

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

2012 IL App (3d) 100694-U

Order filed April 2, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
Plaintiff-Appellee,)	Will County, Illinois,
)	
v.)	Appeal No. 3-10-0694
)	Circuit No. 09-CF-1957
)	
ERICK HERNANDEZ-MERCADO, a/k/a)	Honorable
ERICK MERCADO-HERNANDEZ,)	Amy Bertani-Tomczak,
)	Judge, Presiding.
Defendant-Appellant.		

PRESIDING JUSTICE SCHMIDT delivered the judgment of the court.
Justices Carter and Lytton concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court did not abuse its discretion in sentencing defendant to 54 months' imprisonment. Defendant was entitled to a \$200 credit against her \$200 domestic violence fine for the days he spent in presentencing custody.
- ¶ 2 After entering into open pleas of guilty, defendant, Erick Hernandez-Mercado, a/k/a Erick Mercado-Hernandez, was convicted of aggravated battery (720 ILCS 5/12-4(b)(1) (West 2008)) and domestic battery (720 ILCS 5/12-3.2(a)(1) (West 2008)). Defendant was sentenced to 54

months' imprisonment for aggravated battery and a concurrent term of 12 months' conditional discharge for domestic battery. Defendant was also assessed a \$200 domestic violence fine as part of his sentence. Defendant appeals, arguing that: (1) his sentence of 54 months' imprisonment is excessive given his lack of criminal history, his effort to better himself while jailed in this case, his remorse for his conduct, and his rehabilitative potential; and (2) he is entitled to \$5 per day presentence custody credit against his domestic violence fine. We affirm defendant's sentence and modify the mittimus to reflect a \$200 credit against his \$200 domestic violence fine.

¶ 3

FACTS

¶ 4 The factual basis underlying defendant's guilty plea was that on July 27 and 28, 2009, defendant got into an argument with his wife, Rebecca Mercado, and repeatedly beat her with a metal broomstick pole and a piece of wood trim. Rebecca suffered extensive and severe bruising on her back, legs, and arms.

¶ 5 Prior to sentencing, a presentence investigation report (PSI) was prepared. According to the PSI, defendant was a 30-year-old Mexican national, who immigrated to the United States at the age of 20. Defendant did not have a prior criminal history or a history of drug or alcohol abuse. Defendant was employed for the past six years and had three children with Rebecca. After the incident, Rebecca and defendant divorced. While defendant was jailed for this offense, he earned his General Education Diploma and completed an anger management course.

¶ 6 At defendant's sentencing hearing, Rebecca read her victim impact statement. Rebecca stated that defendant's actions negatively impacted both her and her three young children, who were five years, three years, and six months old at the time of the incident. All three children

were present during the altercation, and as a result, they have suffered from fear and anxiety.

¶ 7 Rebecca feared for her life during the incident and was unable to call the police because defendant controlled the telephone. She was also unable to escape from the house because she could not take the children with her due to her leg injuries. After the incident, Rebecca and her children were no longer able to live in their home because it was too traumatizing to return. She also suffered financial hardship since defendant's arrest, and her home had been foreclosed upon. Rebecca continued to live in fear that defendant would come after her again. In response to defense counsel's question, Rebecca admitted that the argument underlying the incident concerned defendant's discovery that Rebecca was having an extramarital affair.

¶ 8 Defendant made a statement in allocution, expressing regret for his actions and apologizing to Rebecca and his children. Defendant described how he and Rebecca supported their children and provided them with a home. Defendant took responsibility for his actions, but stated that he lost control when he discovered Rebecca had an extramarital affair.

¶ 9 After hearing all of the evidence and reviewing the PSI, the trial court sentenced defendant to a term of 54 months' imprisonment for aggravated battery and a concurrent term of 12 months' conditional discharge for domestic battery. In making its determination, the court noted that defendant did not have a criminal history. However, the court found that a sentence of probation would deprecate the seriousness of the offense, and incarceration was necessary to protect the public. The court noted that the abuse of Rebecca occurred over a period of hours from one evening into the next day, so even if defendant lost control at the beginning, the abuse continued. The court also noted that defendant used a deadly weapon and that the nature of the injuries were severe.

¶ 10 Defendant filed a motion to reconsider sentence, which the trial court denied. Defendant appeals.

¶ 11 ANALYSIS

¶ 12 I. Excessive Sentence

¶ 13 On appeal, defendant first argues that his sentence of 54 months' imprisonment was excessive given his lack of criminal history, his effort to better himself while jailed in this case, his remorse for his conduct, and his rehabilitative potential.

¶ 14 The Illinois Constitution mandates that all penalties be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. Ill. Const. 1970, art. I, § 11. However, the determination and imposition of a sentence involves considerable judicial discretion, and we will not reverse a trial court's sentence unless we find that the court abused its discretion. *People v. Alexander*, 239 Ill. 2d 205 (2010); *People v. La Pointe*, 88 Ill. 2d 482 (1981). A trial court is in a far better position than an appellate court to fashion an appropriate sentence, based upon firsthand consideration of factors such as defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. *People v. Streit*, 142 Ill. 2d 13 (1991). Therefore, we will not substitute our judgment for that of the trial court just because we may have balanced the sentencing factors differently. *Id.*

¶ 15 Furthermore, a sentence that falls within the statutory range will not be deemed excessive unless it either departed greatly from the spirit and purpose of the law, or it was manifestly disproportionate to the nature of the offense. *People v. Spencer*, 303 Ill. App. 3d 861 (1999). Aggravated battery, a Class 3 felony, has a sentencing range of two to five years' imprisonment. 720 ILCS 5/12-4; 730 ILCS 5/5-4.5-40(a) (West 2008). Domestic battery, a Class A

misdemeanor, is punishable by a jail term of less than one year. 720 ILCS 5/12-3.2; 730 ILCS 5/5-4.5-55(a) (West 2008). Both offenses are eligible for a sentence of probation or conditional discharge. 730 ILCS 5/5-4.5-40(d), 5-4.5-55(d) (West 2008).

¶ 16 Here, we find that the trial court did not abuse its discretion in sentencing defendant to 54 months' imprisonment. Defendant argues that the trial court gave too much weight to the degree of harm caused and not enough weight to mitigating factors. However, we cannot substitute our judgment for that of the trial court merely because we would have weighed the factors differently. See *Alexander*, 239 Ill. 2d 205. Furthermore, unless the record affirmatively shows otherwise, the trial court is presumed to have considered all relevant factors, including any mitigating evidence. *People v. Hernandez*, 319 Ill. App. 3d 520 (2001). In light of the degree of harm caused to Rebecca and the emotional trauma to the three children, we cannot say that the court abused its discretion when it weighed the factors and found that a sentence at the high end of the range was appropriate.

¶ 17 Moreover, despite defendant's emphasis on his potential for rehabilitation, the trial court was not required to give greater weight to defendant's rehabilitative potential than to the circumstances of the offense. See *People v. Brown*, 218 Ill. App. 3d 890 (1991). In light of the record, defendant's sentence was not manifestly disproportionate to the nature of the offense; therefore, we hold that the trial court did not abuse its discretion in imposing the sentence. See *Spencer*, 303 Ill. App. 3d 861.

¶ 18 II. \$5 per day Presentence Credit

¶ 19 Defendant next argues that he is entitled to a \$5 per day credit against his \$200 domestic violence fine for the time he spent in custody prior to being sentenced.

¶ 20 A defendant who is assessed a fine is allowed a credit of \$5 for each day spent in custody on a bailable offense for which he did not post bail. 725 ILCS 5/110-14 (West 2010). A defendant may apply for the credit at any stage of court proceedings. *People v. Caballero*, 228 Ill. 2d 79 (2008). The State concedes that defendant is entitled to the presentencing credit, and the record supports its concession. Defendant was incarcerated sufficient days to warrant a credit equal to his fine. 725 ILCS 5/110-14(a) (West 2010). Accordingly, we modify the mittimus to reflect a \$200 credit against the \$200 domestic violence fine.

¶ 21 CONCLUSION

¶ 22 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed as modified.

¶ 23 Affirmed as modified.