NO. 5-01-0088

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Madison County.
Plaintiff-Appellee,	)	
v.	)	No. 98-CF-2131
JAMES A. EVANS,	)	Honorable James Hackett,
Defendant-Appellant.	)	Judge, presiding.

RULE 23 ORDER

James A. Evans (defendant) appeals from his conviction for first-degree murder (720 ILCS 5/9-1(a)(1) (West 1998)), following a jury trial. On appeal, defendant contends that he was denied a fair trial because evidence of other crimes was admitted at the trial, that the imposition of discretionary consecutive sentences violates his right to due process, and that his case should be remanded for resentencing because the trial court considered an improper factor. We affirm.

BACKGROUND

Defendant was the victim of a home invasion on April 13, 1995. The persons involved in the home invasion were Kendra Wilson, Michelle Young, Marcus Holloway, and Nekemar Pearson. Marcus and Nekemar found no money in defendant's home, so they took defendant from his home in defendant's Blazer, robbed defendant of $20, threw defendant out of the vehicle, and drove away in defendant's vehicle.

Marcus and Nekemar removed expensive stereo speakers from defendant's vehicle and subsequently sold them to "Skeeter" Cox. Demond Spruill was present when Marcus and

Nekemar sold the speakers, and Demond went with Skeeter to Reliable Stereo to have the speakers installed in Skeeter's vehicle. At Reliable Stereo, the owner of the store told Demond and Skeeter that the speakers belonged to defendant. Demond later told defendant that it was Nekemar who had stolen the speakers from defendant's vehicle.

On June 24, 1995, Kendala Pearson, Nekemar's sister, had a barbecue in honor of her birthday, at Judy Huff's home. Judy lived across the street from defendant. Nekemar attended Kendala's barbecue, as did defendant. Nekemar was not seen alive after the barbecue. Nekemar's remains were discovered on December 2, 1995, in a wooded area along Pierce Lane in Godfrey, Illinois. Defendant was tried and convicted of Nekemar's murder.

FACTS

The pertinent facts adduced at defendant's trial are as follows. Kendra, Michelle, and Marcus testified to their participation in the home invasion of defendant's residence on April 13, 1995. Kendra also testified that although defendant was unemployed, the home invasion was planned because they believed that defendant had money at his home from selling drugs.

Kendra attended Kendala's barbecue on June 24, 1995. Kendra stated that she last saw Nekemar on the porch of defendant's home.

On cross-examination, Kendra admitted that she had not seen defendant with drugs or selling drugs. On redirect, Kendra stated, "[E]veryone in Alton knows [defendant] sells drugs." Defense counsel objected to this testimony, and the court sustained defendant's objection.

Shirley Thomas, Nekemar's mother, testified that in June 1995, Nekemar was required to be home by 6 o'clock each evening. On June 24, Nekemar did not come home. Thomas identified a watch found on the skeletal remains as the watch she had given to Nekemar.

Judy testified that she helped Kendala search for Nekemar the night of June 24. At about 8:30 or 9 p.m., they went to defendant's home. Judy testified that only defendant was

there, but she admitted that her statement to the police reflected that Clifton Wheeler was also at defendant's home that night.

Kendala testified that her mother called her around 6:15 or 6:30 on June 24 and told her that Nekemar had not come home. Kendala last saw Nekemar with Wheeler at the barbecue earlier that day.

Kendala also testified that although defendant was unemployed, she "supposed" he had money because defendant was a drug dealer. Defense counsel objected to this testimony, and the court sustained the objection. The court also told the jury to disregard this testimony.

Tommie Rounds, Demond Spruill, and Larry Greer testified that defendant told them that defendant brought Nekemar to his home the day of Judy's barbecue and that defendant beat Nekemar, tied him up, and placed him in defendant's basement. According to the three witnesses, defendant told them he put Nekemar in the trunk of defendant's car and drove to a wooded area off Pierce Lane in Godfrey, Illinois, where defendant shot Nekemar and left him to die. Defendant also told them that Brian Warr and Clifton Wheeler accompanied him that night.

Rounds, defendant's cousin, testified that defendant asked Rounds to help defendant kill Nekemar because of Nekemar's participation in the invasion of defendant's home. Rounds did not help defendant kill Nekemar.

Rounds testified that in 1995, defendant had a lot of money. Rounds stated that defendant was not employed, but Rounds was aware that defendant made his money from "drugs and pot." Defense counsel objected to this testimony and requested a mistrial. The court denied defendant's motion and overruled defendant's objection.

Wheeler testified that he is currently incarcerated for another murder. In spring 1995, defendant told Wheeler that Nekemar robbed him during a home invasion. Wheeler went

to the barbecue at Huff's home on June 24, where he saw Nekemar. That afternoon, Nekemar went with Wheeler to defendant's house.

Wheeler stated that defendant pulled a nine-millimeter gun on Nekemar. Defendant beat Nekemar, tied him up, put duct tape on his mouth, and threw him in the basement. Later, defendant cut Nekemar's clothes off him. Brian and Wheeler carried Nekemar to the trunk of defendant's car, and the three men drove to Pierce Lane. Nekemar was removed from the car, and defendant shot him.

William Jenkins testified that he was in jail with defendant and Rounds in late 1998 or early 1999. Jenkins heard defendant and Rounds talking about Nekemar's death. Defendant said that Wheeler was a witness and that defendant wanted to know how much it would cost to have Wheeler killed in jail. Jenkins sent a letter to the police about what he heard.

Keyanna Simpson testified that at the time of the trial she was 17 years of age. In June 1998, a year before defendant's trial, she and defendant had a sexual relationship. Keyanna heard rumors that defendant murdered Nekemar, so she asked defendant about that. Defendant denied the rumors at first, but later defendant told her that he shot Nekemar on the night of a barbecue.

Terry Maddox testified that on December 2, 1995, he found some skeletal remains about 50 or 60 feet off Pierce Lane. Maddox notified his stepfather, who was chief of police, of what he found.

Steve Nonn, deputy sheriff of Madison County, testified that he investigated the murder of Nekemar. Nonn stated that three spent bullets were recovered during the investigation–two during the autopsy and one at the scene where the skeletal remains were found. The bullets were from a nine-millimeter gun. Officer Nonn also identified a watch that was taken from the left wrist of the skeleton.

Ralph Boohlmann, deputy coroner investigator for Madison County, testified that he went to Pierce Lane when the skeletal remains were found. Boohlmann found no clothing at the scene.

The parties stipulated that if Dr. John Stewart and Dr. Barbara Llewellyn, both of whom are forensic scientists, and Special Agent Mark Johnnsey, a forensic anthropologist, were called to testify, they would state that they had examined and analyzed the skeletal remains and that the remains were those of Nekemar Pearson.

Dr. Raj Nanduri, a forensic pathologist, testified that she conducted the autopsy on Nekemar's skeletal remains. She removed two bullets from the backbone of the skeleton. She also found a fractured rib and a fracture of the radius in the forearm, which she attributed to gunshot wounds. Dr. Nanduri stated that the cause of death was gunshot wounds to the trunk and forearm.

During the trial, the court initially instructed the jury that the testimony concerning defendant being a drug dealer was to be considered only for limited purposes, as a possible source of defendant's money and as the possible motive for the invasion of defendant's home. The record reflects that the jury understood that it was only to consider the evidence for that limited purpose. Later in the trial, the court instructed the jury to completely disregard the testimony that defendant was a drug dealer. The court stated to the jury:

> "It's like it [testimony of defendant's drug dealing] never was testified to. And more than that, you have to aggressively make sure that it stays out of your mind in your considerations."

The record reflects that the jury again indicated that it would be able to disregard the evidence as the court instructed.

The jury found defendant guilty of first-degree murder. The court sentenced defendant to 60 years' imprisonment for the murder. Defendant appeals.

ANALYSIS

1. Other-Crimes Evidence

Defendant contends that he was denied a fair trial because evidence of other crimes, *i.e.*, that defendant was a drug dealer and that he sexually abused a minor, were introduced at the trial, thereby prejudicing him. Defendant acknowledges that he did not raise this issue in a posttrial motion. However, defendant asserts that the error can be reviewed under the plain error rule of Supreme Court Rule 615(a) (134 Ill. 2d R. 615(a)).

The failure to raise an issue in a posttrial motion waives the issue for review. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Thus, if defendant's claim is to be considered, it must come under the plain error doctrine found in Rule 615(a). For the plain error doctrine to apply, either a substantial right affecting fundamental fairness must be implicated or the evidence must be closely balanced. *People v. Keene*, 169 Ill. 2d 1 (1995). We find that the plain error doctrine does not apply to defendant's claim.

Defendant objected at the trial to the evidence of defendant's alleged drug dealing, and with one exception the objections were sustained, and the jury was instructed to disregard the evidence. Near the conclusion of the trial, the court instructed the jury at length to disregard the evidence. The record reflects that the jury understood that the evidence presented concerning defendant's alleged drug dealing was to be totally disregarded. Generally, where a trial court instructs a jury to disregard evidence, the error is often cured. *People v. Lewis*, 269 Ill. App. 3d 523 (1995). Thus, the error in the case *sub judice*, if any, did not affect a substantial right or affect the fundamental fairness of defendant's trial.

Similarly, defendant claims that the evidence that defendant sexually abused a minor, Keyanna Simpson, was error and prejudiced him in the eyes of the jury. Defendant made no objection to the testimony at the trial and did not raise the issue in a posttrial motion, so the issue is waived. See *Enoch*, 122 Ill. 2d at 186. Keyanna's age was not emphasized to the

jury, and the State did not expound on Keyanna and defendant's sexual relationship. Keyanna's testimony concerning her sexual relationship with defendant was presented to show why defendant trusted her enough to tell her about his commission of the crime. Evidence of other crimes is admissible if it is relevant to any material issue other than to show that a defendant has a bad character or a propensity to commit crime. *People v. Bean*, 137 Ill. 2d 65 (1990). After Keyanna's brief statement no further mention was made of defendant's relationship with Keyanna. Therefore, the admission of the evidence of defendant's relationship with Keyanna was not error.

Further, the evidence against defendant was not closely balanced. Numerous witnesses testified that defendant confessed to and told them details of Nekemar's murder. The details were corroborated by physical evidence. The bullets were from a nine-millimeter gun, which Wheeler testified was the caliber of gun used by defendant. No clothes were found with Nekemar's body, and Wheeler testified that defendant removed Nekemar's clothing before leaving defendant's home. Nekemar's remains were found off Pierce Lane, where defendant told the witnesses he had taken Nekemar before shooting him. Defendant also had a motive for killing Nekemar.

Although defendant claims that much of the testimony was presented through witnesses with questionable backgrounds or with something to gain by testifying, we find that the jury was aware of the witnesses' backgrounds and motives and ruled against defendant. The jury is given the task of determining the credibility of the witnesses, of weighing the testimony, and of resolving any conflicts therein. *People v. Jackson*, 243 Ill. App. 3d 1026 (1993). Because no substantial rights were affected and because the evidence against defendant was overwhelming, the plain error doctrine does not apply, and defendant has waived the issue of the admission of other-crimes evidence.

2. Consecutive Sentences

Defendant contends that the imposition of consecutive sentences on his murder conviction and his convictions for two counts of solicitation of murder and one count of conspiracy to commit murder, obtained in a separate trial from his murder conviction, was unconstitutional based on the United States Supreme Court holding in *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000). Defendant argues that the sentences were unconstitutional because the provision of the sentencing statute allowing for consecutive sentencing (730 ILCS 5/5-8-4(b) (West 1998)) was not charged in the indictment for murder. He also argues that the sentences were unconstitutional because the facts supporting consecutive sentencing were not submitted to the jury or required to be proven beyond a reasonable doubt.

The Illinois Supreme Court recently decided this issue in *People v. Wagener*, 196 Ill. 2d 269 (2001). In *Wagener*, the court held that *Apprendi* concerns are not implicated by consecutive sentencing. *Wagener*, 196 Ill. 2d at 286. The court noted that the Supreme Court in *Apprendi* "explicitly disclaimed any holding regarding consecutive sentencing." *Wagener*, 196 Ill. 2d at 284. Pursuant to the holding in *Wagener*, we find that the imposition of consecutive sentencing in defendant's case was not unconstitutional.

3. Improper Sentencing Factor

Defendant's final claim is that the trial court considered an improper sentencing factor in aggravation–that the defendant's conduct caused or threatened serious harm (730 ILCS 5/5-5-3.2(a)(1) (West 1998))–when it imposed its sentence of 60 years' imprisonment for defendant's murder conviction. Defendant asserts that because the threat of serious harm is implicit in the crime of murder, the court's sentence should be vacated and the cause remanded for a new sentencing hearing.

A review of the record reveals that when imposing the 60-year prison sentence for

defendant's murder conviction, the court did not consider that defendant's conduct caused or threatened serious harm. Defendant's sentence was imposed at a consolidated sentencing hearing for both his murder conviction and his convictions for two counts of solicitation of murder and one count of conspiracy to commit murder, convictions obtained at a separate trial. The court asked the State and defense counsel if there was an objection to the consolidated sentencing hearing, and both parties agreed that the procedure was acceptable. Thus, the court conducted two sentencing hearings in one proceeding.

Here, the court's consideration of the factor that defendant's conduct caused or threatened serious harm related to the sentences to be imposed on defendant's convictions for the solicitation of murder and the conspiracy to commit murder. Whether a defendant's conduct threatened serious harm is a factor in aggravation that can be considered in sentencing for a conviction for solicitation of murder. See *People v. O'Toole*, 226 Ill. App. 3d 974 (1992). The court did not consider an improper factor in aggravation in sentencing defendant for his murder conviction. The court's imposition of a sentence of 60 years' imprisonment for first-degree murder was within the statutory range (730 ILCS 5/5-8-1(a)(1)(a) (West 1998)) and was proper.

CONCLUSION

For the foregoing reasons, the judgment of the circuit court of Madison County is affirmed.

Affirmed.

HOPKINS, J., with MAAG, P.J., and KUEHN, J., concurring.