

NOTICE
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2012 IL App (4th) 100686-U

Filed 4/6/12

NO. 4-10-0686

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Livingston County
STEPHEN D. TURLEY,)	No. 09CF825
Defendant-Appellant.)	
)	Honorable
)	Jennifer H. Bauknecht,
)	Judge Presiding.

JUSTICE McCULLOUGH delivered the judgment of the court.
Justices Pope and Cook concurred in the judgment.

ORDER

- ¶ 1 *Held:* Trial court did not abuse its discretion in sentencing defendant to an aggregate 50 years in prison.
- ¶ 2 On May 7, 2010, defendant, Stephen D. Turley, pleaded guilty to six counts of aggravated child pornography (720 ILCS 5/11-20.3(a)(1)(ii), (vii) (West 2008)); one count of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2008)); one count of attempt (predatory criminal sexual assault of a child) (720 ILCS 5/8-4(a), 12-14.1(a)(1) (West 2008)); and two counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West 2008)). On June 29, 2010, the trial court sentenced him to an aggregate 50 years in prison.
- ¶ 3 Defendant appeals, arguing his sentence was excessive and the trial court erred in its consideration of factors in aggravation and mitigation. We affirm.
- ¶ 4 On January 5, 2010, the State filed a 10-count information charging defendant

with six counts of aggravated child pornography (720 ILCS 5/11-20.3(a)(1)(ii), (vii) (West 2008)); one count of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2008)); one count of attempt (predatory criminal sexual assault of a child) (720 ILCS 5/8-4(a), 12-14.1(a)(1) (West 2008)); and two counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West 2008)). The alleged victim in all counts was an eight-year-old female child, K.T.S.

¶ 5 On May 7, 2010, defendant entered an open plea of guilty to the charged offenses. On June 29, 2010, the trial court held defendant's sentencing hearing. The presentence investigation report (PSI) indicated the 59-year-old defendant was dating the victim's grandmother at the time of the offenses. Defendant indicated his father had been arrested for stabbing his mother and was committed to the VA hospital, "temp insanity - time served." Defendant served in the United States Marine Corps from 1969 to 1973, and the United States Army from 1978 to 1984.

¶ 6 Defense counsel argued the following:

"The question I think before the Court really is[,] is the Court going to sentence [defendant] to life in prison or not. He's 59 years of age. Does the Court want him to die in prison or is the Court going to let him get out at some point in time? That's really the bottom line."

Defense counsel recommended an aggregate sentence of 20 years in prison noting defendant committed "[a] very bad crime."

¶ 7 The trial court stated as follows in imposing sentence. It could add nothing

"regarding how serious and sickening and heinous these crimes are." While defendant accepted some responsibility and prevented the minor and her family from having to participate in a trial, he must have understood after the hearing pursuant to section 115-10 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10 (West 2008)), that the evidence against him was "extremely overwhelming." The court considered as mitigating factors (1) the incident between his parents and (2) defendant's military service, from which he was discharged due to an accident. Further, the trial court considered in mitigation that defendant had a minimal criminal history (a single traffic ticket and a domestic battery conviction).

¶ 8 The trial court noted defendant acted not once but over an extended period of time. Defendant "caused some very deep scars not only for the family here but I'm sure for the child." The court found in aggravation "the very serious harm that you caused this child both physically and emotionally." Further, the court considered in aggravation that defendant was in a position of trust and "really abused that trust with this child." Finally, the court considered the need for deterrence as a "major factor" in aggravation.

¶ 9 The trial court sentenced defendant to (1) six concurrent 20-year prison terms for counts I through VI, (2) a concurrent 15-year sentence on count VIII, and (3) concurrent 7-year sentences on counts IX and X, with each concurrent sentence to be served consecutive to a 30-year sentence for count VII, for an aggregate sentence of 50 years in prison.

¶ 10 On July 6, 2010, defendant filed a motion to reconsider his sentence arguing "the sentence imposed was excessive in consideration of all factors before the court." At the hearing on defendant's motion, defense counsel argued again for a sentence that would give defendant hope that he eventually would be released from prison. In denying defendant's motion, the trial

court stated that it considered all the statutory factors, which did not include defendant's hope that he would be released from prison during his lifetime. The sentence was not a life sentence, but was a sentence well within the range prescribed by statute. There was no extraordinary medical condition or other strong factor in mitigation that would outweigh "the overwhelmingly strong factors in aggravation." The court noted that the sentences for defendant's "very extraordinarily heinous" crimes were lower than what the State recommended and were appropriate under all the factors in aggravation and mitigation the court considered.

¶ 11 This appeal followed.

¶ 12 Defendant argues the trial court erred in sentencing him by (1) considering a factor in aggravation that was inherent in the offense, (2) relying on speculation of early release, and (3) considering prior arrests or charges. The State argues defendant has forfeited these sentencing arguments because he did not include them in his motion to reconsider his sentence. See *People v. Thompson*, 375 Ill. App. 3d 488, 492, 874 N.E.2d 572, 575-76 (2007) ("Under Rule 604(d), any issue not raised in a motion to withdraw a guilty plea or to reconsider a sentence after a guilty plea is forfeited"). In reply, defendant argues his sentencing issue is reviewable under the plain-error doctrine (Ill. S. Ct. R. 615(a) (eff. Jan.1, 1967)).

¶ 13 The plain-error doctrine permits a reviewing court to consider unpreserved error. *People v. Sargent*, 239 Ill. 2d 166, 189, 940 N.E.2d 1045, 1058 (2010). To obtain relief under this rule, a defendant must first show that a clear or obvious error occurred. *Sargent*, 239 Ill. 2d at 189, 940 N.E.2d at 1058. In the sentencing context, a 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. *Sargent*, 239 Ill. 2d at 189, 940 N.E.2d at 1058.

¶ 14 We begin our plain-error analysis by first determining whether any error occurred at all. *Sargent*, 239 Ill. 2d at 189, 940 N.E.2d at 1059. If error did occur, this court then considers whether either of the two prongs of the plain-error doctrine has been satisfied. *Sargent*, 239 Ill. 2d at 189-90, 940 N.E.2d at 1059. Under both prongs, the defendant bears the burden of persuasion. *Sargent*, 239 Ill. 2d at 190, 940 N.E.2d at 1059.

¶ 15 Defendant argues the trial court erred in sentencing him by considering a factor in aggravation that was inherent in the offense. At defendant's sentencing hearing, the trial court stated the following:

"But having said that, I'm not sure how you ever get past some of the aggravating factors that are in this case. The very serious harm that you caused this child both physically and emotionally which unfortunately we may see later in life."

¶ 16 The Illinois Constitution provides that "[a]ll penalties shall 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, sec. 11. A reasoned judgment as to the proper penalty to be imposed must therefore be based upon the particular circumstances of each individual case. *People v. Saldivar*, 113 Ill. 2d 256, 268, 497 N.E.2d 1138, 1143 (1986). Such a judgment depends upon many relevant factors including the defendant's demeanor, habits, age, mentality, credibility, general moral character, and social environment. *Saldivar*, 113 Ill. 2d at 268, 497 N.E.2d at 1143. "It is permissible for a sentencing judge to consider the nature and circumstances of the offense, including the nature and extent of each element of the offense as committed by the defendant." *People v. Tolliver*, 98 Ill. App. 3d 116, 117-118, 424 N.E.2d 44,

45 (1981).

¶ 17 The supreme court in *Saldivar* further stated:

"Sound public policy demands that a defendant's sentence be varied in accordance with the particular circumstances of the criminal offense committed. 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.*" (Emphasis in original.)

Saldivar, 113 Ill. 2d at 269, 497 N.E.2d at 1143.

¶ 18 Acts of sexual abuse of minors almost inevitably cause emotional harm to the victims. See *People v. Leggans*, 253 Ill. App. 3d 724, 737, 625 N.E.2d 1133, 1143 (1993).

"The psychological harm caused by the act of molestation of a child is a proper factor to consider in aggravation when sentencing a defendant." *Leggans*, 253 Ill. App. 3d at 737, 625 N.E.2d at

1143. Here, the trial court's consideration of the factor that defendant caused "very serious harm [to K.T.S.] both physically and emotionally" was a proper consideration of the degree of harm defendant caused to K.T.S. The trial court had ample evidence of the emotional damage caused to the minor victim by the defendant's acts of sexually assaulting K.T.S. Accordingly, the court properly considered harm as an aggravating factor in sentencing defendant for his 10 convictions.

¶ 19 Defendant next argues the trial court erred in sentencing him by relying on speculation of early release. At defendant's sentencing hearing, the trial court stated the following:

"I suppose [defense counsel] has boiled it down to whether it's going to be a life sentence or not a life sentence. Certainly that's all going to depend on the rules at the time of day that the Governor or whomever is in charge decides whatever whimsical thing they want to do at the time. So I'm never really convinced that even if I was in the position to impose life that you would actually get a life sentence because people are released all the time on much longer sentences than whatever I can impose in this case."

¶ 20 It is presumed that the trial court considers only competent evidence in sentencing. *People v. Ayala*, 386 Ill. App. 3d 912, 920, 899 N.E.2d 513, 520 (2008). There is nothing in the record to rebut the presumption that the court considered only competent evidence in sentencing defendant. Moreover, the court enumerated the factors it considered in sentencing defendant. At no point did the court indicate that it considered "the possibility of future legislative or gubernatorial actions resulting in a prisoner's early release" in sentencing defendant.

Accordingly, the statement was not harmful based on the presumption that the court considered only competent evidence in sentencing defendant. See also *People v. Nussbaum*, 251 Ill. App. 3d 779, 785, 623 N.E.2d 755, 759 (1993) (In imposing sentence, trial court may consider realities of sentencing law and the effect of such realities on prison time actually served).

¶ 21 Defendant next argues that the trial court erred in sentencing him by considering prior arrests or charges. Defendant's PSI showed defendant failed to disclose the following:

"Maricopa County, Arizona CR-162186 - Kidnapping, Sex Abuse Under 15, Sex Assault, and Aggravated Assault, filed 10-06-86.

According to a letter written by the defendant found in his belongings, he was arrested 09-26-86 and released 01-07-87. This cause was dismissed.

Maricopa County, Arizona CR-8809576 - Kidnapping and Sexual Conduct with a Minor, filed 10-17-88. This case went to trial, and was dismissed 07-19-90."

¶ 22 In addition to considering a defendant's previous convictions, a sentencing court routinely considers crimes of which the defendant has not been convicted, including crimes for which the defendant has not been prosecuted. *People v. Jackson*, 149 Ill. 2d 540, 548, 599 N.E.2d 926, 930 (1992). A sentencing court may even consider evidence of crimes of which the defendant has been acquitted. *People v. Deleon*, 227 Ill. 2d 322, 340, 882 N.E.2d 999, 1009 (2008). This is so because a finding of not guilty is not a conclusive finding that the defendant did not commit the crime, but rather means that the State was unable to offer proof beyond a reasonable doubt that he did. Thus, the underlying facts of the previous crime may be considered

during a sentencing hearing, where the burden of proof is lower. *Jackson*, 149 Ill. 2d at 550, 599 N.E.2d at 930. The evidence of prior criminal conduct need be only relevant, reliable, and subject to cross-examination. *People v. Thomas*, 137 Ill. 2d 500, 547, 561 N.E.2d 57, 76 (1990).

¶ 23 At defendant's sentencing hearing, the trial court stated the following:

"Also the PSI talked about your prior history. I don't know that I can put much weight in those charges out of Arizona since they were dismissed. So in terms of your history, criminal history, I don't see much there; and I guess that I sort of lumped into your mitigating factors with the issues with your parents and the military which I think I can consider in mitigation."

¶ 24 Contrary to defendant's argument, the record shows that the trial court did not consider defendant's prior arrests or charges but considered in mitigation that defendant had a minimal criminal history (a single traffic ticket and a domestic battery conviction).

¶ 25 Defendant next argues his aggregate 50-year sentence is excessive.

¶ 26 "[T]he range of sentences permissible for a particular offense is set by statute." *People v. Fern*, 189 Ill. 2d 48, 55, 723 N.E.2d 207, 210 (1999). "Within that statutory range, the trial court is charged with fashioning a sentence based upon the particular circumstances of the individual case, including the nature of the offense and the character of the defendant." *Fern*, 189 Ill. 2d at 55, 723 N.E.2d at 210. "'[A] sentence within statutory limits will not be deemed excessive unless it is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense.'" *People v. Romero*, 387 Ill. App. 3d 954, 978, 901 N.E.2d 399, 419-20 (2008) (quoting *Fern*, 189 Ill. 2d at 54, 723 N.E.2d at 210).

¶ 27 Defendant pleaded guilty to six counts of aggravated child pornography, a Class X felony with a sentencing range between 6 and 30 years' imprisonment (720 ILCS 5/11-20.3(a)(1)(ii), (vii) (c) (West 2008)); one count of predatory criminal sexual assault of a child, a Class X felony with a sentencing range between 6 and 60 years' imprisonment (720 ILCS 5/12-14.1(a)(1), (b) (West 2008)); one count of attempt (predatory criminal sexual assault of a child), a Class 1 felony with a sentencing range between 4 to 12 years' imprisonment (720 ILCS 5/8-4(a), 12-14.1(a)(1), (b) (West 2008)); and two counts of aggravated criminal sexual abuse, a Class 2 felony with a sentencing range between three to seven years' imprisonment (720 ILCS 5/12-16(c)(1)(i) (West 2008)). We note the mandatory consecutive sentencing statute (730 ILCS 5/5-8-4(a)(ii) (West 2008) (now 730 ILCS 5/5-8-4(d)(2) (West 2010))) requires a consecutive sentence for predatory criminal sexual assault of a child (count VII).

¶ 28 A reviewing court must afford great deference to the trial court's judgment regarding sentencing because that court, having observed the defendant and the proceedings, is in a far better position to consider such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment and habits than a reviewing court, which must rely on a "cold" record. *Romero*, 387 Ill. App. 3d at 978, 901 N.E.2d at 420. "Thus, '[i]n considering the propriety of a sentence, the reviewing court must proceed with great caution and must not substitute its judgment for that of the trial court merely because it would have weighed the factors differently' [citation], and it may not reduce a defendant's sentence unless the sentence constitutes an abuse of the trial court's discretion [citation]." *Romero*, 387 Ill. App. 3d at 978, 901 N.E.2d at 420 (quoting *Fern*, 189 Ill. 2d at 53, 723 N.E.2d at 209).

¶ 29 Defendant's sentences fall well within the statutory ranges and are commensurate

with the seriousness of his acts. Contrary to defendant's argument, the trial court properly weighed the factors in mitigation and aggravation. The balance to be struck amongst the aggravating and mitigating factors is a matter of judicial discretion that should not be disturbed absent an abuse of discretion. *People v. Hernandez*, 204 Ill. App. 3d 732, 740, 562 N.E.2d 219, 225 (1990). The court considered in mitigation the incident between defendant's parents, a minimal prior criminal history, and defendant's military service. The court considered in aggravation the very serious harm defendant caused K.T.S. both physically and emotionally, defendant's position of trust in relation to K.T.S., and the need for deterrence. The court properly accounted for the relevant mitigating and aggravating factors. The sentences imposed by the court were neither excessive nor contrary to the spirit of the law. The trial court did not abuse its discretion in sentencing defendant.

¶ 30 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.

¶ 31 Affirmed.