

NOTICE
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2011 IL App (4th) 100789-U

Filed 12/19/11

NO. 4-10-0789

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Sangamon County
BRIAN D. WADE,)	No. 09CF815
Defendant-Appellant.)	
)	Honorable
)	John W. Belz,
)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Presiding Justice Turner and Justice Knecht concurred in the judgment.

ORDER

- ¶ 1 *Held:* The appellate court affirmed, concluding that the trial court did not abuse its discretion by sentencing defendant to 40 years in prison.
- ¶ 2 Following a June 2010 trial, a jury convicted defendant, Brian D. Wade, of (1) two counts of home-invasion, (2) two counts of aggravated criminal sexual assault, (3) residential burglary, and (4) theft. Shortly thereafter, the court sentenced defendant to 15 years in prison on each count of aggravated criminal sexual assault to run consecutively to a 10-year prison term for home invasion, and 364 days in prison on the theft count, which the court ordered to be served concurrently to his 15- and-10-year sentences. (The court did not enter judgment on one of the home-invasion counts or on the residential-burglary charge.)
- ¶ 3 Defendant appeals, arguing that his aggregate sentence of 40 years in prison is excessive because he was only 20 years old at the time of the crimes and had no prior criminal

record. We disagree and affirm.

¶ 4

I. BACKGROUND

¶ 5 At approximately 2 a.m. on September 16, 2009, police were dispatched to an apartment in response to a report of a battery. Upon arriving at the apartment, the responding officer determined that the victim, A.D., had been sexually assaulted. A.D. described her assailant as a shirtless black male, 5 foot 7 inches to 5 foot 8 inches tall, with an athletic build. A.D. was then transported by ambulance to the hospital, where a sexual-assault evidence kit was collected. A.D. informed the nurse collecting the sample that she had been sexually assaulted.

¶ 6 Later that day, the responding officer questioned defendant at his residence, and shortly thereafter, officers arrested him. During a subsequent police interrogation, which was audio-recorded, defendant admitted that he was present at A.D.'s apartment the night before and he asked "a woman" for money. When she refused, he hit her in the face. Defendant also admitted that he took approximately \$7 from the kitchen counter and ran out of the apartment, but he denied having sexual contact with the woman.

¶ 7 In October, 2009, the State charged defendant with (1) three counts of home invasion (720 ILCS 5/12-11(a)(2), (a)(6) (West 2008)), (2) four counts of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(4) (West 2008)), (3) two counts of criminal sexual assault (720 ILCS 5/12-13(a)(1) (West 2008)), (4) one count of residential burglary (720 ILCS 5/19-3(a) (West 2008)), (5) one count of theft (720 ILCS 5/16-1(a)(1) (West 2008)), and (6) two counts of battery (720 ILCS 5/12-3(a)(2) (West 2008)).

¶ 8 At defendant's June 2010 trial, A.D. testified that at approximately 2 a.m. on September 16, 2009, she was awakened by a man pulling her pants off as she slept on the living

room floor. She attempted to sit up and told the man to stop but he told her to "[s]hut up" and pushed her back down and continued to pull her pants off. A.D. stated that the man then straddled her, punched her in the face, and performed oral sex on her by placing his mouth on her vagina. The man then stood up, pulled his pants down and penetrated her vagina with his penis. When he was finished, he got up, pulled up his pants, walked into the kitchen, took money off the counter, told her not to say anything, and left. Shortly thereafter, the victim's friend returned to the apartment and, upon learning the victim had been sexually assaulted, called the police.

¶ 9 Illinois State Police forensic scientist Jennifer Aper testified that the vaginal and anal swabs taken from A.D. at the hospital revealed low levels of semen and sperm. Illinois State Police forensic scientist Kelly Biggs testified she performed a deoxyribonucleic acid (DNA) analysis on the swabs. The vaginal swab contained a mixture of DNA from at least three people, including A.D. (A.D. acknowledged that she had consensual sex within 72 hours preceding the sexual assault). After comparing the DNA from the vaginal swab to a buccal standard collected from defendant, defendant could not be excluded as a possible contributor to the DNA mixture. Biggs concluded that "approximately one in 11 black, one in ten Caucasian, or one in nine Hispanic" persons could not be excluded as a contributor to this mixture of DNA. Defendant also could not be excluded as a contributor to the mixture of DNA found on the anal swab. Biggs explained that "approximately one in 100 billion black, one in 910 billion white, or one in 150 billion Hispanic unrelated individuals could not be excluded from having contributed to that [DNA mixture]."

¶ 10 Defendant's statement was then played for the jury.

¶ 11 On this evidence, the jury convicted defendant of two counts of home invasion,

two counts of aggravated criminal sexual assault (counts IV and VI, charging that defendant, by the use of force or threat of force penetrated A.D. by placing his penis in her vagina and by placing his mouth on her vagina), residential burglary, and theft.

¶ 12 At defendant's September 2010 sentencing hearing, the trial court sentenced defendant to 15 years in prison on each count of aggravated criminal sexual assault to run consecutively to a 10-year prison term for home-invasion, and 364 days in prison on the theft count, which the court ordered to be served concurrently to his 15- and-10-year sentences. At the time of sentencing, both the aggravated-criminal-sexual-assault and home-invasion crimes were Class X felonies, punishable by between 6 and 30 years in prison (720 ILCS 5/12-11(a)(2), (c), 12-14(a)(4) (West 2008)) and subject to mandatory consecutive sentencing (730 ILCS 5/5-8-1(a)(3) (West 2008)).

¶ 13 In September 2010, defendant filed a motion to reconsider sentence, arguing that (1) the trial court failed to appropriately consider (a) his rehabilitative potential and (b) certain other mitigating factors, and (2) his sentence was excessive. Later that month, the court denied defendant's motion, explaining that it "did give adequate consideration to all of the factors in aggravation and mitigation [and t]he sentence was within the [statutory] guidelines."

¶ 14 This appeal followed.

¶ 15 II. ANALYSIS

¶ 16 Defendant argues that the trial court abused its discretion by sentencing him to 40 years in prison because he was only 20 years old at the time of the crimes and had no prior criminal history. Specifically, defendant contends that although the court properly focused on the nature of the offense and his culpability, the court "neglected to even mention the specific factors

in mitigation and thereby failed to strike the proper balance between the defendant's culpability and his potential for rehabilitation." We are not persuaded.

¶ 17 A trial court is given great deference when determining appropriate sentences, and a reviewing court will not disturb a sentence within statutory guidelines unless the trial court abused its discretion and the sentence is manifestly disproportionate to the nature of the case. *People v. Grace*, 365 Ill. App. 3d 508, 512, 849 N.E.2d 1090, 1093-94 (2006).

¶ 18 At the time of sentencing in this case, three of defendant's convictions were Class X felonies, each of which carried a nonextended sentencing range of 6 to 30 years in prison, and all of which were subject to mandatory consecutive sentencing. 730 ILCS 5/5-4.5-25(a), 8-1(a)(3) (West 2008). Thus, defendant faced a potential sentence between 18 and 90 years' imprisonment. The State requested a total sentence of 40 years' in prison, stating that "anything less would deprecate the seriousness of the crimes." Additionally, the State argued a 40-year sentence was necessary for deterrence purposes, despite defendant's lack of criminal history, emphasizing that defendant entered the apartment without permission, showed no remorse, and bragged about leaving "his fist in [the victim's] face." Defense counsel argued for the minimum sentence, stressing that defendant had no prior criminal or juvenile record, was a good father, and was mildly mentally retarded.

¶ 19 The trial court agreed with the State that a lengthy sentence was necessary in order to deter others and addressed defendant, in part, as follows:

"[T]his case and the facts of this case *** are appalling. *** [T]his case is every woman's nightmare. It is an absolute horror story, and when you hear the facts, words cannot describe what the

victim in this case was put through. Words can't describe *** your actions. They have no place in society. They have no place in our society here in Sangamon County.

The Court considers all of the factors in aggravation and mitigation. That's one thing that leaps out because I don't think anyone wants any woman to have to got through *** what [the victim] went through in this case."

The court then sentenced defendant as stated.

¶ 20 While defendant acknowledges he could have received a sentence of 90 years in prison, he contends that the trial court specifically failed to consider the following mitigating factors: (1) he was only 20 years old at the time of the crimes; (2) he had no prior criminal or juvenile record; (3) he was diagnosed as being mildly mentally retarded and suffered from a learning disability; (4) he was physically abused as a child; and (5) he was under the influence of cannabis, ecstasy, OxyContin, and alcohol at the time of the crimes. He argues that the court's failure to consider these factors resulted in an improper balance between punishment and rehabilitation. Defendant asserts that the court only paid "lip service" to the mitigating factors when stating it considered "all of the evidence or all of the factors in aggravation and mitigation." In this regard, defendant claims that the court's statement was insufficient to show it complied with the legislative mandate from section 5-5-3.1 of the Unified Code of Corrections (730 ILCS 5/5-5-3.1 (a)(4), (a)(7), (a)(13) (West 2008)), requiring that specific statutory factors "shall" be accorded weight in favor of withholding or minimizing a sentence of imprisonment. Thus,

defendant posits that because the court did not specifically name the mitigating factors it considered, it is impossible to determine how much, if any, weight was given to those factors.

¶ 21 Although defendant is correct that the legislature requires statutory mitigating factors to be accorded weight when fashioning a sentence, his argument that the trial court's "catchall" statement is insufficient to show compliance with this statutory requirement is not persuasive. "[A] trial court is not required to expressly indicate its consideration of all mitigating factors and what weight each factor should be assigned." *People v. Kyse*, 220 Ill. App. 3d 971, 975, 581 N.E.2d 285, 288 (1991). It is presumed that a trial court considered all relevant mitigating and aggravating factors in fashioning a sentence, and that presumption will not be overcome absent explicit evidence from the record that the trial court failed to consider mitigating factors. *People v. Flores*, 404 Ill. App. 3d 155, 158, 935 N.E.2d 1151, 1155 (2010). Such evidence is not present here.

¶ 22 At defendant's sentencing hearing, defense counsel specifically brought the following mitigating factors to the attention of the trial court: (1) defendant's mild mental retardation diagnosis, (2) defendant's lack of criminal history, (3) and the hardship that imprisonment of defendant would cause to his dependent daughter. In response, the State emphasized the following factors: (1) the impact that the sexual assault and battery had on A.D., (2) defendant's lack of remorse, and (3) the need for deterrence. Prior to sentencing defendant, the court considered the information presented in the presentence investigation report (PSI), which included defendant's age, lack of criminal history, his mental and learning disabilities, and his history with substance abuse. This is supported by the court's statement that it "has had an opportunity to review all of the presentence reports" and its acknowledgment that it would not

"consider any sort of gang affiliation" which was noted in the PSI. The court further outlined the factors it considered, as follows:

"I am also considering the [d]efendant's exhibit that's been submitted [(the letter from defendant's daughter's mother)], the victim impact statement from [A.D.], and the financial impact of incarceration, *** *all the evidence or all of the factors in aggravation and mitigation, all of the arguments of counsel, evidence that's been presented here today, and arguments of counsel.*

So, in looking at this case and in hearing all of the facts of the case *** I do agree with [the State] *** that this case is every woman's nightmare.

So, in looking at that, applying all of the factors, I do agree with [the State] that a sentence in this case is necessary to deter others.

The Court considers *all of the factors in aggravation and mitigation*. That's one thing that leaps out because I don't think anyone [should have] to go through *** what [A.D.] went through in this case." (Emphases added.)

¶ 23 At the hearing on defendant's motion to reconsider sentence, defendant argued that the trial court "did not give adequate consideration to the mitigating evidence that was

presented by way of his mother *** [and] the deficits that he has had throughout his life, [specifically] his mental retardation as reflected in the fitness evaluation." In denying defendant's motion, the court explained that it gave "adequate consideration to all of the factors in aggravation and mitigation." In this regard, we conclude that the court was no more impressed with defendant's mitigating factors than we are, and simply chose not to cite each mitigating factor specifically.

¶ 24 In closing, we note that the defendant's sentence was well within the statutory guidelines. Indeed, given the facts of this case, the trial court would have been entirely justified had it imposed a much lengthier sentence. See *People v. Johnson*, 368 Ill. App. 3d 1146, 1171, 859 N.E.2d 290, 311 (2006).

¶ 25 III. CONCLUSION

¶ 26 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 27 Affirmed.