No. 130191

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RYANN N. JOHNSON, Defendant-Appellant.	)	On Appeal from the Appellate Court of Illinois, Fourth Judicial District, No. 4-23-0087 There on Appeal from the Circuit Court of the Eleventh Judicial Circuit, Logan County, Illinois, No. 18 CF 200 The Honorable Thomas W. Funk, Judge Presiding.

BRIEF OF PLAINTIFF-APPELLEE PEOPLE OF THE STATE OF ILLINOIS

KWAME RAOUL
Attorney General of Illinois

JANE ELINOR NOTZ
Solicitor General

KATHERINE M. DOERSCH
Criminal Appeals Division Chief

JEREMY M. SAWYER
Assistant Attorney General
115 South LaSalle Street
Chicago, Illinois 60603
(773) 758-4503
eserve.criminalappeals@ilag.gov

Counsel for Plaintiff-Appellee
People of the State of Illinois

ORAL ARGUMENT REQUESTED

E-FILED
6/11/2024 3:12 PM
CYNTHIA A. GRANT
SUPREME COURT CLERK

TABLE OF CONTENTS

NATURE OF THE CASE 1

ISSUE PRESENTED FOR REVIEW 1

JURISDICTION 1

STATEMENT OF FACTS 1

I. A Jury Convicted Defendant of Aggravated Domestic Battery. 1

II. The Court Sentenced Defendant to a 10-year Term of Imprisonment. 6

III. The Appellate Court Affirmed the Judgment. 11

POINTS AND AUTHORITIES

STANDARD OF REVIEW 12

People v. Jackson, 2022 IL 127256 12

ARGUMENT 12

The Trial Court's Consideration of the Challenged Factor at Sentencing Is Not a Structural Error That May be Noticed as Second-Prong Plain Error. 12

People v. Bourke, 96 Ill. 2d 327 (1983) 13

A. The Plain-Error Standard and the Rarely Applied Second-Prong Plain-Error Rule 13

People v. Hall, 195 Ill. 2d 1 (2000) 13

People v. Hillier, 237 Ill. 2d 539 (2010) 13

People v. Jackson, 2022 IL 127256 ..... 13, 14

People v. Logan, 2024 IL 129054 14

People v. Moon, 2022 IL 125959 13

United States v. Davila, 569 U.S. 597 (2013) 14

B. The Trial Court Did Not Commit Second-Prong Plain Error. 14

1. The trial court did not clearly or obviously err by considering in aggravation that defendant attacked the mother of his child. 14

People v. Beals, 162 Ill. 2d 497 (1994) 15, 16

People v. Brunner, 2012 IL App (4th) 100708 15

People v. Gray, 2017 IL 120958 ..... 16, 17

People v. Manskey, 2016 IL App (4th) 140440 ..... 15, 18

People v. Moon, 2022 IL 125959 15

People v. Olson, 2019 IL App (2d) 170334 15

People v. Saldivar, 113 Ill. 2d 256 (1986) 16

People v. Ward, 113 Ill. 2d 516 (1986) 15

United States v. Christian, 673 F.3d 702 (7th Cir. 2012) 15, 18

730 ILCS 5/5-5-3.1 ..... 15, 16, 17

730 ILCS 5/5-5-3.2 ..... 15, 17

Orly Rachmilovitz, *Bringing Down the Bedroom Walls: Emphasizing Substance Over Form in Personalized Abuse*, 14 William & Mary J. Women & L. 495 (2008) 16, 17

2. Consideration of an inapplicable aggravating factor at sentencing is not a structural error cognizable as second-prong plain error. 18

People v. Hall, 195 Ill. 2d 1 (2000) 18

People v. Hillier, 237 Ill. 2d 539 (2010) 18

730 ILCS 5/5-4-1 18

a. A claim that the sentencing court considered an inapplicable aggravating factor does not allege a constitutional error that undermines the integrity of the judicial process. 19

People v. Jackson, 2022 IL 127256 ..... 19, 20

People v. Johnson, 2019 IL 122956 19

United States v. Davila, 569 U.S. 597 (2013) 19

730 ILCS 5/5-5-3.2 ..... 19, 20

b. A claim that the sentencing court considered an inapplicable aggravating factor is subject to harmless error analysis and therefore cannot be structural error. 21

People v. Bourke, 96 Ill. 2d 327 (1983) 21

People v. Colon, 225 Ill. 2d 125 (2007) 21

People v. Glasper, 234 Ill.2d 173 (2009) 21

People v. Jackson, 2022 IL 127256 ..... 21, 22

People v. Logan, 2024 IL 129054 ..... 21, 22

People v. Ward, 113 Ill. 2d 516 (1986) 21

c. The appellate court decisions on which defendant relies are incorrect. 22

Ingraham v. Wright, 430 U.S. 651 (1977) 22

MB Fin. Bank, N.A. v. Brophy, 2023 IL 128252 24

People v. Abdelhadi, 2012 IL App (2d) 111053 22

People v. Castleberry, 2015 IL 116916 24

People v. Haley, 2011 IL App (1st) 093585 22

People v. Jackson, 2022 IL 127256 24

People v. Joe, 207 Ill. App. 3d 1079 (5th Dist. 1991) 22

People v. Lighthart, 2023 IL 128398 24

People v. Martin, 119 Ill. 2d 453 (1988) 22, 23

People v. Moon, 2022 IL 125959 24

People v. Young, 2022 IL App (3d) 190015 22

d. Defendant's argument illustrates why a sentencing court's consideration of an inapplicable aggravating factor is not a structural error. 24

People v. Jackson, 2022 IL 127256 25

People v. McCarty, 223 Ill. 2d 109 (2006) 26

People v. Mertz, 218 Ill. 2d 1 (2005) 27

People v. Moon, 2022 IL 125959 ..... 25, 27

People v. Sebby, 2017 IL 119445 25

Vancura v. Katris, 238 Ill. 2d 352 (2010) 26

730 ILCS 5/5-5-3.2 26

Ill. S. Ct. R. 341 26

CONCLUSION 29

RULE 341(c) CERTIFICATE OF COMPLIANCE

CERTIFICATE OF FILING AND SERVICE

NATURE OF THE CASE

Following a jury trial, defendant was convicted of aggravated domestic battery and sentenced to 10 years in prison. Defendant appeals from the appellate court's judgment affirming his sentence, rejecting his contention that the trial court committed plain error when it considered an allegedly improper factor in aggravation at sentencing. No questions are raised on the pleadings.

ISSUE PRESENTED FOR REVIEW

Whether the trial court's consideration of an allegedly improper sentencing factor qualifies as second-prong plain error.

JURISDICTION

On January 24, 2024, this Court allowed defendant's petition for leave to appeal. This Court has jurisdiction under Supreme Court Rules 315 and 612(b).

STATEMENT OF FACTS

I. A Jury Convicted Defendant of Aggravated Domestic Battery.

Defendant was charged with two counts of home invasion, two counts of criminal sexual assault, and one count of aggravated domestic battery for his assault on Lacey S., his former romantic partner and the mother of one of his children. C20-22; R561-62.[1]

[1] Citations to the common law record, the report of proceedings, the exhibits, the sealed record, defendant's brief, and defendant's appendix appear as "C__," "R__," "E__," "CS__," "Def. Br. __" and "A__," respectively.

At trial, Lacey testified that she met defendant in 2015, they had dated for a time, and they had a now-six-year-old daughter together. R562. One day in October 2018, defendant had been texting Lacey, demanding to speak to their daughter and to know why Lacey had not answered his calls. R563-64, 566-67; E20-21. Lacey repeatedly asked defendant to stop calling and texting — she considered defendant's text messages to be harassing — and threatened to call the police if he did not leave her alone. R563-64; E19-21. In response, defendant accused Lacey of being "selfish" if she were to cause him to be sent to prison and thus "rip" him from their daughter's life. E20-22.

About 10 minutes later, Lacey was lying on her living room couch when she heard heavy footsteps coming down the hallway. R569. Defendant burst into the living room, grabbed Lacey's cell phone, and began reading her text messages. R563, 568-69. When Lacey tried to stand up and get her phone back, defendant grabbed her by her hair and threw her to the ground. R570. As Lacey lay on the ground, defendant sat on her chest, pinned her arms to her sides, and slammed her head against the floor while accusing her of cheating on him. R570-71.

Defendant then grabbed Lacey by her hair, forced her to stand up, and told her to go into the bedroom. R572. There, he shoved her face down onto the bed, called her a whore, and threatened to slit her throat unless she pulled her pants down. R572-73. Knowing that defendant carried a knife,

Lacey complied. R573. Defendant then pulled down her underwear and forced his fingers into her vagina, causing her extreme pain. R573-74. Defendant asked Lacey how long she had been seeing the man with whom she had exchanged text messages, grabbed her by the neck, and began to strangle her. R574-75. She could not breathe, and she started to "see black spots" as she heard defendant say that he wished he could kill her. R575-77.

When defendant released Lacey's neck, he forced her onto the bedroom floor. R577. There, he made her unzip his pants, then forced his penis into her mouth. R577-78. He grabbed the back of her head and forced it back and forth until she told him she was going to be sick. R578. He let her get up, then followed her out of the bedroom and stood in the doorway as she used the bathroom. R578-79.

As they returned from the bathroom, Lacey tried to escape, but defendant caught her and shoved her head into the door. R579-80. She fell to the ground and bruised her shoulder. R580-81. Defendant stood over her and pushed her head into the floor. R581. He refused to leave until Lacey assured him that she would change her phone number and would not call the police. R581-82. Defendant stood by while she called the phone company to change her number, then left. *Id.* After defendant left, Lacey called the police. R587. Defendant's attack lasted over an hour, R582, and their daughter was in the house the entire time, s*ee* R569.

A police officer who was dispatched to Lacey's residence arrived to find her crying and distraught. R548-50. Lacey had red marks on her neck and arms. R550. An ambulance transported her to the hospital, *id.*, where she was treated by an emergency room doctor, R533, 538. She told the doctor that her head had hit the ground and that she had been sexually assaulted, and the doctor observed bruising on both sides of her neck. R533, 538-40. The results of the examination were consistent with physical and sexual assault. R540-41. A sexual assault kit was administered, a partial sample of one male's DNA was recovered from the swab of Lacey's vagina, and analysis revealed that defendant could not be excluded as the contributor of that DNA. R538, 587-88, 721-22.

Pursuant to 725 ILCS 5/115-7.4, the People presented evidence that defendant had committed previous domestic violence offenses against both Lacey, R591-94, and Bianca R., another of his former romantic partners and the mother of two of his children, R510-19. Lacey testified that in 2015, three years prior to the charged battery, defendant had forcefully shoved her into the door of a truck during an argument. R591-93. Defendant pleaded guilty to domestic battery in connection with that incident. R593-94.

Bianca testified that one morning in August 2014, she awoke at around 1:30 a.m. to find defendant — who was subject to an order of protection preventing him from having contact with her — straddling her in her bed and pinning her arms down. R511-13. He had entered Bianca's

home by climbing through a window. R521. Defendant wanted to talk about their relationship, and they started arguing. R513-14. Their argument escalated, and defendant grabbed Bianca by her throat, choked her until she lost consciousness, and threw her first into a glass door, and then into a nightstand, injuring her knees, shoulders, and arms. R514-17. By then, Bianca's five-year-old son had awoken and was watching the assault. R517. Defendant threatened the child that he would kill Bianca if the child told anyone what happened. *Id.* Defendant later pleaded guilty to aggravated domestic battery for his assault on Bianca. R526.

For the defense, defendant testified that Lacey had let him into her home. R757-58. In the kitchen, defendant and Lacey at first argued about their daughter. R758. After the argument subsided, defendant and Lacey watched television in the living room for about an hour. R758-59.

When Lacey got up to go to the bathroom, defendant went through her phone and discovered she had been texting a man named Jason, to whom she had sent photos of their daughter. R759-60. Defendant confronted Lacey about the texts, and she slapped him. R760-61. Defendant then grabbed her by her hair and threw her to the floor, calling her a "stupid, dirty whore." R761. He also grabbed her neck and "squeezed" it. R761. Defendant attempted to leave the house, but Lacey hit him in the face with her phone, and defendant shoved her to the ground. R762. Defendant denied entering

the home without permission, dragging Lacey into the bedroom, or sexually assaulting her. R763-64.

On cross-examination, defendant admitted that he went to Lacey's house even though he knew Lacey did not want him in her house that day. R769-70. He also admitted that he did not have any bruises or marks after the incident, despite his testimony that Lacey had hit him in the face with her phone. R775. After the assault, defendant knew police were searching for him, so he hid in his basement. R778-80. Defendant admitted that he threw Lacey to the ground, grabbed her by the throat, and called her a "dirty whore"; he explained that he did so because he was angry that she was dating someone else. R782-83, 785. He also acknowledged that before he left the house, he told her not to call the police. R784.

Following closing arguments, the jury found defendant guilty of aggravated domestic battery and not guilty of the remaining charges (for home invasion and criminal sexual assault). C256-60; R878-79. The court entered judgment on the verdicts and scheduled a sentencing hearing. R880.

II. The Court Sentenced Defendant to a 10-year Term of Imprisonment.

In advance of defendant's sentencing hearing, a presentence investigation report (PSI) was prepared. The PSI revealed that defendant had three prior felony convictions — the two prior convictions for domestic battery that had been introduced at trial, plus a 2007 conviction for disorderly conduct — and three misdemeanor convictions. CS5-7. Defendant

was initially sentenced to probation for the 2007 disorderly conduct offense, but his probation was revoked after he committed domestic battery, and he was sentenced to two years in prison. CS7-8.

Defendant committed the 2015 domestic battery against Lacey while he was on probation for the 2014 aggravated domestic battery against Bianca. CS8. As a result, defendant's probation for the 2014 aggravated domestic battery was revoked, and he was sentenced to three years in prison for that offense. *Id*. For the 2015 domestic battery, defendant received a one-year sentence. CS7. He committed the aggravated domestic battery in this case two months after he was released to begin serving his term of mandatory supervised release. CS8.

At the sentencing hearing, Lacey gave a victim impact statement. R886-92. She explained that in addition to causing her physical injuries, defendant's attack robbed her of her sense of self-worth and resulted in symptoms of post-traumatic stress disorder. R886-88. Lacey told the court that she often woke up at night in a cold sweat with flashbacks of defendant strangling her, and that she feared defendant would kill her. R887-88.

The People recommended a 13-year prison term, given the seriousness and violent nature of defendant's offense. *See* R892-93, 899. The People urged the court to consider the evidence of sexual assault that had been introduced at trial. R893-94. In addition, the People emphasized that defendant was a recidivist offender who had violently assaulted women,

including Lacey, on previous occasions. R895-96. The People argued that five of the statutory aggravating factors listed under 730 ILCS 5/5-5-3.2 applied: defendant's conduct caused serious harm; defendant had a history of criminal conduct; the sentence was necessary to deter others from committing the same crime; defendant committed the offense while on parole for a previous offense; and defendant held a position of trust or supervision over a household member (referring to Lacey). R896-97.

Defense counsel conceded that although defendant was statutorily eligible for probation, "a community-based sentence is not appropriate in this case," and that the previous prison sentences of one, two, and three years had failed to deter defendant from committing further offenses. R901-02. Arguing that "sentencing is supposed to be graduated," counsel requested a sentence of five years. R902-03. In support, counsel argued in mitigation that defendant had strong family ties and a history of mental health issues, had struggled with dependency on narcotics and alcohol, had facilitated recovery meetings for other addicted prisoners during his incarceration, and had a history of gainful employment. R899-901. Counsel did not object to the People's contention that the evidence established that defendant held a position of trust relative to Lacey. *See* R899-904. In a brief allocution statement, defendant apologized for his crime and told the court that he had discovered religion while incarcerated and that, if given another chance, he would not return to the courtroom as a criminal defendant. R904.

In announcing defendant's sentence, the court began by noting that it had considered all evidence presented at the sentencing hearing, as well as the information in the PSI. The court agreed that probation was not an appropriate sentence, given defendant's "long history" of violating the terms of probation and parole. R905-06.

In determining the appropriate prison term, the court focused on the seriousness of defendant's offense, observing that this was "one of the more violent domestic violence cases this [c]ourt ha[d] presided over," and noting that "not every [domestic violence] case involves strangulation, and strangulation to the point where the victim was almost passing out." R906. The court acknowledged the jury's findings that the prosecution had not proved defendant guilty of the sexual assault charges beyond a reasonable doubt but explained that it had considered Lacey's testimony, as well as Bianca's testimony about defendant's previous domestic battery against her. *Id*. The common factor in defendant's criminal history, the court observed, was his willingness to employ violence when he did not get his way. R907.

The court found that an extended-term sentence was necessary for several reasons. R908. First, the court found that no significant mitigating factor applied — defendant did not commit the offense without causing serious harm, nor did he act under strong provocation. *Id*. The court considered defendant's history of substance abuse and his mental health issues but concluded that defendant nonetheless was responsible for failing to

control his impulses. R908-09. His previous convictions, coupled with his past failures to comply with probation and parole, demonstrated that he had not learned to control his impulses and prevented the court from finding that the circumstances surrounding defendant's attack on Lacey were unlikely to recur. R909-10.

The court next turned to the aggravating factors that applied to defendant's conduct. R910. The court found that defendant's assault caused serious harm, and he had a history of criminal activity. *Id.* The court further found that a significant sentence was necessary to deter others from committing the same crime, given that defendant is "not the only person in this state that thinks they can control women when they don't get their way by violence." *Id.* Finally, the court mentioned two additional facts that it found aggravating: that defendant committed this offense while on mandatory supervised release for a previous crime and that he and Lacey had a child together, which relationship the court described as placing defendant "in a position of trust, being the father of [Lacey's] child." *Id.* Taking "all of those factors into consideration," the court sentenced defendant to 10 years in the Illinois Department of Corrections. R911.

Defendant filed a pro se motion to reconsider sentence, which cited domestic violence cases in which the defendants had received prison sentences of seven years or fewer but did not argue that the trial court had improperly relied on any statutory aggravating factor. C277-78. At a

hearing on that motion, defense counsel adopted the pro se motion and contended that the sentence was excessive because defendant must serve it at 85%. R915-17.

The court denied the motion. R919. The court explained that it had considered all factors in aggravation and mitigation when it imposed the sentence, but that the "most important" factor in the court's determination was defendant's "previous record," which included offenses that he had committed while on probation. R918-19.

III. The Appellate Court Affirmed the Judgment.

On appeal, defendant argued that the sentencing court improperly considered as an aggravating factor that he held a position of trust in relation to Lacey. *People v. Johnson*, 2023 IL App (4th) 230087-U, ¶ 2. Defendant acknowledged that he had forfeited this argument by failing to object at the sentencing hearing and by failing to raise the issue in his posttrial motion to reconsider sentence, but he asked the appellate court to review it under the plain-error rule. *Id.* ¶ 34. The appellate court declined to excuse defendant's forfeiture, concluding that neither prong of the plain-error rule applied: the evidence was not closely balanced for purposes of first-prong plain error, *id.* ¶ 55, and the sentencing court's consideration of an inapplicable sentencing factor did not constitute second-prong plain error, *id.* ¶ 57.

STANDARD OF REVIEW

Whether defendant's forfeiture is excusable as second-prong plain error is a question of law that this Court reviews de novo. *People v. Jackson*, 2022 IL 127256, ¶ 25.

ARGUMENT

The Trial Court's Consideration of the Challenged Factor at Sentencing Is Not a Structural Error That May be Noticed as Second-Prong Plain Error.

The appellate court properly denied relief because defendant failed to show that his forfeited claim — that the trial court improperly considered at sentencing the fact that he and the victim shared a child — constituted second-prong plain error. Second-prong plain errors are clear or obvious structural errors, meaning they are clear or obvious errors that affect the very structure within which the trial or sentencing occurred, rather than errors within that structure that may have affected the outcome of the verdict or, as alleged here, the sentence. Defendant's claim fails to satisfy either requirement of second-prong plain error, for the alleged error was neither clear or obvious nor structural. At bottom, defendant's complaint is that the sentencing court properly considered evidence that he had a child with the victim of his attack but mislabeled the evidence as falling under an inapplicable statutory provision. This is not a clear or obvious error. But even the court had considered substantively improper evidence in aggravation, such an error would be susceptible to harmless error review, as

this Court recognized in *People v. Bourke*, 96 Ill. 2d 327 (1983). Therefore, the claimed error cannot have been second-prong plain error, and the Court should affirm the appellate court's judgment.

A. The Plain-Error Standard and the Rarely Applied Second-Prong Plain-Error Rule

The plain-error rule provides a narrow exception to the principles of forfeiture. *People v. Moon*, 2022 IL 125959, ¶ 21. The rule permits review of a forfeited error only if the error was "clear or obvious," *Jackson*, 2022 IL 127256, ¶ 21, and either (1) "the evidence was so closely balanced the error alone severely threatened to tip the scales of justice," or (2) "the error was so serious it affected the fairness of the trial and challenged the integrity of the judicial process," *Moon*, 2022 IL 125959, ¶¶ 23-24 (citations omitted). Where a defendant alleges an error at sentencing, the second-prong inquiry concerns the integrity of the defendant's sentencing hearing, not the trial. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010); *People v. Hall*, 195 Ill. 2d 1, 18 (2000). Under both prongs of the plain-error rule, the defendant has the burden of persuasion. *Moon*, 2022 IL 125959, ¶ 20; *Hillier*, 237 Ill. 2d at 545.

Forfeitures are rarely excused under the second prong of the plain-error rule, *Jackson*, 2022 IL 127256, ¶ 27, for the second prong is limited to "structural error," *id.* ¶ 28. Structural error, in turn, is defined as an error akin to the types of errors that the United States Supreme Court has identified as structural, such as the complete denial of counsel or trial before a biased judge. *Id.* ¶¶ 29-30. These are "fundamental constitutional errors

that defy analysis by harmless error standards," *United States v. Davila*, 569 U.S. 597, 611 (2013) (cleaned up); *accord Jackson*, 2022 IL 127256, ¶ 49, because they "affect the framework within which the trial proceeds," as opposed to "mere errors in the trial process itself," *Jackson*, 2022 IL 127256, ¶ 29. Accordingly, if an error is subject to harmless error analysis, then it is not a structural error and cannot satisfy the second prong of the plain-error rule. *Id*. ¶¶ 37, 49; *People v. Logan*, 2024 IL 129054, ¶ 80.

B. The Trial Court Did Not Commit Second-Prong Plain Error.

Defendant invokes the second prong of the plain-error rule to excuse his forfeiture of his claim that the sentencing court improperly considered the fact that he and Lacey shared a child as a statutory aggravating factor, Def. Br. 10-11, but that argument fails for several reasons. As an initial matter, the court did not commit a clear or obvious error by considering that defendant had attacked the mother of his child. But even if it had, a court's consideration of an inapplicable statutory aggravating factor at sentencing is not structural error, for such errors are not constitutional errors, they do not affect the integrity of the judicial process, and they are amenable to harmless error review.

1. The trial court did not clearly or obviously err by considering in aggravation that defendant attacked the mother of his child.

At the threshold, defendant cannot excuse his forfeiture as second-prong plain error because he cannot show that the trial court clearly or

obviously erred by considering in aggravation that defendant had attacked the mother of his child. *See Moon*, 2022 IL 125959, ¶ 22 (first step of plain-error analysis "is to determine whether there was a clear or obvious error"). An error is clear or obvious when it "just about leap[s] off the pages of the record." *People v. Manskey*, 2016 IL App (4th) 140440, ¶ 82 ("Arguable error is not enough."); *see United States v. Christian*, 673 F.3d 702, 708 (7th Cir. 2012) (error is clear or obvious "when it is so obvious that the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it") (internal quotation marks omitted). Defendant's assertion that it is "undisputed" that a clear or obvious error occurred, Def. Br. 10, is baseless; as the People argued before the appellate court, the sentencing court did not commit a clear or obvious error.

At sentencing, a court "must consider all matters reflecting upon the defendant's personality, propensities, purpose, tendencies, and indeed every aspect of his life relevant to the sentencing proceeding." *People v. Ward*, 113 Ill. 2d 516, 527 (1986). While many such matters have been codified as statutory aggravating or mitigating factors, *see* 730 ILCS 5/5-5-3.1 (listing statutory factors in mitigation); 730 ILCS 5/5-5-3.2 (listing statutory factors in aggravation), those statutory factors "are not an exclusive listing that prohibits a court from considering any other relevant sentencing factor," *People v. Brunner*, 2012 IL App (4th) 100708, ¶ 49; *People v. Olson*, 2019 IL App (2d) 170334, ¶ 27 (quoting *Brunner*); *cf. also People v. Beals*, 162 Ill. 2d

497, 510, 512 (1994) (approving of sentencing court's consideration in aggravation of evidence not statutorily specified as aggravating).

Defendant cannot demonstrate a clear or obvious error because the sentencing court properly considered the nature of defendant's relationship with Lacey — including that they had a child together — as it was part of the circumstances of the assault. *See* 730 ILCS 5/5-5-3.1(b) (sentencing court must consider "the nature and circumstances of the offense"); *People v. Saldivar*, 113 Ill. 2d 256, 268-69 (1986) (same). By appealing to the allegedly deleterious effect of his potential imprisonment on their daughter to discourage Lacey from calling the police, defendant used the child to access and abuse Lacey on the day of the assault. R563-64, 568-69. Even defendant's own testimony linked the assault to their daughter, as he invoked a purported need to protect their daughter from the man that Lacey was texting as the reason defendant was angry with Lacey. R759-60.

The sentencing court appropriately viewed this conduct as aggravating. As this Court has recognized, "accessibility and familiarity enable domestic violence to be ongoing and to effectively intimidate and control the victim." *People v. Gray*, 2017 IL 120958, ¶ 65. The trust and intimacy that domestic relationships frequently entail "may render persons more vulnerable to abuse by former romantic partners" who can "'exploit the relationship, continu[e] to access the victim, [and] carry[ ] on the abusive and controlling behavior.'" *Id.* (quoting Orly Rachmilovitz, *Bringing Down the*

Bedroom Walls: Emphasizing Substance Over Form in Personalized Abuse, 14 William & Mary J. Women & L. 495, 500-01 (2008)). Thus, the sentencing court's comments can reasonably be interpreted as a finding that defendant's violence against his former romantic partner was particularly egregious because they had a child together, making it difficult or even impossible for Lacey to cut ties with defendant and thereby rendering her particularly vulnerable to defendant's abuse. *See id.*

To be sure, as the appellate court recognized, defendant's relationship with Lacey did not place him in a "position of trust" as that term is used in 730 ILCS 5/5-5-3.2(a)(14). *See Johnson*, 2023 IL App (4th) 230087-U, ¶ 49 (concluding statutory "position of trust" factor did not apply to defendant's conduct). To the extent that the sentencing court's description of defendant as holding a "position of trust" because he had a child with Lacey was a reference to section 5-5-3.2(a)(14), that characterization was error. But although the court used the term "position of trust," the court also stated that it considered the fact that defendant had a child with his victim to be an aggravating factor. *See* R910. And, as explained, the court's consideration of the fact that defendant and Lacey have a child together, such that defendant's violence against Lacey represented a particularly egregious violation of trust, was appropriate because it was relevant to the nature and circumstances of defendant's offense. *E.g.*, 730 ILCS 5/5-5-3.1(b). That the court mistakenly labeled an applicable non-statutory aggravating factor as

an inapplicable statutory aggravating factor does not rise to the level of clear or obvious error. *See*, *e.g.*, *Manskey*, 2016 IL App (4th) 140440, ¶ 82 (clear or obvious error is error that "leap[s] off the pages of the record"); *Christian*, 673 F.3d at 708.

2. Consideration of an inapplicable aggravating factor at sentencing is not a structural error cognizable as second-prong plain error.

Even if the sentencing court had clearly or obviously erred in considering an inapplicable statutory aggravating factor, that error would not constitute second-prong plain error because it is not a structural error. In the sentencing context, a structural error is one that renders the sentencing process an unreliable means of determining the defendant's culpability for purposes of fashioning the appropriate sentence. *Cf. Hillier*, 237 Ill. 2d at 545 (error must be so egregious as to deny defendant a fair sentencing hearing); *Hall*, 195 Ill. 2d at 18-19 (same). Because the sentencing court must weigh all evidence and factors in aggravation and mitigation, *see* 730 ILCS 5/5-4-1, a defendant's culpability is determined with reference to the balance between evidence in aggravation and mitigation, and thus a structural error at sentencing is one that renders the sentencing hearing an unreliable means of undertaking that balance.

The alleged error that defendant identifies does not satisfy this standard. It is not an error of constitutional dimension, nor does it undermine the integrity of the judicial process. And unlike structural errors,

a sentencing court's consideration of an improper aggravating factor is amenable to harmless error analysis.

a. A claim that the sentencing court considered an inapplicable aggravating factor does not allege a constitutional error that undermines the integrity of the judicial process.

Defendant claims that the sentencing court mistakenly believed that section 5-5-3.2(a)(14) applied where, as here, the defendant and the victim share a child, and therefore considered an inapplicable statutory aggravating factor. *See* Def. Br. 16-17. But even if true, that claimed error of statutory interpretation is not a "fundamental constitutional error," the threshold requirement for structural error. *See Davila*, 569 U.S. at 613; *Jackson*, 2022 IL 127256, ¶¶ 51, 67 (no structural error where asserted violation did not relate to fundamental constitutional right). Defendant has no fundamental constitutional right to have a sentencing court consider (or not consider) the particular facts of his case under the statutory label "position of trust." *See People v. Johnson*, 2019 IL 122956, ¶¶ 36, 38-41 (claim that the sentencing court considered improper aggravating factors is "an excessive sentence challenge" that cannot "be restated in a constitutional due process framework" to avoid procedural bar). Indeed, defendant does not argue that the error he claims occurred is of constitutional dimension. *See generally* Def. Br.

In addition, even if a sentencing court's consideration of an inapplicable statutory factor could be considered a "fundamental

constitutional error," it would not be a structural error because it does not undermine the integrity of the judicial process. Defendant's claim that the sentencing court incorrectly considered the fact that he had a child with his victim as satisfying section 5/5-3.2(a)(14) does not allege a distortion of the framework within which the sentencing process takes place, but instead alleges an error in the sentencing process itself. *See, e.g.*, Def. Br. 18-19 (arguing sentencing process was flawed given consideration of section 5/5-3.2(a)(14)). Accordingly, defendant's claim that the sentencing court improperly considered an inapplicable statutory aggravating factor does not allege a structural error, as is required for the asserted error to be noticed as second-prong plain error. *See Jackson*, 2022 IL 127256, ¶ 67 (error not structural where right not constitutional and therefore not part of framework in which trial process proceeds).

b. A claim that the sentencing court considered an inapplicable aggravating factor is subject to harmless error analysis and therefore cannot be structural error.

"An error that is amenable to harmless error analysis is not a structural error" and may not be noticed as second-prong plain error. *Logan*, 2024 IL 129054, ¶ 80; *see also Jackson*, 2022 IL 127256, ¶ 37; *id.* ¶ 49 ("[S]econd-prong plain error can be invoked only for structural errors that are not subject to harmless error analysis."). And because a claim that the sentencing court considered an inapplicable aggravating factor is amenable to

harmless error analysis, it follows that defendant's claim is not a structural error and his forfeiture may not be excused as second-prong plain error.

When addressing a defendant's preserved claim that the sentencing court erred in considering an inapplicable aggravating factor, a reviewing court reviews the record to determine whether the asserted error was harmless. *See Bourke*, 96 Ill. 2d at 332-33 (reviewing claim that sentencing court considered improper sentencing factor for harmlessness). In *Bourke*, for example, the sentencing court considered an inapplicable sentencing factor. *Id*. at 330-31. This Court held that resentencing was not required "where it can be determined from the record that the weight placed on the improperly considered aggravating factor was so insignificant that it did not lead to a greater sentence." *Id*. at 332. That is, the Court held that precisely the type of error alleged here is subject to harmless error analysis.[2]

Bourke's holding was correct, for it is often possible to determine from the record whether a sentencing court's consideration of an inapplicable aggravating factor was harmless. *See Jackson*, 2022 IL 127256, ¶ 42 (citing *People v. Glasper*, 234 Ill. 2d 173, 202-03 (2009)); *see also Ward*, 113 Ill. 2d at 526-27 (reviewing courts consider "the entire record as a whole" when determining whether sentence was improperly imposed). Because the asserted error here is subject to harmless error analysis, the error is not

[2] Defendant fails to acknowledge *Bourke*, much less provide the necessary special justification for departing from stare decisis. *See People v. Colon*, 225 Ill. 2d 125, 146 (2007).

structural, and the second prong of the plain-error rule does not apply. *Logan*, 2024 IL 129054, ¶ 80; *Jackson*, 2022 IL 127256, ¶ 49.

c. The appellate court decisions on which defendant relies are incorrect.

In arguing that a sentencing court's consideration of an inapplicable statutory aggravating factor constitutes second-prong plain error, defendant relies heavily on appellate court cases. *See* Def. Br. 11-14 (citing, among other cases, *People v. Haley*, 2011 IL App (1st) 093585, *People v. Abdelhadi*, 2012 IL App (2d) 111053, *People v. Young*, 2022 IL App (3d) 190015, and *People v. Joe*, 207 Ill. App. 3d 1079, 1086 (5th Dist. 1991)). But his reliance on those cases is misplaced because each rests on a misunderstanding of *People v. Martin*, 119 Ill. 2d 453 (1988), wherein this Court noted, in the context of assessing whether an alleged sentencing error was *first-prong* plain error, *see id.* at 458-59, that the sentencing court's consideration of an inapplicable aggravating factor in that case had "affected the defendant's fundamental right to liberty," *id*. at 458 (citing *Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977)).[3]

Because *Martin* was limited to considering whether first-prong plain error had occurred, *Martin* did not suggest that any sentencing error that

[3] *Ingraham* was a civil case in which the United States Supreme Court held that due process does not require notice and a hearing before imposing corporal punishment in public schools. 430 U.S. at 682. It presented no issue with respect to a criminal defendant's claim that a court committed plain error at sentencing. Accordingly, *Martin*'s citation to *Ingraham* for the proposition that the sentencing court's consideration of an inapplicable aggravating factor affected that defendant's "fundamental right to liberty"

affects a defendant's right to liberty — which category would presumably include *any* sentencing error — constitutes second-prong plain error. Thus, contrary to defendant's contention, *Martin* did not "explain[ ] 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.'" Def. Br. 12 (purporting to quote *Martin*, 119 Ill. 2d at 458). Indeed, this language does not appear anywhere in *Martin*. And for good reason: As explained, *Martin* analyzed the forfeited error before it under the first prong of the plain-error test. *See* 119 Ill. 2d at 458-59 (noting that "[t]he plain error doctrine may be used in reviewing a sentence if the evidence is closely balanced" and reviewing the defendant's claim of error at sentencing upon finding that "[t]he evidence presented at the sentencing hearing was not simply closely balanced, it strongly favored leniency for the defendant").

As a result, *Martin*'s passing observation that the sentencing court's consideration of an inapplicable factor in aggravation implicates a defendant's "fundamental right to liberty," *id*., cannot bear the weight that defendant places on it. *See* Def. Br. 12-17 (repeatedly invoking the phrase "fundamental right to liberty," and twice characterizing *Martin* as establishing "the clear precedent of this Court" that consideration of an

---

confirms that *Martin* could not have been suggesting that this type of error was second-prong plain error.

inapplicable sentencing factor necessarily constitutes second-prong plain error because it affects a defendant's "fundamental right to liberty"). Indeed, *Martin*'s statement that consideration of the inapplicable sentencing factor affected that defendant's right to liberty "is *obiter dictum*, as it was not essential to the outcome of the case, is not an integral part of the opinion, and thus is not binding authority or precedent within the stare decisis rule." *People v. Lighthart*, 2023 IL 128398, ¶ 50. The appellate court cases that have concluded a sentencing court's consideration of an inapplicable factor in aggravation constitutes second-prong plain error rely on this same misreading of *Martin* and should be overruled.[4]

d. Defendant's argument illustrates why a sentencing court's consideration of an inapplicable aggravating factor is not a structural error.

Finally, defendant's own arguments are analytically incompatible with a claim of second-prong plain error and demonstrate why a sentencing court's consideration of an inapplicable aggravating factor cannot be second-prong

[4] In the alternative, if the Court were to agree with defendant's characterization of *Martin*'s dictum, then that dictum was incorrect and should be overruled. *See People v. Castleberry*, 2015 IL 116916, ¶¶ 1, 16-17, 19 (abolishing void sentence rule because subsequent decisions of this Court had eroded rule's foundations and rendered it invalid); *MB Fin. Bank, N.A. v. Brophy*, 2023 IL 128252, ¶¶ 22, 30 (abolishing unrelated rule for same reason). A holding that a court's consideration of an inapplicable sentencing factor in aggravation satisfies the second prong of the plain-error rule would no longer be good law following this Court's recent decisions emphasizing that second-prong plain error equates to structural error. *See, e.g.*, *Jackson*, 2022 IL 127256, ¶¶ 26, 28; *Moon*, 2022 IL 125959, ¶¶ 26, 28.

plain error. In defendant's view, this Court should hold that the sentencing court's consideration of the allegedly inapplicable aggravating factor affected his sentence because (1) the inapplicable factor made up "twenty percent of the aggravating factors considered by the court," and (2) the 10-year sentence fell "near the middle" of the applicable sentencing range. Def. Br. 18-19. In other words, defendant argues that the sentencing court's assessment of his culpability could have been different had the court not considered the fact that he and Lacey had a child together. *See id*.

These arguments are incompatible with review under the second prong of the plain-error analysis because "the concern under the second prong of the plain-error rule is addressing unpreserved errors that undermine the integrity and reputation of the judicial process regardless of the strength of the evidence or the effect of the error on the trial outcome." *Jackson*, 2022 IL 127256, ¶ 24. An argument (like defendant's here) that an alleged error affected the outcome at trial or sentencing due to the closeness of the evidence is analyzed under the *first* prong of the plain-error rule, under which an unpreserved error may be noticed if the evidence was so closely balanced that any error, no matter how seemingly inconsequential, was "actually prejudicial." *People v. Sebby*, 2017 IL 119445, ¶ 51; *see Moon*, 2022 IL 125959, ¶¶ 20, 23; *Jackson*, 2022 IL 127256, ¶ 23.

Defendant did not argue in his petition for leave to appeal or in his opening brief to this Court that the alleged sentencing error should be

excused as first-prong plain error. Thus, he has doubly forfeited that argument. *See People v. McCarty*, 223 Ill. 2d 109, 122 (2006) ("failure to raise an issue in a petition for leave to appeal results in the forfeiture of that issue before this [C]ourt."); Ill. S. Ct. R. 341(h)(7) ("[p]oints not argued [in appellant's opening brief] are forfeited and shall not be raised in the reply brief, in oral argument, or on petition for rehearing"); *Vancura v. Katris*, 238 Ill. 2d 352, 369-70 (2010) (collecting cases applying Rule 341(h)(7)).

And defendant's choice to proceed solely on his second-prong plain error claim was a considered one. In the proceedings below, the appellate court rejected defendant's argument that his forfeiture could be excused as first-prong plain error, concluding that the evidence was not closely balanced given the scant evidence in mitigation and the substantial evidence in aggravation. *Johnson*, 2023 IL App (4th) 230087-U, ¶ 55. The appellate court's rejection of defendant's claim of first-prong plain error was correct.

Defendant's conduct — which included breaking into Lacey's home prior to violently sexually assaulting her two separate times — was extremely serious, leading the sentencing court to remark that it was "one of the more violent domestic violence cases" it had seen. R906. The court also found that a significant sentence was necessary to deter others from committing the same crime. *See* 730 ILCS 5/5-5-3.2(a)(7). But in the sentencing court's estimation, the most important factor was defendant's criminal history, which consisted of three previous felony convictions and

three misdemeanor convictions, including several convictions for violence against women. CS5-7; R906-07, 910; *see* R918-19 (explaining when denying motion to reconsider sentence that "probably most important in the Court's mind" was defendant's "previous record"). Indeed, defendant committed the present domestic violence offense while on mandatory supervised release for a domestic violence offense against Bianca, his prior romantic partner and the motion of two of his children. R910; CS8.

Against this significant evidence in aggravation, the sentencing court considered the evidence that defendant presented in mitigation, which the court appropriately found was entitled to little weight. R908-09. The court observed that defendant's mental health struggles and his history of drug and alcohol abuse — purported factors in mitigation — could not excuse his attack on Lacey. *Id.*[5] The evidence at sentencing was therefore not "so closely balanced the error alone severely threatened to tip the scales of justice," *Moon*, 2022 IL 125959, ¶ 23, and the appellate court correctly concluded that defendant could not excuse his forfeiture under the first prong of the plain-error rule.

[5] Defendant does not contend in his opening brief that the sentencing court erred by not giving adequate weight to his mitigating evidence, and thus he has forfeited any such argument. *See* Ill. S. Ct. R. 341(h)(7). In any event, this Court has repeatedly observed that evidence like that presented by defendant is not inherently mitigating. *See People v. Mertz*, 218 Ill. 2d 1, 83-84 (2005) (collecting cases).

Thus, defendant's arguments — that this Court can and should hold that the sentencing court would have sentenced him differently had it not considered that he and his victim had a child together — illustrate why the alleged sentencing error was not structural and thus not second-prong plain error. The sentencing court's consideration of the fact that defendant had a child with Lacey, even if improper if viewed as satisfying section 5-5-3.2(a)(14), did not render the sentencing hearing a fundamentally unreliable means of determining defendant's culpability. Therefore, defendant's argument that a sentencing court's consideration of an improper sentencing factor constitutes second-prong plain error is meritless.

CONCLUSION

For these reasons, the People of the State of Illinois respectfully request that this Court affirm the judgment of the appellate court.

June 11, 2024

Respectfully submitted,

KWAME RAOUL
Attorney General of Illinois

JANE ELINOR NOTZ
Solicitor General

KATHERINE M. DOERSCH
Criminal Appeals Division Chief

JEREMY M. SAWYER
Assistant Attorney General
115 South LaSalle Street
Chicago, Illinois 60603
(773) 758-4503
eserve.criminalappeals@ilag.gov

Counsel for Plaintiff-Appellee
People of the State of Illinois

RULE 341(c) 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 containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service is 29 pages.

/s/ Jeremy M. Sawyer
JEREMY M. SAWYER
Assistant Attorney General

CERTIFICATE OF FILING AND SERVICE

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. The undersigned certifies that on June 11, 2024, the foregoing **Brief of Plaintiff-Appellee People of the State of Illinois**, was filed with the Clerk of the Illinois Supreme Court, using the court's electronic filing system, which provided notice to the following email address:

Zachary Wallace
Office of the State Appellate Defender
Second Judicial District
One Douglas Avenue, Second Floor
Elgin, IL 60120
(847) 695-8822
2nddistrict.eserve@osad.state.il.us

Counsel for Defendant-Appellant

/s/ Jeremy Sawyer
Jeremy M. Sawyer
Assistant Attorney General
115 South LaSalle Street
Chicago, Illinois 60603
(773) 758-4503
eserve.criminalappeals@ilag.gov

E-FILED
6/11/2024 3:12 PM
CYNTHIA A. GRANT
SUPREME COURT CLERK