No. 130191

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- RYANN N. JOHNSON, Petitioner-Appellant.	)	Appeal from the Appellate Court of Illinois, No. 4-23-0087. There on appeal from the Circuit Court of the Eleventh Judicial Circuit, Logan County, Illinois, No. 18-CF-200. Honorable Thomas W. Funk, Judge Presiding.

BRIEF AND ARGUMENT FOR PETITIONER-APPELLANT

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NATURE OF THE CASE

After a jury trial, Ryann N. Johnson was convicted of aggravated domestic battery and sentenced to 10 years in prison. Johnson then appealed his conviction, which was affirmed by the appellate court. *People v. Johnson*, 2023 IL App (4th) 230087-U. This Court granted Johnson's petition for leave to appeal on January 24, 2024. No issue is raised challenging the charging instrument.

ISSUE PRESENTED FOR REVIEW

Whether the trial court's consideration of improper factors in aggravation at sentencing constitutes second prong plain error.

STATUTES AND RULES INVOLVED

Supreme Court Rule 615(a)

> Insubstantial and Substantial Errors on Appeal.
>
> Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court.

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STATEMENT OF FACTS

On October 21, 2018, Ryann Johnson was involved in a domestic incident during which Lacey Sutheard was allegedly choked. (C. 20-22) As a result, on October 23, 2018, Ryann Johnson was charged by information with two counts of home invasion, two counts of criminal sexual assault, and one count of aggravated domestic battery based on strangulation. (C. 20-22)

On July 19, 2022, the cause proceeded to a jury trial. (R. 384) On October 21, 2018, Lincoln Police Sergeant Robert Sherren was dispatched to a house in Lincoln, Illinois in response to a report of a home invasion. (R. 548) When Sherren arrived, Lacey Sutheard let him inside the house. (R. 549) Sherren briefly spoke with Sutheard and described her demeanor as being "emotionally disturbed" and very upset. (R. 549-550) Sherren noticed that Sutheard had been crying and that she had marks on her neck and arms. (R. 550) After Sherren spoke with Sutheard, she was taken to the hospital. (R. 551)

Doctor Sumesh Jain was the emergency room physician who treated Sutheard at the hospital. (R. 538) When Jain examined Sutheard, he noted that she had pain and bruising to both sides of her neck, and reported having injuries to her shoulder, ankle, and foot. (R. 539)

Lacey Sutheard, the complainant, started dating Johnson in 2015 and had one child with him. (R. 562) On the day of the incident, Johnson repeatedly sent Sutheard text messages about wanting to see his daughter. (R. 564) Eventually, Johnson stopped messaging Sutheard, and Sutheard continued watching TV in the living room of her house. (R. 569) While she was watching TV, she heard footsteps and noticed that Johnson was in her house, walking towards her. (R.

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569) Once Johnson reached Sutheard, he immediately grabbed her phone and started looking through her text messages. (R. 569) Sutheard tried to get the phone back, but Johnson grabbed her by her hair and threw her onto the floor. (R. 570) While Sutheard was on the floor, Johnson sat on top of her and continued to look through her phone. (R. 571)

Eventually, Johnson told Sutheard to go to the bedroom. (R. 572) Once they reached the bedroom, Johnson pushed her onto the bed and told her to pull her pants down. Sutheard testified that Johnson told her that if she did not listen to him, he would "slit" her throat. (R. 573) Once Sutheard pulled her pants down, Johnson put his fingers inside her vagina and kept them inside of her for about 15 to 30 seconds. (R. 573, 602) After this occurred, Johnson questioned Sutheard about her dating someone else and started to choke her for about 10 to 15 seconds. (R. 575) When Johnson squeezed Sutheard's neck, Sutheard felt like her eyes were "popping out" and almost lost consciousness. (R. 575-576)

After this occurred, Sutheard tried to leave the house through the front door, but before she could reach the door Johnson caught her and threw her at the door. (R. 580) Sutheard hit the door and fell to the ground. (R. 581) While she was on the ground, Johnson stood over her and shoved her head into the floor. (R. 581)

Eventually, Johnson let Sutheard off the floor, and they started talking about their relationship. (R. 581) During their conversation, Johnson made Sutheard call her phone company and change her phone number. (R. 582) After she called the phone company, Johnson left the house. (R. 582) As soon as Johnson left, Sutheard called the police. (R. 587)

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When the police arrived, Sutheard briefly spoke with them, before being transported to the hospital. (R. 587) Sutheard testified that she had bruising to her left shoulder, marks on her neck and face, and a cut on the back of her left ear. (R. 587)

Pursuant to a pre-trial ruling on the State's 725 ILCS 5/115-7.4 motion, Sutheard also testified about a prior domestic incident she had with Johnson in 2015. (R. 591) Sutheard indicated that in April 2015, she got into an argument with Johnson, which resulted in Johnson pushing her into the door of his truck. (R. 591-594) After Johnson pushed her into the truck, the police were called, and Johnson eventually pled guilty to domestic battery as a result of the incident. (R. 594)

On cross-examination, Sutheard revealed that she had home security keypads by the doors in her house, and had a security screen in her kitchen that had a button she could push in emergencies. (R. 616, 620) Sutheard testified that when she called her phone company during the incident, she was on the phone for 20 to 25 minutes, but did not mention that she had been assaulted, or ask for the phone company to call the police. (R. 612)

Detective James Rehann interviewed Johnson about the incident at the Lincoln Police Department. (R. 650) During the interview, Johnson talked about his relationship with Sutheard and explained that he was upset that she was seeing someone else. (R. 651) Johnson told Rehann that, on the day of the incident, he was messaging Sutheard to see his daughter. (R. 652) Johnson initially told Rehann that Sutheard invited him over to her house, but later in the interview acknowledged that she did not invite him over. (R. 652)

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According to the interview, after sending Sutheard messages about their daughter, Johnson went to Sutheard's house and knocked on the side door. (R. 652) Sutheard walked over to the door and let him inside of the house. (R. 652) Once inside, Johnson talked to Sutheard about their relationship. (R. 652) During their conversation, Sutheard's new boyfriend got brought up, and Johnson got upset and put his hands on Sutheard. (R. 653) Johnson told Rehann that he grabbed Sutheard by her hair, threw her down, and put his hands on her throat. (R. 653) When Johnson left the house, he initially hid from the police but was brought into custody later that night. (R. 663)

Pursuant to the State's 725 ILCS 5/115-7.4 motion, Bianca Ramos testified about a prior domestic incident between her and Johnson that resulted in Johnson pleading guilty to aggravated domestic battery. (R. 510-519) Ramos and Johnson previously dated, and had two children together. (R. 510-511) On August 15, 2014, Johnson entered Ramos' house in the middle of the night, without permission. (R. 513) Johnson went to Ramos' bedroom, woke her up, and went outside with her to talk about their relationship. (R. 513-519) While outside, Johnson threw Ramos around and choked her until she lost consciousness. Johnson stopped battering Ramos when her five-year-old son came to the back door. (R. 515-519)

Ryann Johnson, the defendant, testified for the defense. (R. 755) On the day of the incident, Johnson drove to Sutheard's house. (R. 757) When he arrived, he knocked on the door, and Sutheard entered a code into the security keypad and let him inside the house. (R. 757) Once he was inside, Johnson and Sutheard started arguing. (R. 758) Eventually, they both calmed down and went to the living room to watch TV. (R. 759)

While they were watching TV, Sutheard went to the bathroom. (R. 760)

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When Sutheard left to use the bathroom, Johnson took her phone and started looking through her text messages. (R. 760) Johnson discovered that Sutheard was talking to another man named Jason and was sending pictures of his daughter to Jason. (R. 760) Johnson confronted Sutheard about this, and they started arguing again. (R. 760) During the argument, Sutheard "muff slapped" Johnson. (R. 761) Johnson responded by grabbing Sutheard's hair and throwing her to the ground. (R. 761) When Sutheard was on the floor, Johnson called her a "stupid, dirty, whore" and started choking her. (R. 761) Johnson stopped choking Sutheard when he realized that she was struggling to breathe. (R. 783)

After choking Sutheard, Johnson tried to leave the house. (R. 762) As he was leaving, Sutheard got up and hit him in the back of his head with her phone. (R. 762) When this happened, Johnson turned around and shoved Sutheard to the ground. (R. 763) After this, Johnson left the house. (R. 763) Johnson testified that he did not go to Sutheard's bedroom or make Sutheard call her phone company during the incident. (R. 763-764) Johnson admitted that he battered Sutheard, but indicated that he did not sexually assault her. (R. 764)

Following closing argument, the jury found Johnson guilty of aggravated domestic battery and not guilty of all other charges. (R. 878-879)

On September 16, 2022, the court held a sentencing hearing. (R. 884) Lacey Sutheard provided a victim impact statement. (R. 886, 890-891) In the statement, Sutheard described how she felt helpless during the incident. (R. 886-887) Since the incident, Sutheard has entered behavioral counseling to try to help her manage the PTSD symptoms that she now suffers from. (R. 887) Sutheard no longer feels safe, and she frequently wakes up at night with cold sweats and flashbacks of Johnson strangling her. (R. 887)

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After the victim impact statement, Johnson made an allocution statement. (R. 904) Johnson apologized for the crimes that he was convicted of and told the court that he had been taking parenting classes to try to better himself. (R. 904) Johnson also indicated that he had a "new found hope in God" and explained that he had become a Christian during the time he was incarcerated. (R. 904)

Following argument by the parties, the court sentenced Johnson to a 10-year, extended-term sentence in the Department of Corrections to be served at 85%. (C. 270) In announcing sentence, the court first determined that a term of probation would be inappropriate, as Johnson had a long history of failing to successfully complete periods of probation or parole. (R. 905-906) Having determined that a sentence to the Department of Corrections was appropriate, the court stated:

> this was one of the more violent domestic violence cases this court has presided over. Obviously, it's inherent in the elements of the offense, aggravated domestic battery, that there is violence, but not every case involves strangulation, and strangulation to the point where the victim was almost passing out.

(R. 906)

In addition to rejecting a sentence of probation, the court found that an extended-term sentence was necessary for several reasons. (R. 908) In determining that an extended-term sentence was necessary, the court considered the factors in mitigation and aggravation. (R. 908-910) In mitigation, the court considered the character letters submitted on Johnson's behalf, Johnson's history of substance abuse, his struggle with mental health issues, and the fact that his attitude in court had been remorseful. (R. 908-909) When discussing Johnson's mental health struggles, the court noted that it appeared as if Johnson was addressing his mental health problems through the use of cocaine and methamphetamines, which was not appropriate. (R. 908)

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The court considered five factors in aggravation. Specifically, the court considered:

> On the other hand, the aggravating factors, you did cause serious harm. You have a history of prior delinquency or criminal activity. The sentence here is necessary to deter others. You are, obviously, not the only person in this state that thinks that they can control women when they don't get their way by violence. We deal with that every day, so we need to deter others by the sentence here today; and, of course, this crime occurred while you were on parole, on mandatory supervised release, and you were in a position of trust, being the father of Ms. Sutheard's child.

(R. 910)

On September 21, 2022, Johnson filed a *pro se* motion to reduce sentence, arguing that his sentence should be reduced to a term of seven years, citing other aggravated domestic battery cases which resulted in seven-year sentences. (C. 277) Following argument, the court denied the motion to reduce sentence. (R. 919)

On appeal, Johnson argued that in sentencing him for aggravated domestic battery, the trial court erred in considering in aggravation that he had a position of trust over the victim where that statutory factor did not and could not apply, and erred in considering the fact that Johnson strangled the victim where that fact was inherent in the offense of aggravated domestic battery.

On October 6, 2023, the appellate court affirmed Johnson's conviction and sentence. *People v. Johnson*, 2023 IL App (4th) 230087-U. The Fourth District rejected the choking argument, holding that the trial court did not err in considering the unique nature and extent that Johnson strangled the victim. *Johnson*, 2023 IL App (4th) 230087-U, ¶ 45. The Fourth District did agree that the trial court erred in considering the "position of trust" statutory factor in aggravation at sentencing. *Johnson*, 2023 IL App (4th) 230087-U, at ¶ 50. Nevertheless, the appellate court held that Johnson forfeited this argument and declined to review

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it under the plain error rule. *Johnson*, 2023 IL App (4th) 230087-U, at ¶ 57. Specifically, the appellate court determined that a sentencing court's consideration of an improper sentencing factor does not, by itself, constitute second-prong plain error. *Johnson*, 2023 IL App (4th) 230087-U, at ¶ 57.

This Court granted leave to appeal on January 24, 2024.

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ARGUMENT

Where the consideration of an improper factor in aggravation at sentencing affects a defendant's fundamental right to liberty, the trial court's consideration of improper sentencing factors should be subject to plain error review under the second prong of the plain error rule.

It is undisputed that the sentencing court committed a clear and obvious error where it considered an improper factor in aggravating Johnson's sentence. This Court has held that "[r]eview of whether the circuit court improperly considered a factor in aggravation under the second prong of the plain error doctrine is proper, as it affects a fundamental right, defendant's right to liberty." *People v. Martin*, 119 Ill.2d 453, 458 (1988). In accordance with this holding, the First, Second, Third, and Fifth Districts of the Appellate Court have similarly found that a circuit court's improper consideration of a factor in aggravation can be reviewed under the second prong of the plain error doctrine because it affects the defendant's fundamental right to liberty. *See infra.*

Yet, in this case, the Fourth District rejected this precedent and held that the consideration of an improper sentencing factor, by itself, does not affect a defendant's fundamental rights such that the error is subject to review under the second prong of the plain error rule. *People v. Johnson*, 2023 IL App (4th) 230087-U, ¶ 57. As a result, only citizens in the Fourth District are foreclosed from arguing that a sentencing court's consideration of an improper sentencing factor alone constitutes second-prong plain error. However, the clear precedent of this Court, coupled with the long-standing practice of Illinois reviewing courts invoking plain error in this situation, demonstrates the incorrectness of the Fourth District's holding. Accordingly, this Court should find that Johnson's argument can be reviewed under the second prong of the plain error rule and, because the weight

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placed on the improper sentencing factor was not insignificant, vacate Johnson's sentence and remand the case for re-sentencing free of the consideration of improper aggravating factors. Should this Court choose not to reach the merits of Johnson's claim, it should remand the cause to the appellate court with directions to consider Johnson's argument under the second prong of the plain error rule and determine if the error requires the defendant's case to be remanded for a new sentencing hearing because the weight placed on the improper sentencing factor was not insignificant.

The plain error doctrine stems from Illinois Supreme Court Rule 615(a), which provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." *People v. Herron*, 215 Ill.2d 167, 176 (2005). Plain error can occur in either one of two circumstances: (1) when the evidence is close, regardless of the seriousness of the error, or (2) when the error is serious, regardless of the closeness of the evidence. *Herron*, 215 Ill.2d at 187. In the sentencing context, to establish plain error a 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." *People v. Hillier*, 237 Ill.2d 539, 545 (2010).

This Court has held that the Illinois doctrine of second-prong plain error includes all of the six federally identified categories of structural error. *People v. Thompson*, 238 Ill.2d 598, 613 (2010); *see also Washington v. Recuenco*, 548 U.S. 212, 218 n.2 (2006). However, the doctrine of second-prong plain error has not been limited to the six types of structural error that the United States Supreme Court has recognized. *People v. Clark*, 2016 IL 118845, ¶ 46. Instead, Illinois allows a reviewing court to reach a forfeited issue where clear or obvious error occurred

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and where the error was so serious that it "affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *Clark*, 2016 IL 118845, ¶ 42 (internal quotation marks omitted); Ill. S. Ct. R. 615(a).

Illinois reviewing courts have long held that the trial judge's consideration of improper factors at sentencing constitutes plain error, as it affects the defendant's fundamental right to liberty and impinges on the defendant's right not to be sentenced based on improper factors. Indeed, this decades-old principle of law was established by this Court in *People v. Martin*, 119 Ill.2d 453, 458-460 (1988).

In *Martin*, this Court found both prongs of plain error applicable to the issue of whether the trial court erred in considering a factor inherent in the offense at sentencing where the defendant failed to preserve the error. 119 Ill.2d at 458-460. This Court reviewed the issue under plain error because it "clearly affected the defendant's fundamental right to liberty" and "impinged on her right not to be sentenced based on improper factors." *Martin*, 119 Ill.2d at 458-460. This Court explained that "[r]eview of whether the circuit court improperly considered a factor in aggravation under the second prong of the plain error doctrine is proper, as it affects a fundamental right, defendant's right to liberty." *Martin*, 119 Ill.2d at 458.

Since *Martin*, Illinois courts have repeatedly invoked plain error when faced with the question of whether the trial court considered improper aggravating factors at sentencing. Indeed, the First, Second, Third, and Fifth Districts of the Appellate Court have held that a circuit court's improper consideration of a factor in aggravation can be reviewed under the second prong of the plain error doctrine because it affects the defendant's fundamental right to liberty. *See People v. Haley*, 2011 IL App (1st) 093585, ¶ 62; *People v. Whitney*, 297 Ill.App.3d 965, 969 (1st

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Dist. 1998); *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 7; *People v. Pierce*, 223 Ill.App.3d 423, 441 (2d Dist. 1991); *People v. Sanders*, 2016 IL App (3d) 130511, ¶ 17; *People v. Young*, 2022 IL App (3d) 190015, ¶ 23; *People v. Joe*, 207 Ill.App.3d 1079, 1085 (5th Dist. 1991); *People v. Dempsey*, 242 Ill.App.3d 568, 597-598 (5th Dist. 1993).

For instance, in *Haley*, the defendant waived his contention that the circuit court considered an improper aggravating factor at sentencing by failing to include it in a post-trial motion. 2011 IL App (1st) 093585, ¶ 61. Yet, the First District reviewed the defendant's argument as plain error, stating that "[r]eview of whether the circuit court improperly considered a factor in aggravation under the second prong of the plain error doctrine is proper, as it affects a fundamental right, defendant's right to liberty." *Haley*, 2011 IL App (1st) 093585, ¶ 62 (citing *Martin*, 119 Ill.2d at 458).

The Second District stated something similar in *Abdelhadi*, when it found that "when a trial court considers erroneous aggravating factors in determining the appropriate sentence of imprisonment, the defendant's 'fundamental right to liberty' is unjustly affected, which is seen as serious error." 2012 IL App (2d) 111053, ¶ 7 (citations omitted). As did the Third and Fifth Districts in *Sanders* and *Joe*, where they stated that the consideration of improper sentencing factors impinged on the defendant's right not to be sentenced based on an improper factor and affected his fundamental right to liberty. *Sanders*, 2016 IL App (3d) 130511, ¶ 17 (citing *Martin*, 119 Ill.2d at 458); *Joe*, 207 Ill.App.3d at 1085 (citing *Martin*, 119 Ill.2d at 458). Notably, all of the cases mentioned above rely on this Court's decision in *Martin* as support for the notion that the consideration of improper sentencing factors constitutes second-prong plain error. Yet, each of these cases

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stand in direct conflict with the Fourth District's decision in this case.

Indeed, despite the clear precedent of this Court and every other appellate district on the fact that the consideration of an improper sentencing factor affects a person's fundamental right to liberty, the Fourth District continuously rejects this rule. *See People v. Rathbone*, 345 Ill.App.3d 305, 311 (4th Dist. 2003); *People v. Ahlers*, 402 Ill.App.3d 726, 734 (4th Dist. 2010); *People v. Hanson*, 2014 IL App (4th) 130330, ¶¶ 27-29; *People v. McGath*, 2017 IL App (4th) 150608, ¶ 68.

In this case, the Fourth District has once again rejected the clear precedent of this Court and held that the trial court's consideration of improper sentencing factors alone did not affect a defendant's fundamental right to liberty such that it constituted second-prong plain error. *People v. Johnson*, 2023 IL App (4th) 230087-U, ¶ 57. Notably, the appellate court found clear and obvious error where the trial judge considered the fact that Johnson had a position of trust over the victim in aggravating Johnson's sentence when that statutory factor did not and could not apply. *Johnson*, 2023 IL App (4th) 230087-U, at ¶ 50. However, the court refused to address whether the sentencing court's error required remand for a new sentencing hearing. *Johnson*, 2023 IL App (4th) 230087-U, at ¶ 57. Instead, the court determined that such error was not subject to review under the second prong of the plain error doctrine. *Johnson*, 2023 IL App (4th) 230087-U, at ¶ 57. Specifically, the court refused to invoke the plain error doctrine because it concluded that the trial court's consideration of improper sentencing factors did not sufficiently affect the defendant's fundamental right to liberty to trigger second-prong plain error review. *Johnson*, 2023 IL App (4th) 230087-U, at ¶ 57. Additionally, the court found that Johnson failed to explain how the trial court's consideration of the improper factor at sentencing, in this case, deprived him of a fair sentencing

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hearing. *Johnson,* 2023 IL App (4th) 230087-U, at ¶ 57.

While it was consistent with its own prior decisions, the Fourth District's decision obviously conflicts with the long-standing practice of reviewing courts invoking plain error when faced with the question of whether the trial court considered improper aggravating factors at sentencing. Notably, the appellate court did not address this Court's analogous decision in *Martin. See Johnson*, 2023 IL App (4th) 230087-U, at ¶ 57.

Furthermore, it is well-established that the right to be sentenced lawfully is substantial because it affects a defendant's fundamental right to liberty. *See People v. Baaree,* 315 Ill.App.3d 1049, 1050 (1st Dist. 2000); *People v. Burrage,* 269 Ill.App.3d 67, 71 (1st Dist. 1994); *People v. Lindsay*, 247 Ill.App.3d 518, 527 (2d. Dist. 1993); *People v. Kopczick*, 312 Ill.App.3d 843, 852 (3d. Dist. 2000). This Court has long recognized that criminal defendants have the right not to be sentenced based on improper factors. *See Martin*, 119 Ill.2d at 458; *People v. Conover*, 84 Ill.2d 400, 405 (1981). The imposition of a sentence of incarceration is arguably the most important step in a criminal conviction–it is the point at which an individual's right to liberty is stripped–and that is why all the courts in this State, save for the Fourth District, hold that is plain error to consider improper factors. This Court has made clear that "in the interest of justice, a reviewing court may consider *all* questions which appear to be plain error *or affect substantial rights of a party*," and it is undeniable that the error here affected Johnson's substantial rights, as his loss of liberty was based in part on an improper sentencing factor. *Martin*, 119 Ill.2d at 458 (emphasis added) (citations omitted). As such, this Court should reject the Fourth District's holding and reassert that a sentencing court's consideration of improper aggravating factors at sentencing affects a defendant's

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fundamental rights to liberty such that the error constitutes second-prong plain error.

Moreover, to the extent that the appellate court found that Johnson inadequately invoked the plain error doctrine, this Court should reject such a claim. In the appellant's opening brief, Johnson explained exactly how the trial judge relied on an improper sentencing factor in aggravating his sentence to a term above the minimum. (Def. Op. Br., p. 17-18) Johnson noted that the trial court explicitly mentioned the improper factor in handing down the sentence and pointed out that his sentence was seven years over the minimum prison sentence for a Class 2 felony. (Def. Op. Br., p. 17-18) Johnson then argued that the consideration of improper aggravating factors constitutes plain error because it deprived him of a fair sentencing hearing. (Def. Op. Br., p. 19-20) In support, Johnson cited *Martin*, *Sanders*, *Abdelhadi*, and *People v. Maggio*, 2017 IL App (4th) 150287. (Def. Op. Br., p. 20)

Accordingly, Johnson demonstrated in his opening brief that the trial judge committed error in this case and that the error affected his fundamental right to liberty by increasing his sentence without proper basis. As this Court has already recognized, the consideration of improper sentencing factors affects a defendant's "fundamental right to liberty" and is, therefore, a violation of his substantial rights. *Martin*, 119 Ill.2d at 458-460. Notably, the Illinois plain error rule does not incorporate any harmless error analysis into the determination of whether a forfeited error affects substantial rights such to trigger second prong plain error review. *See Herron*, 215 Ill.2d at 413-414 (noting that under the second prong of plain error review, prejudice is presumed due to the importance of the right involved). As such, Johnson's explanation was sufficient to invoke plain error review. *See*

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Herron, 215 Ill.2d at 178 (holding that the plain error doctrine was developed to allow "a reviewing court to reach a forfeited error affecting substantial rights").

In sum, this Court has stated that "[t]he foundation of plain-error review is fundamental fairness." *People v. Lewis*, 234 Ill.2d 32, 47 (2009) (citing *Herron*, 215 Ill.2d at 177; *People v. Keene*, 169 Ill.2d 1, 17 (1995)). The fundamental right to liberty is arguably the most important right, and any denial of that right based on improper sentencing factors should be reviewable in a court of review. In recognition of the importance of the right to liberty, this Court has held that considering improper sentencing factors constitutes second-prong plain error.

Similarly, reviewing courts in the First, Second, Third, and Fifth appellate districts have universally found that considering improper sentencing factors is reviewable under the second prong of the plain error rule. Yet, citizens from the Fourth District are foreclosed from arguing that the trial court's consideration of improper factors at sentencing trigger second-prong plain error review. That is fundamentally unfair. As such, this Court should find that Johnson's argument can be reviewed under the second prong of the plain error rule.

Because the appellate court refused to review Johnson's argument as plain error, the court never addressed whether the weight placed on the improper sentencing factor was insignificant. Yet, the record on appeal is sufficient for this Court to determine that the weight placed on the improper sentencing factor was not insignificant. Indeed, given the obvious error by the trial court, it would be much more efficient for this Court to remand this case directly to the trial court for a new sentencing hearing free from the consideration of the improper sentencing factor. *See People v. Cregan*, 2014 IL 113600, ¶ 18 (considering unpreserved constitutional claim where waiting for a later proceeding would not be "in the

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interest of judicial economy").

A sentence based on an improper factor must be vacated unless the reviewing court can determine that the weight placed on the improper factor was an insignificant element of the defendant's sentence. *People v. Heider*, 231 Ill.2d 1, 21-22 (2008). A remand is required even if it is "unclear how much weight the trial court placed on the improper factor." *People v. Dowding*, 388 Ill.App.3d 936, 946 (2d Dist. 2009). Remand may be required even if the improper factor was not the only or the foremost aggravation factor. *See People v. Wallace*, 145 Ill.App.3d 247, 256 (2d Dist. 1986) (remanding for re-sentencing despite the fact that the trial judge "obviously" placed more weight on another incident than on the improperly considered incident).

Here, the trial court explicitly considered that Johnson had a position of trust over Sutheard as an aggravating factor at sentencing. (R. 910) Indeed, this was the final factor in aggravation that the court found applied in Johnson's case. (R. 910) As the court explicitly mentioned the improper factor in handing down the sentence, it cannot be presumed that it did not play a role in the sentence. *Whitney*, 297 Ill.App.3d at 971; *see also People v. Wardell*, 230 Ill.App.3d 1093, 1103 (1st Dist. 1992) ("If it is on the judge's tongue, it most assuredly must be on his mind.").

The role the improper factor played in the sentence is even more evident when considering the absence of other aggravating factors applicable to Johnson. Indeed, the court considered a total of five aggravating factors. (R. 910) However, one of the five factors was improper. Thus, twenty percent of the aggravating factors considered by the court were improper. As such, it cannot be said that the weight placed on the improper factor was insignificant, where the factor played a prominent

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role in sentencing.

Additionally, the normal sentencing range for a Class 2 felony is three to seven years, and the extended-term sentencing range is seven to 14 years. 739 ILCS 5/5-4.5-35(a) (2022). Johnson received an extended-term sentence of 10 years, which is near the middle of the extended-term sentencing range, and seven years over the minimum prison sentence for a Class 2 felony. (C. 270); 730 ILCS 5/5-4.5-35(a). Under these circumstances, it cannot be said that the trial court's consideration of this improper sentencing factor was insignificant.

Therefore, because it cannot be said that the weight placed on the improper factor was insignificant, this Court should not only find that Johnson's argument is reviewable under the second prong of the plain error rule, but also vacate Johnson's sentence and remand for re-sentencing free from the consideration of the improper aggravating factor. To the extent that this Court does not believe that it can reach the merits of Johnson's underlying claim, it should find that Johnson's argument can be reviewed under the second prong of the plain error rule and remand the cause to the appellate court with directions to review the matter as plain error and determine whether the error requires Johnson's case to be remanded for a new sentencing hearing.

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CONCLUSION

For the foregoing reasons, Ryann N. Johnson, petitioner-appellant, respectfully requests that this Court review Mr. Johnson's argument as plain error and vacate his sentence and remand the case to the circuit court for a new sentencing hearing. Alternatively, Mr. Johnson respectfully requests that this Court remand the cause to the appellate court with direction that the appellate court review Mr. Johnson's argument as plain error.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342, is 20 pages.

/s/Zachary Wallace
ZACHARY WALLACE
Assistant Appellate Defender

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No. 130191

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- RYANN N. JOHNSON, Petitioner-Appellant.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 4-23-0087. There on appeal from the Circuit Court of the Eleventh Judicial Circuit, Logan County, Illinois, No. 18-CF-200. Honorable Thomas W. Funk, Judge Presiding.

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 115 S. LaSalle St., Chicago, IL 60603, eserve.criminalappeals@ilag.gov;

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Mr. Ryann N. Johnson, Register No. S10832, Danville Correctional Center, 3820 East Main Street, Danville, IL 61834

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On February 28, 2024, the Brief and Argument was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the petitioner in an envelope deposited in a U.S. mail box in Elgin, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Brief and Argument to the Clerk of the above Court.

/s/Kimberly Maloney
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APPEAL TO THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
LOGAN COUNTY, ILLINOIS

PEOPLE Plaintiff/Petitioner v JOHNSON, RYANN N S10832 Defendant/Respondent	Reviewing Court No: 4-23-0087 Circuit Court No: 2018CF200 Trial Judge: FUNK

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APPEAL TO THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
LOGAN COUNTY, ILLINOIS

PEOPLE	)	
Plaintiff/Petitioner	)	Reviewing Court No: 4-23-0087
	)	Circuit Court No: 2018CF200
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APPEAL TO THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
LOGAN COUNTY, ILLINOIS

PEOPLE)
Plaintiff/Petitioner) Reviewing Court No: 4-23-0087
) Circuit Court No: 2018CF200
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APPEAL TO THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
LOGAN COUNTY, ILLINOIS

PEOPLE Plaintiff/Petitioner v JOHNSON, RYANN N S10832 Defendant/Respondent	Reviewing Court No: 4-23-0087 Circuit Court No: 2018CF200 Trial Judge: FUNK

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APPEAL TO THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
LOGAN COUNTY, ILLINOIS

PEOPLE)
Plaintiff/Petitioner) Reviewing Court No: 4-23-0087
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Defendant/Respondent)

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APPEAL TO THE APPELLATE COURT OF ILLINOIS
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FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
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PEOPLE	)	
Plaintiff/Petitioner	)	Reviewing Court No: 4-23-0087
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	)	Trial Judge: FUNK
v	)	
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JOHNSON, RYANN N S10832	)	
Defendant/Respondent	)	

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FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
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PEOPLE	)	
Plaintiff/Petitioner	)	Reviewing Court No: 4-23-0087
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LOGAN COUNTY, ILLINOIS

PEOPLE	)	
Plaintiff/Petitioner	)	Reviewing Court No: 4-23-0087
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File Date: 3/31/2023 9:30 AM
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APPELLATE COURT 4TH DISTRICT

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
LOGAN COUNTY, ILLINOIS

PEOPLE
Plaintiff/Petitioner

v

JOHNSON, RYANN N S10832
Defendant/Respondent

Reviewing Court No: 4-23-0087
Circuit Court No: 2018CF200
Trial Judge: FUNK

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APPEAL TO THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
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APPEAL TO THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
LOGAN COUNTY, ILLINOIS

PEOPLE)
Plaintiff/Petitioner) Reviewing Court No: 4-23-0087
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JOHNSON, RYANN N S10832)
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APPEAL TO THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
LOGAN COUNTY, ILLINOIS

PEOPLE Plaintiff/Petitioner	)	Reviewing Court No: 4-23-0087
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IN THE CIRCUIT COURT OF LOGAN COUNTY, ILLINOIS
ELEVENTH JUDICIAL CIRCUIT

PEOPLE OF THE STATE OF ILLINOIS) Case No 18CF200 Date of Sentence 9/16/22
Vs. Date of Birth 2/25/87 (Defendant)

Ryann N. Johnson
Defendant

FILED
SEP 16 2022
Kelly Elias
Clerk of the Circuit Court
Logan County, Illinois

JUDGMENT – SENTENCE TO ILLINOIS DEPARTMENT OF CORRECTIONS

WHEREAS the above-named defendant has been adjudged guilty of the offenses enumerated below; IT IS THEREFORE ORDERED that the defendant be and hereby is sentenced to confinement in the Illinois Department of Corrections for the term of years and months specified for each offense.

COUNT	OFFENSE	DATE OF OFFENSE	STATUTORY CITATION	CLASS	SENTENCE	MSR
I.	Aggravated Domestic Battery	10/21/18	720 ILCS 5/12-3.3(a-5)	2	10 Yrs. ___ Mos.	4 Yrs. ___ Mos.

To run (concurrent with) (consecutively to) count(s)______ and served at ~~50%~~, ~~75%~~, (85%) ~~100%~~ pursuant to 730 ILCS 5/3-6-3 ____ Per PRB, MSR up to 12 Mos.

____ ____ ____ ____ ____ ____ Yrs. ___ Mos. ___ Yrs. ___ Mos.
To run (concurrent with) (consecutively to) count(s)______ and served at 50%, 75%, 85%, 100% pursuant to 730 ILCS 5/3-6-3 ____ Per PRB, MSR up to 12 Mos.

____ ____ ____ ____ ____ ____ Yrs. ___ Mos. ___ Yrs. ___ Mos.
To run (concurrent with) (consecutively to) count(s)______ and served at 50%, 75%, 85%, 100% pursuant to 730 ILCS 5/3-6-3 ____ Per PRB, MSR up to 12 Mos.

This Court finds that the defendant is:

____ Convicted of a Class ________ offense but sentenced as a Class X offender pursuant to 730 ILCS 5/5-4.5-95.
____ Convicted of a Class 3 or 4 offense (other than a violent crime as defined in Section 3 of the Rights of Crime Victims & Witnesses Act)
____ *4 or more months remaining* ________ fewer than 4 months remaining 730 ILCS 5/5-4-1(c-7) (effective 7/1/21 P.A. 101-652)

X The Court further finds that the defendant is entitled to receive credit for time actually served in custody (of 1,426 days as of the date of this order) from (specify dates) 10/21/18 - 9/15/22 and/or credit for time served on electronic monitoring, GPS monitoring, or home confinement (of Ø days as of the date of this order) from (specify dates) ________. *The defendant is also entitled* to receive credit for the additional time served in custody from the date of this order until the defendant is received at the Illinois Department of Corrections.

____ The Court further finds that the conduct leading to conviction for the offenses enumerated in counts ________ resulted in great bodily harm to the victim. (730 ILCS 5/3-6-3(a)(2)(iii))

____ The Court further finds that the defendant meets the eligibility requirements for possible placement in the Impact Incarceration Program. (730 ILCS 5/5-4-1(a))

____ The Court further finds that offense was committed as a result of the use of, abuse of, or addiction to alcohol or a controlled substance and recommends the defendant for placement in a substance abuse program. (730 ILCS 5/5-4-1(a))

____ The defendant successfully completed a full-time (60-day or longer) Pre-Trial Program ____ *Educational/Vocational* ___ *Substance Abuse* ___ Behavior Modification ___ Life Skills ___ Re-Entry Planning – provided by the county jail while held in pre-trial detention prior to this commitment and if eligible for sentence credit in accordance with 730 ILCS 5/3-6-3(a)(4). THEREFORE IT IS ORDERED that the defendant shall be awarded one day of sentence credit for each day in which the Defendant is engaged in the activities, ________ *days, if not previously awarded. (effective 7/1/21 P.A. 101-652)*

____ The defendant passed the high school level test for General Education and Development (GED) on ________ while held in pre-trial detention prior to this commitment and is eligible to receive Pre-Trial GED Program Credit in accordance with 730 ILCS 5/3-6-3(a)(4.1). THEREFORE IT IS ORDERED that the defendant shall be awarded 90 days of additional sentence credit, if not previously awarded.

____ The Court further finds that the Defendant served ____ days engaged in a self-improvement program, volunteer work, or work assignments, and shall receive 0.5 days of sentence credit for each day the Defendant was engaged in activities for a total of ________. (730 ILCS 5/3-6-3(a)(4.2)

____ The Court further finds that the Defendant has been advised of and given a copy of the financial obligations and statutory fines, fees and assessments pursuant to SCR 452.

____ IT IS FURTHER ORDERED the sentence(s) imposed on count(s) ______ be (concurrent with) (consecutive to) the sentence imposed in case number ________ *in the Circuit Court of* ________ *County.*

____ IT IS FURTHER ORDERED that ________
The Clerk of the Court shall deliver a certified copy of this order to the sheriff. The Sheriff shall take the defendant into custody and deliver the defendant to the Department of Corrections which shall confine said defendant until expiration of this sentence or until otherwise released by operation of law.

This order is (X effective immediately) (______ stayed until ______)

DATE: 9/16/22 ENTER: [signature]

Thomas W. Funk
(PLEASE PRINT JUDGE'S NAME HERE)

C 270

Approved by Conference of Chief Judges March 2022

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FILED
2/16/2023 1:42 PM
KELLY ELIAS
CLERK OF THE CIRCUIT COURT
LOGAN COUNTY ILLINOIS

No. 4-23-0087

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the Eleventh Judicial Circuit, Logan County, Illinois
Plaintiff-Appellee,	)	
	)	No. 18-CF-200
-vs-	)	
	)	
RYANN N. JOHNSON,	)	Honorable Thomas W. Funk,
Defendant-Appellant.	)	Judge Presiding.

AMENDED NOTICE OF APPEAL

An appeal is taken to the Appellate Court, Fourth Judicial District:

Appellant(s) Name:	Mr. Ryann N. Johnson
Appellant's Address:	Danville Correctional Center 3820 East Main Street Danville, IL 61834
Appellant(s) Attorney:	Office of the State Appellate Defender
Address:	400 West Monroe Street, Suite 303 Springfield, IL 62704
Offense of which convicted:	Aggravated Domestic Battery
Date of Judgment or Order:	January 24, 2023
Sentence:	10 years in prison
Nature of Order Appealed:	Conviction, Sentence, and Denial of Motion to Reconsider Sentence

/s/ Catherine K. Hart
CATHERINE K. HART
ARDC No. 6230973
Deputy Defender

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NOTICE
This Order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

2023 IL App (4th) 230087-U

NO. 4-23-0087

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
October 6, 2023
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RYANN N. JOHNSON, Defendant-Appellant.	)	Appeal from the Circuit Court of Logan County No. 18CF200 Honorable Thomas W. Funk, Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice DeArmond and Justice Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant forfeited his argument that the trial court considered improper aggravating factors when sentencing him to 10 years' imprisonment for aggravated domestic battery.

¶ 2 Defendant, Ryann N. Johnson, appeals the trial court's judgment sentencing him to ten years' imprisonment for aggravated domestic battery. On appeal, defendant argues the court improperly considered two factors in aggravation: (1) an element inherent in the offense and (2) that he held a position of trust in relation to the victim. We affirm.

¶ 3 I. BACKGROUND

¶ 4 A. The Charges

¶ 5 On October 23, 2018, the State charged defendant by information with two counts of home invasion (720 ILCS 5/19-6(a)(2) (West 2018)) (counts I and II), two counts of criminal

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sexual assault (*id.* § 11-1.20(a)(1)) (counts III and IV), and one count of aggravated domestic battery (*id.* § 12-3.3(a-5)) (count V). We note that a jury acquitted defendant of counts I through IV, and we therefore discuss the facts related to those offenses only as necessary to resolve the issue raised on appeal. In count V, the State alleged that on October 21, 2018, defendant, in committing a domestic battery, "knowingly strangled Lacey S., a family or household member." The State further indicated in count V that defendant was eligible for extended-term sentencing pursuant to section 5-5-3.2(b)(1) of the Unified Code of Corrections (Corrections Code) (730 ILCS 5/5-5-3.2(b)(1) (West 2018)) and faced a potential sentencing range of 7 to 14 years' imprisonment if convicted.

¶ 6 B. The State's Pretrial Motion to Introduce Other-Crimes Evidence

¶ 7 On April 24, 2019, the State filed a pretrial motion pursuant to section 115-7.4 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-7.4 (West 2018)), seeking to introduce evidence of defendant's other crimes. Specifically, the State sought to introduce evidence from Logan County case Nos. 14-CF-85 and 15-CF-68, in which, respectively, defendant pleaded guilty to the aggravated domestic battery of Bianca R. and the domestic battery of Lacey S.. The trial court granted the State's motion.

¶ 8 C. The Jury Trial

¶ 9 Defendant's jury trial commenced on July 18, 2022, and concluded on July 21, 2022.

¶ 10 1. *Robert Sherren*

¶ 11 Robert Sherren, a sergeant with the Lincoln Police Department, testified that he was dispatched to Lacey S.'s residence at approximately 3:20 p.m. on October 21, 2018. Sherren briefly spoke with Lacey S. and testified she appeared "emotionally disturbed and upset."

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According to Sherren, Lacey S. "was crying, her face was red, and she was just—you could just tell she was distraught." Sherren testified that he observed red marks on her neck and arms. Lacey S. was then transported to the hospital by ambulance.

¶ 12 2. *Lacey S.*

¶ 13 Lacey S. testified that she began dating defendant in 2015 and shared a six-year-old daughter with him. Lacey S. testified that on October 21, 2018, she was at her home and defendant was repeatedly texting her asking to see their child, who was in her bedroom. Defendant stopped texting Lacey S. at approximately 1:30 p.m., and she went back to watching TV. Shortly thereafter, Lacey S. heard footsteps coming down the hallway behind her. Lacey S. testified that defendant entered the living room, "came towards [her] pretty quickly," grabbed her cell phone, and began reading her text messages. When Lacey S. attempted to take her phone back from defendant, he grabbed her by the hair and threw her onto the floor. Defendant then sat on Lacey S. chest and pinned her arms to the ground while he continued to read her messages and accused her of cheating on him.

¶ 14 After slamming her head against the floor several times, defendant told Lacey S. to go to her bedroom. Once in the bedroom, defendant shoved her onto the bed and told her to take her pants down or else he would "slit" her throat. Lacey S. complied with defendant's demand, and defendant digitally penetrated her for approximately 15 seconds. Defendant allowed Lacey S. to sit up at the end of the bed and asked her how long she had been seeing the man she was texting. Lacey S. stated she had not been seeing him for very long, at which point defendant "grabbed [her] by the neck, pushed [her] back on the bed, and started to strangle [her]." Lacey S. elaborated as follows:

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"Q. When you say, put you back on the bed, where were you located on the bed?

A. I was sitting at the end of the bed.

Q. And then he put his hands on you?

A. Yes.

Q. Do you recall which hands [*sic*]?

A. It was his right hand.

Q. And where did he put it on your body?

* * *

A. On my neck.

* * *

Q. Did he apply any pressure to your neck?

A. He did.

Q. And what happened when he applied that pressure to your neck?

A. I started to see black spots.

Q. How long did he hold your neck?

A. Ten—maybe ten seconds.

Q. [Were] you able to breathe?

A. No.

Q. Was blood able to go to your head?

A. It felt like my eyes were going to pop out.

Q. How hard was he squeezing?

A. Extremely hard.

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Q. Was he saying anything to you when he was squeezing your neck?

A. He just continued to accuse me and asked me why I was telling everybody that we weren't together.

Q. After he held you by the neck, what happened?

A. He let go and backed up, and I was able to sit up.

Q. What happened—and were you sitting on the bed at that time?

A. Yes.

Q. What happened after you sat up?

A. He asked me more questions, and then he attacked me again—or he pushed me back down on the bed by my neck.

Q. And what happened when he pushed you back down by your neck?

A. He choked me again.

Q. How long did he have his hands on your neck that time?

A. Fifteen or twenty seconds.

Q. How hard was he squeezing you that time?

A. Extremely hard.

Q. Did you ever lose consciousness?

A. I just remember seeing a lot of black spots, and he told me he wished he could kill me.

Q. But you never completely blacked out; is that correct?

A. That's correct.

Q. And were you having a hard time breathing then, too?

A. I couldn't breathe."

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¶ 15 Lacey S. testified that defendant eventually stopped his assault and began "basically *** having a conversation" with her. Defendant asked Lacey S. repeatedly if she was going to call the police if he left her house. Lacey S. testified that defendant told her he would leave if she agreed to change her phone number and promised not to call the police. Lacey S. called the phone company and had her phone number changed. Defendant then left and Lacey S. called the police. Once the police arrived, Lacey S. was taken to the hospital by ambulance for a physical and sexual examination.

¶ 16 Lacey S. also testified about a separate domestic incident involving defendant that occurred on April 18, 2015. Lacey S. testified she and defendant had attended a wedding together on that date. After the wedding, they went to a hotel and got into an argument. Lacey S. decided to leave the hotel so as not to escalate the argument. Defendant followed her to the parking lot and shoved her into a truck's door handle using two hands. Defendant was arrested and he subsequently pleaded guilty to domestic battery in Logan County case No. 15-CF-68.

¶ 17 3. *Sumesh Jain*

¶ 18 Sumesh Jain, an emergency medicine physician, testified that he treated Lacey S. at the hospital on October 21, 2018. Jain testified that he observed bruising to both sides of Lacey S.'s neck. According to Jain, Lacey S. "had a history and exam consistent with physical assault and sexual assault."

¶ 19 4. *Bianca R.*

¶ 20 Bianca R. testified that she had known defendant since 2011. She was previously engaged to him and they shared two children. At approximately 1:30 in the morning on August 15, 2014, Bianca R. received a phone call from an unknown number while in bed. Bianca R. answered the phone and recognized defendant's voice on the other end, so she hung up and went

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back to sleep. Approximately one hour later, Bianca R. awoke to defendant "standing over" her and "straddling" her in her bedroom. Bianca R. testified she attempted to grab her phone, but defendant told her it was "already gone." Defendant then pinned Bianca R.'s arms down and told her that they were going to "figure it out." Bianca R. testified that they went outside to talk because there were three small children asleep in the house. When they got outside, Bianca R. "looked at him in the eye and told him, Fuck you." Bianca R. further testified that in response to her statement, defendant "[g]rabbed me by the throat, choked me until I lost consciousness, tossed me around, [and] threw me." Around this time, Bianca R.'s six-month-old child awoke and "needed a bottle." While Bianca R. was attending to the baby in the living room, defendant went into her bedroom and fell asleep. Bianca R. testified that because she could not locate her phone, she contacted a friend using her Kindle. The friend called the police, and the police arrested defendant. Defendant subsequently pleaded guilty to aggravated domestic battery in Logan County case No. 14-CF-85.

¶ 21 5. *Defendant*

¶ 22 Defendant testified that on October 21, 2018, he went to Lacey S.'s house uninvited and knocked on her back door. According to defendant, Lacey S. let him into the house, and they conversed in the kitchen for a period of time before moving to the living room to watch TV. After a while, Lacey S. got up to use the restroom. While she was in the bathroom, defendant grabbed her phone and began scrolling through her messages. Defendant testified that he discovered Lacey S. had been messaging another man in a sexual manner and sending him pictures of their child. Defendant began arguing with Lacey S. when she returned to the living room. Defendant testified that Lacey S. slapped him while they were arguing. In response, defendant grabbed her by the hair and threw her to the floor. Once she was on the floor,

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defendant "called her a stupid, dirty whore and grabbed her by the neck." Defendant testified that he did, in fact, squeeze and hold Lacey S.'s neck, but he denied sexually assaulting her or entering her home without permission.

¶ 23 6. *The Jury Verdict*

¶ 24 The jury subsequently found defendant guilty of aggravated domestic battery and not guilty of the remaining charges.

¶ 25 D. The Sentencing Hearing

¶ 26 On September 16, 2022, the trial court conducted a sentencing hearing. A presentence investigation report (PSI) was prepared in advance of the hearing. According to the PSI, defendant's criminal history included three misdemeanor convictions and three felony convictions. As noted above, defendant was convicted of the aggravated domestic battery of Bianca R. in Logan County case No. 14-CF-85 and the domestic battery of Lacey S. in Logan County case No. 15-CF-68, both felonies. Defendant committed the latter offense while on probation for the former. The PSI further indicated that defendant's parents divorced when he was two years old, he was diagnosed with attention-deficit/hyperactivity disorder (ADHD) at the age of four, and he had struggled with symptoms of depression and anxiety for most of his life. Defendant began smoking marijuana at the age of 10 and started using additional substances throughout his teens. Defendant described himself as an alcoholic and as being addicted to cocaine.

¶ 27 Defendant provided multiple character letters and Lacey S. submitted a victim impact statement to the court. In the victim impact statement, Lacey S. stated, in relevant part, that her daughter witnessed the "attack" and "had to ride next to me in an ambulance because of [it]." Neither party presented any additional evidence in mitigation or aggravation at the hearing.

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¶ 28 The State, after arguing against a sentence of probation and noting defendant faced a sentencing range of 3 to 14 years' imprisonment, asserted the trial court should consider the following statutory factors in aggravation when fashioning its sentence:

> "MR. HAUGE: [(STATE'S ATTORNEY)]: On the other hand, there are statutory factors in aggravation that do apply, specifically Subsection 1 of [the Corrections Code (730 ILCS 5/5-5-3.2(a)(1) (West 2022))], that the defendant's conduct caused or threatened serious harm, and that's not just the physical harm that [Lacey S.] suffered, but that's the emotional harm, as well. And you can see that she still carries that with her years and years and years later and will continue to.
>
> Subsection 3, the defendant has a history of prior delinquency or criminal conduct, and he does.
>
> Subsection 7, the sentence is necessary to deter others from committing the same crime. Again, a message needs to be sent that domestic violence towards women, sexual assaults, home invasions, should not be tolerated.
>
> Subsection 12, the defendant was convicted of a felony committed while he was on parole, and that's what we have here, Your Honor. That's a statutory factor in aggravation.
>
> And Subsection 14, the last section that applies is that the defendant held a position of trust or supervision over another, such as a family or household member, and that's what [Lacey S.] is. So there are five statutory factors in aggravation that apply in this case."

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The State ultimately recommended a sentence of 13 years' imprisonment. Defendant agreed that a sentence of probation was inappropriate and recommended a sentence of five years' imprisonment.

¶ 29 The trial court found that a sentence of probation was inappropriate given defendant's "long history of an inability to conduct himself in accordance with the provisions of any type of community-based court sentencing." In highlighting the seriousness of the offense, the court noted that "[t]his was one of the more violent domestic violence cases [it] has presided over. Obviously, it's inherent in the elements of the offense, aggravated domestic battery, that there is violence, but not every case involves strangulation, and strangulation to the point where the victim was almost passing out." In considering the statutory factors in mitigation and aggravation, the court concluded an extended-term sentence was necessary. In mitigation, the court found defendant had a long history of substance abuse and mental health issues, and his attitude in court had been remorseful. The court then identified the following aggravating factors:

> "THE COURT: On the other hand, the aggravating factors, you did cause serious harm. You have a history of prior delinquency or criminal activity. The sentence here is necessary to deter others. You are, obviously, not the only person in this state that thinks that they can control women when they don't get their way by violence. We deal with that every day, so we need to deter others by the sentence here today; and, of course, this crime occurred while you were on parole, on mandatory supervised release, and you were in a position of trust, being the father of [Lacey S.'s] child.
>
> So all of those factors apply. All of those point to a higher sentence. Like I said before, I think an extended term is necessary."

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The court then sentenced defendant to 10 years' imprisonment.

¶ 30 E. The Motion to Reconsider Sentence

¶ 31 On September 21, 2022, defendant *pro se* filed a motion to reconsider sentence. He asked the trial court to reduce his sentence to seven years' imprisonment, citing several cases in which the defendants had received sentences of seven years or less for aggravated domestic battery. On January 24, 2023, following a hearing, the court denied defendant's motion.

¶ 32 This appeal followed.

¶ 33 II. ANALYSIS

¶ 34 On appeal, defendant argues the trial court erred in sentencing him to ten years' imprisonment by improperly considering in aggravation (1) an element inherent in the offense and (2) that he held a position of trust in relation to the victim. Defendant acknowledges he forfeited his argument by failing to object at the sentencing hearing and raise the issue in his motion to reconsider sentence, but he nonetheless asks this court to review it under the plain-error doctrine. See, *e.g.*, *People v. Hillier*, 237 Ill. 2d 539, 544 (2010) ("[T]o preserve a claim of sentencing error, both a contemporaneous objection and a written postsentencing motion raising the issue are required.").

¶ 35 A. The Plain-Error Doctrine and Standard of Review

¶ 36 The plain-error doctrine is a "narrow and limited exception" to the general rules of forfeiture. *Hillier*, 237 Ill. 2d at 545. To obtain relief under the doctrine, a defendant first must demonstrate that a clear or obvious error occurred. *Id.* If the defendant successfully does so, he "must then 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.* The

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defendant bears the burden of persuasion under both prongs of the plain-error doctrine. *Id.* "If the defendant fails to meet his burden, the procedural default will be honored." *Id.*

¶ 37 The Corrections Code (730 ILCS 5/5-5-3.1, 5-5-3.2 (West 2022)) sets forth mitigating and aggravating factors a trial court must consider in fashioning an appropriate sentence. *People v. Brunner*, 2012 IL App (4th) 100708, ¶¶ 43-45. "Although the imposition of sentence is generally a matter of judicial discretion [citation], the 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*." (Internal quotation marks omitted.) *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 49.

¶ 38 B. Whether the Trial Court Considered Improper Factors in Aggravation

¶ 39 Defendant argues that in sentencing him to ten years' imprisonment, the trial court improperly considered in aggravation (1) an element inherent in the offense and (2) that he held a position of trust in relation to the victim.

¶ 40 1. *Element Inherent in the Offense*

¶ 41 Defendant argues the trial court improperly considered in aggravation an element inherent in the offense of aggravated domestic battery. Specifically, defendant contends the court improperly considered the fact that he strangled Lacey S., thereby causing serious harm, as an aggravating factor.

¶ 42 An improper double enhancement occurs when, in relevant part, "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." *People v. Garcia*, 2018 IL App (4th) 170339, ¶ 29. The Corrections Code provides that a trial court may consider a defendant's conduct to constitute an aggravating factor when that "conduct caused or threatened serious harm." 730 ILCS

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5/5-5-3.2(a)(1) (West 2022). In considering whether the defendant's conduct "caused or threatened serious harm," the court "compares the conduct in the case before it against the minimum conduct necessary to commit the offense." *Hibbler*, 2019 IL App (4th) 160897, ¶ 67. As the supreme court explained in *People v. Saldivar*, 113 Ill. 2d 256, 269 (1986), a sentencing court may consider the harm caused as an aggravating factor even in situations where serious harm is inherent in the offense committed by a defendant:

> "Certain criminal conduct may warrant a harsher penalty than other conduct, even though both are technically punishable under the same statute. Likewise, the commission of any offense, regardless of whether the offense itself deals with harm, can have varying degrees of harm or threatened harm. The legislature clearly and unequivocally intended that this varying quantum of harm may constitute an aggravating factor. While the classification of a crime determines the sentencing range, 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.).

¶ 43 "A person who, in committing a domestic battery, strangles another individual commits aggravated domestic battery." 720 ILCS 5/12-3.3(a-5) (West 2018). "Strangle," in this context, "means intentionally impeding the normal breathing or circulation of the blood of an individual by applying pressure on the throat or neck of that individual or by blocking the nose or mouth of that individual." *Id.* Aggravated domestic battery is a Class 2 felony with a nonextended-term sentencing range of 3 to 7 years' imprisonment and an extended-term

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sentencing range of 7 to 14 years' imprisonment. *Id.* § 12-3.3(b); 730 ILCS 5/5-4.5-35(a) (West 2018).

¶ 44 Here, after finding a sentence of imprisonment was necessary, the trial court stated the following: "This was one of the more violent domestic violence cases this Court has presided over. Obviously, it's inherent in the elements of the offense, aggravated domestic battery, that there is violence, but not every case involves strangulation, and strangulation to the point where the victim was almost passing out."

¶ 45 We find it was not improper for the trial court to consider in aggravation the fact that defendant strangled Lacey S. until she almost passed out. Contrary to defendant's assertion, the court did not merely consider the fact that defendant strangled the victim, without considering the unique nature of that act. Instead, the court found defendant strangled the victim to an extent beyond that which was necessary to establish that element of the offense. See *Hibbler*, 2019 IL App (4th) 160897, ¶ 67 (noting that, in considering whether the defendant's conduct "caused or threatened serious harm," the court "compares the conduct in the case before it against the minimum conduct necessary to commit the offense"). The court explicitly stated that not every aggravated domestic battery involved "strangulation to the point where the victim was almost passing out." As the supreme court noted in *Saldivar*, a sentencing court is permitted to consider the degree of harm caused by a defendant's conduct, even where harm is inherent in the offense. *Saldivar*, 113 Ill. 2d at 269. Thus, while it is true strangulation is inherent in the offense for which defendant was convicted, not every act of strangulation leads to the victim nearly passing out, and the court could properly consider the greater degree of harm defendant caused in this case. Moreover, the record supports the court's finding. At trial, Lacey S. testified that defendant squeezed her neck "extremely hard" for approximately ten seconds until she

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"started to see black spots" and "felt like [her] eyes were going to pop out." Accordingly, the court did not err in considering as a factor in aggravation that defendant strangled Lacey S..

¶ 46 2. *Position of Trust*

¶ 47 Defendant additionally argues the trial court improperly considered in aggravation that he held a position of trust in relation to Lacey S. Defendant contends the statutory aggravating factor related to holding a position of trust is inapplicable under the circumstances because it only applies in cases involving certain enumerated sex offenses and a victim under the age of 18. The State asserts the court did not indicate defendant held a position of trust in relation to Lacey S., but instead "the position of trust the court considered was that of defendant being the father of the six-year-old child." According to the State, "defendant's knowledge of the presence of a six-year-old child and the possible effect of his actions on her psychologically should be and is a non-statutory factor in aggravation."

¶ 48 Section 5-5-3.2(a) of the Corrections Code lists the statutory factors a trial court may consider in aggravation when imposing sentence. 730 ILCS 5/5-5-3.2(a) (West 2022). Subsection (a)(14) provides that the court may consider in aggravation that a defendant held a position of trust or supervision in relation to a victim under the age of 18 where the defendant committed one of several enumerated sex offenses. *Id.* § 5-5-3.2(a)(14).

¶ 49 Here, in identifying the applicable aggravating factors, the trial court stated, in pertinent part, that defendant was "in a position of trust, being the father of [Lacey S.'s] child." This statutory factor did not apply in this case. Defendant was acquitted of the criminal sexual assault charges, and Lacey S. was not a victim under the age of 18. See *id.* Thus, we agree with defendant that the court considered an improper factor in aggravation.

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¶ 50 The State contends the trial court was actually referring to defendant's daughter, not Lacey S., when it stated that defendant held a position of trust. However, the State's contention is clearly contradicted by the record. In recommending a 13-year prison sentence, the State identified five statutory factors in aggravation. It stated the following with respect to the fifth and final aggravating factor: "And Subsection 14, the last section that applies is that the defendant held a position of trust or supervision over another, such as a family or household member, *and that's what [Lacey S.] is*." (Emphasis added.). Notably, when the court recited the five factors it had considered in aggravation, its recitation mirrored exactly the five statutory factors previously identified by the State. Thus, when the court stated, "[Y]ou were in a position of trust, being the father of [Lacey S.] child," it is apparent the court was referring to defendant's position relative to Lacey S., not the child. Accordingly, we reject the State's contention and find the court erred in considering this statutory factor in aggravation.

¶ 51 C. Whether Defendant Established Plain Error

¶ 52 Having found the trial court considered an improper factor in aggravation, we must next determine whether the error constitutes plain error. As noted above, after establishing that a clear or obvious error occurred, defendant "must then 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." *Hillier*, 237 Ill. 2d at 545. Defendant argues that both prongs apply. We disagree.

¶ 53 1. *The Evidence Was Not Closely Balanced*

¶ 54 First, defendant argues that the evidence at the sentencing hearing "was closely balanced because there were multiple mitigating factors in [his] favor." Specifically, he points to (1) the fact his parents divorced when he was a child, (2) his ADHD diagnosis and "struggle[s]

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with anxiety and depression," (3) his substance abuse history, (4) the character letters submitted to the court on his behalf, and (5) his work with substance abuse treatment groups while incarcerated.

¶ 55 After considering this purported mitigating evidence, we cannot say it was closely balanced when compared with the evidence in aggravation. Defendant committed a violent act that caused physical and emotional harm to Lacey S. Moreover, he did so after having been previously convicted of committing aggravated domestic battery and domestic battery against Bianca R. and Lacey S., respectively. We note the domestic battery involving Lacey S. in 2015 occurred while defendant was on probation for his aggravated domestic battery conviction involving Bianca R.. According to Bianca R., during the attack against her, defendant "tossed [her] around" and strangled her until she passed out. Regarding the assault in this case, Lacey S. testified defendant strangled her close to the point of unconsciousness. In his testimony, defendant admitted he "squeeze[d]" Lacey S.'s neck and threw her to the floor by her hair. Defendant had also been convicted of a third felony and three misdemeanors. The evidence in aggravation demonstrated that a lengthy prison sentence was warranted. Ultimately, defendant was sentenced to 10 years in prison which was just below the midpoint of the extended-term sentencing range of 7 to 14 years. For these reasons, we find defendant has failed to establish that the evidence at sentencing was closely balanced.

¶ 56 2. *Defendant Was Not Denied a Fair Sentencing Hearing*

¶ 57 Alternatively, defendant argues we may consider his claim under the second prong of plain error review. His argument in this regard consists of just two sentences: "This issue can also be considered under the second prong of plain error review because it deprived [him] of a fair sentencing hearing. Courts have reviewed the consideration of an improper

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sentencing factor as second-prong plain error." Defendant does not explain how the trial court's consideration of an improper sentencing factor here deprived him of a fair sentencing hearing. Essentially, defendant is asking this court to find that a sentencing court's consideration of an improper sentencing factor, by itself, necessarily constitutes second-prong plain error. We previously rejected this notion in *People v. Johnson*, 2017 IL App (4th) 160920, ¶ 56, and we do so again in this case.

¶ 58 III. CONCLUSION

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

¶ 60 Affirmed.

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