to show that the circuit court committed plain error by considering an improper aggravating factor.
- ¶ 2 Following a jury trial, the defendant, Tyrone C. Webb, was found guilty of one count of aggravated domestic battery (720 ILCS 5/12-3.3(a) (West 2016)), a Class 2 felony; one count of aggravated battery (*id.* § 12-3.05(f)(1)), a Class 3 felony; and one count of domestic battery (*id.* § 12-3.2(a)(1)), a Class A misdemeanor. After merging the two felony counts, the circuit court sentenced the defendant to concurrent terms of five

years' imprisonment for aggravated domestic battery and one year in jail for domestic battery.

¶ 3 The defendant appeals his prison sentence contending that the circuit court committed plain error when it improperly considered as a factor in aggravation that his conduct caused or threatened serious harm to the victim. Because serious harm is inherent in the offense of aggravated domestic battery, the defendant contends that the court improperly considered this factor. We affirm.

¶ 4 I. Background

¶ 5 On June 1, 2016, the defendant was charged by information with aggravated domestic battery (720 ILCS 5/12-3.3(a) (West 2016)), aggravated battery (*id.* § 12-3.05(f)(1)), and domestic battery (*id.* § 12-3.2(a)(1)). The charges for aggravated domestic battery and aggravated battery stemmed from the defendant's act of cutting the leg of his girlfriend, Krista Parola, with a razor blade on May 9, 2016, while the charge for domestic battery stemmed from the defendant's acts of kicking and striking Parola between May 5, 2016, and May 9, 2016.

¶ 6 On December 12, 2016, a two-day jury trial commenced, and the following evidence was adduced. Starting on May 5, 2016, the defendant binge drank alcohol for several days. As he became more intoxicated, he became increasingly more violent and began to physically abuse Parola. In particular, the defendant repeatedly punched and kicked Parola on several occasions and prevented her from leaving the residence. Once the defendant ceased drinking on May 7, 2016, he became sober and the physical abuse stopped. Parola did not inform police at that time.

¶ 7 The following day, however, the defendant resumed drinking and, once again, became physically violent with Parola. The defendant forced her to remain in the bedroom all day while he drank and listened to music with friends in the living room. During the evening and into the early morning hours, the defendant periodically returned to the bedroom where he repeatedly punched Parola in the head and body, hit her with a plastic strip, threw a chair at her, and kicked her so hard that her head struck the wall. At approximately 4 a.m., after the defendant's friends had left the house, the defendant forced Parola to sit on the couch and informed her that he was going to cut her. The defendant subsequently slashed Parola's leg with a straight razor. Parola then bandaged the wound and went to bed with the defendant. At approximately 7 a.m., Parola left the residence while the defendant was asleep. Parola was subsequently taken to the hospital by a friend where she received treatment for her injuries, which included multiple bruises to her face and body and a wound to her leg that required 12 staples to close. After she left the hospital, she informed police of the defendant's physical abuse.

¶ 8 After the jury deliberated, the defendant was found guilty of all three counts. The defendant later filed a motion for new trial, which the circuit court denied.

¶ 9 On February 16, 2017, the sentencing hearing was held. The State identified aggravating factors for the circuit court to consider, which included that "the defendant's conduct caused or threatened serious harm" (730 ILCS 5/5-5-3.2(a)(1) (West 2016)), "the defendant has a history of prior delinquency or criminal activity" (*id.* § 5-5-3.2(a)(3)), and "the sentence is necessary to deter others from committing the same crime" (*id.* § 5-5-3.2(a)(7)). With regard to the first factor, the State argued as follows:

"There is no question in this case the harm was serious. [The victim] was treated at the hospital. We have photographs that were entered into the jury trial in which she had staples closing the wound that was caused by this defendant in cutting her with a razor blade."

The State recommended the maximum sentence of seven years' imprisonment due to "the seriousness of the case" and the defendant's "numerous" prior criminal convictions as reflected in the presentence investigation report (PSI).

¶ 10 In contrast, defense counsel identified several mitigating factors, which included that "[t]here were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense" (*id.* § 5-5-3.1(a)(4)); "[t]he defendant's criminal conduct was the result of circumstances unlikely to recur" (*id.* § 5-5-3.1(a)(8)); "[t]he character and attitudes of the defendant indicate that he is unlikely to commit another crime" (*id.* § 5-5-3.1(a)(9)); and "[t]he imprisonment of the defendant would endanger his or her medical condition" (*id.* § 5-5-3.1(a)(12)).

¶ 11 In response to the State's argument that the defendant's conduct caused or threatened serious harm, defense counsel argued as follows:

"Although the pictures of Ms. Parola that were introduced at trial, as well as the evidence of the cut that she had received looked awful ***, the same charge would be brought if bones were broken, if a lengthy hospital stay had been had. So I am not going to try and lessen to say, oh, so what he did wasn't bad ***. It was bad, but the same charge encompasses things that could be much, much, much worse, and for those offenders the maximum sentence should be reserved."

Following argument on the additional mitigating factors stated above, defense counsel recommended a sentence of time served.

¶ 12 Prior to imposing sentence, the circuit court stated, *inter alia*, the following:

"Let the record reflect the Court has considered arguments of counsel, recommendations of both counsel this afternoon. The Court has also reviewed and considered the trial evidence, testimony and exhibits that were produced during the course of the trial, as well as the exhibits which were covered this afternoon. The Court has also considered factors in aggravation cited by the State this afternoon, including Factor No. 1, Factor No. 3, Factor No. 7, also considers the mitigation cited by the defense, specifically Factor No. 2, No. 4, No. 8, No. 9 and No. 12 would come into play, as well as others cited that would come into play in accordance with the statute in arriving at a sentence."

After merging the two felony counts, the defendant was sentenced concurrently to five years' imprisonment for aggravated domestic battery and one year imprisonment for domestic battery. The defendant did not file a postsentencing motion. The defendant filed a timely appeal.

¶ 13

II. Analysis

¶ 14 The only issue raised on appeal is the defendant's claim that the circuit court, at sentencing, improperly considered as a factor in aggravation that his conduct caused or threatened serious harm, which is an inherent factor for the offense of aggravated domestic battery. In particular, the court considered section 5-5-3.2(a)(1) of the Unified Code of Corrections (730 ILCS 5/5-5-3.2(a)(1) (West 2016)), which provides that "the defendant's conduct caused or threatened serious harm." The defendant requests us to vacate his sentence and remand for resentencing.

¶ 15 Although the defendant forfeited this claim of error by not raising it at sentencing and in a written postsentencing motion, the defendant asserts that we should review his claim under the plain-error doctrine. In response, the State asserts that (1) the circuit court properly considered the serious degree of harm caused by defendant, (2) the defendant

forfeited his claim for review, and (3) a plain-error analysis is inappropriate where no error occurred. We agree with the State.

¶ 16 A forfeited sentencing claim may be reviewed for plain error. *People v. Nowells*, 2013 IL App (1st) 113209, ¶ 18 (citing *People v. Hillier*, 237 Ill. 2d 539, 544 (2010)). The plain-error doctrine is not a general savings clause but "a limited and narrow exception 'designed to redress serious injustices.'" *People v. Scott*, 2015 IL App (4th) 130222, ¶ 41 (quoting *People v. Baker*, 341 Ill. App. 3d 1083, 1090 (2003)). To obtain relief under this rule, a defendant must first show that a clear or obvious error occurred. *Hillier*, 237 Ill. 2d at 545 (citing *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)). In the sentencing context, defendant must show either that "(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." *Id.* (citing *People v. Hall*, 195 Ill. 2d 1, 18 (2000)). The burden of persuasion remains on the defendant. *Id.* A reviewing court conducting plain-error analysis must first determine whether an error occurred because "[w]ithout reversible error, there can be no plain error." *People v. McGee*, 398 Ill. App. 3d 789, 794 (2010).

¶ 17 The responsibility of fashioning a sentence is generally a matter of judicial discretion. *People v. Perruquet*, 68 Ill. 2d 149, 154-55 (1977). A sentencing court may consider the nature and extent of each element of the offense as committed by the defendant. *People v. Sanders*, 2016 IL App (3d) 130511, ¶ 13. Although the circuit court has broad discretion when imposing a sentence, it may not consider a factor implicit in the offense as an aggravating factor in sentencing. *People v. Phelps*, 211 Ill. 2d 1, 12 (2004). Such dual use of a single factor is often referred to as a "double enhancement."

People v. Gonzalez, 151 Ill. 2d 79, 85 (1992). "A double enhancement occurs when either (1) a single factor is used both as an element of an offense and as a basis for imposing a harsher sentence than might otherwise have been imposed, or (2) the same factor is used twice to elevate the severity of the offense itself." *People v. Guevara*, 216 Ill. 2d 533, 545 (2005).

¶ 18 "[T]he 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 (*de novo* review where defendant claimed sentencing court improperly considered a factor inherent in the offense as an aggravating factor). The weight given to any aggravating factor, however, is within the court's discretion and will not be disturbed absent an abuse of discretion. *People v. Arbuckle*, 2016 IL App (3d) 121014-B, ¶ 39. The defendant bears the burden of establishing that a sentence was based on improper considerations. *People v. Dowding*, 388 Ill. App. 3d 936, 943 (2009). We will not reverse a sentencing court unless it is clearly evident that the sentence was improperly imposed. *People v. Ward*, 113 Ill. 2d 516, 526 (1986).

¶ 19 In *People v. Saldivar*, 113 Ill. 2d 256, 269 (1986), our supreme court stated that "the severity of the sentence depends upon the *degree of harm* caused to the victim and as such may be considered as an aggravating factor in determining the exact length of a particular sentence, *even in cases where serious bodily harm is arguably implicit in the offense for which a defendant is convicted*." (Emphases in original.) As such, under *Saldivar*, a court may properly consider the degree of harm caused even if serious bodily

harm was arguably implicit in the offense. *Id.*; see *Arbuckle*, 2016 IL App (3d) 121014-B, ¶ 42 ("Great bodily harm *** can certainly exist in varying degrees.").

¶ 20 In the present case, the defendant's enhanced Class 2 conviction for aggravated domestic battery arose from his act of causing Parola to suffer great bodily harm by cutting her leg with a straight razor. In addressing the seriousness of the injury, the State noted that Parola had received medical treatment at a hospital for a severe wound that required 12 staples to close. The State also requested a maximum sentence due to "the seriousness of the case" and the defendant's "numerous" prior criminal convictions. In response, defense counsel stated that, even though "the cut that [Parola] had received looked awful ***, the same charge encompasses things that could be much, much, much worse, and for those offenders the maximum sentence should be reserved." Based on the above, the record demonstrates that both parties argued that the degree of harm caused by the defendant was a factor for the circuit court to consider at sentencing.

¶ 21 Before sentencing the defendant, the circuit court stated that it had "considered arguments of counsel, recommendations of both counsel this afternoon" and "reviewed and considered the trial evidence." Here, the record demonstrates that the parties' arguments focused on the degree of the injury caused to the victim as a factor for the court to consider—rather than the mere fact that the defendant's conduct caused serious harm—and the trial evidence showed repeated violent acts resulting in various injuries. On that basis, we interpret the court's statement to indicate that it took into account the degree of harm caused to the victim in fashioning a mid-range sentence of five years'

imprisonment. As such, we do not believe the court relied on any elements of the crime as an aggravating factor.

¶ 22 In an effort to distinguish the rule in *Saldivar*, however, the defendant cites *Arbuckle*, 2016 IL App (3d) 121014-B, ¶ 44, for the proposition that the aggravating factor at issue should not be considered in cases where great bodily harm was an element of the offense unless the degree of harm "rise[s] above a baseline level." In support, the defendant argues that "a 'cut' to the victim's *** thigh—did not 'rise above a baseline level.' " In the present case, the circuit court considered the evidence presented at trial demonstrating the seriousness of Parola's injuries, which included photographic evidence of serious bruising to her face and body and a wound to her leg that required 12 staples to close. Given the nature of this case, the court could have readily determined that the wound on Parola's leg, alone, constituted harm well above the essential harm necessary to consider it an aggravating factor, given that the evidence demonstrated the defendant's acts of extreme violence and cruel behavior over several days culminated in a brutal attack upon the victim with a straight razor.

¶ 23 Lastly, even if the circuit court considered the seriousness of the injury as an aggravating factor, we could not say that it served as the primary factor in the defendant's sentence. In other words, we cannot conclude that the court would not have imposed the same sentence if it did not improperly consider that factor. See *People v. O'Toole*, 226 Ill. App. 3d 974, 992 (1992). Again, in deciding the appropriate sentence, the record demonstrates that the court took into account the trial evidence, the PSI, the evidence

presented at the sentencing hearing, and all applicable aggravating and mitigating factors, including the degree of harm caused to Parola.

¶ 24 In sum, because the record indicates that the circuit court based its sentence determination on the degree of harm caused to the victim, rather than an improper factor, we cannot say that the court's summary consideration of "Factor No. 1" (730 ILCS 5/5-5-3.2(a)(1) (West 2016)) resulted in a double enhancement. In view of this, the defendant cannot demonstrate that a clear and obvious error occurred that resulted in an enhancement of his sentence. "Absent reversible error, there can be no plain error." *People v. McDonald*, 2016 IL 118882, ¶ 48 (citing *People v. Williams*, 193 Ill. 2d 306, 349 (2000)). Accordingly, the defendant's claim of error is forfeited.

¶ 25 III. Conclusion

¶ 26 The circuit court did not commit plain error by considering as a factor in aggravation that the defendant's conduct caused or threatened serious bodily harm when the court weighed the degree of harm caused to the victim. Based on the foregoing, the defendant failed to demonstrate a clear and obvious error. Accordingly, the defendant's sentencing challenge is forfeited, and the judgment of sentence of the circuit court of Jackson County is hereby affirmed.

¶ 27 Affirmed.