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2013 IL App (3d) 120003-U

Order filed August 20, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 10th Judicial Circuit,
Plaintiff-Appellee,)	Tazewell County, Illinois,
)	
v.)	Appeal No. 3-12-0003
)	Circuit No. 09-CF-437
)	
SCOTT MATTINGLY,)	Honorable
)	Stuart P. Borden,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Holdridge and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion in sentencing defendant.

¶ 2 Defendant, Scott Mattingly, pled guilty to four counts of sexual exploitation of a child (720 ILCS 5/11-9.1(a)(2), (a-5) (West 2008)) and one count of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West 2008)). The trial court sentenced defendant to three two-year terms of imprisonment on counts I, II, and III, a three-year term of imprisonment on count IV, and a five-year term of imprisonment on count V. All sentences were to run consecutively, for a

total of 14 years of imprisonment. Defendant filed a motion to reconsider sentence, which was denied. Defendant appealed. This court remanded for compliance with Illinois Supreme Court Rule 604(d) (eff. July 1, 2006) for defendant's attorney to file a certificate stating that he consulted with defendant to ascertain the defendant's contentions of error in the sentence and make any necessary amendments to the motion. *People v. Mattingly*, No. 3-10-0258 (unpublished order under Supreme Court Rule 23). On remand, defendant's counsel filed a Rule 604(d) certificate and amended motion to reconsider sentence, which the trial court denied. Defendant appealed.

¶ 3 On appeal, defendant argues that the trial court erred by imposing an excessive sentence because the trial court failed to account for his rehabilitative potential, history of steady employment, expression of remorse, and initiative in seeking treatment. We affirm.

¶ 4 **FACTS**

¶ 5 Defendant entered an open guilty plea to four counts of sexual exploitation of a child (Class 4 felony) and one count of aggravated criminal sexual abuse (Class 2 felony). In counts I, II, and III, the State alleged that defendant had persuaded three girls to remove their clothing. In count IV the State alleged that defendant exposed his sex organ to the three girls. In count V the State alleged defendant had one of the girls touch his sex organ.

¶ 6 The factual basis to support defendant's guilty plea indicated that defendant often watched his girlfriend's daughters, E.L. (age 10) and S.L. (age 6), while his girlfriend worked. On two separate occasions, between March 1 and April 30, 2009, defendant played the game of truth-or-dare with E.L. and her friends, A.F. (age 9) and R.L. (age 10), during a girls' sleepover. The game took place while S.L. was sleeping and defendant's girlfriend was working an overnight

shift.

¶ 7 The first incident involved only E.L. and A.F., and the second incident involved E.L., A.F., and R.L. Based on defendant's dare, the girls removed their clothing, and defendant removed his own clothing in their presence. R.L. did not want to participate and asked to go home. Defendant told her it was too late to take her home. Also on defendant's dare, one of the girls touched defendant's sex organ, and defendant touched her sex organ and buttocks. Defendant additionally showed the girls playing cards containing pornographic images. When interviewed by Illinois State Police on July 27, 2009, defendant admitted playing truth or dare with the girls, daring the girls to remove their clothing, and touching one of the girl's sex organs.

¶ 8 At the plea hearing, defendant confirmed that he was pleading guilty of his own free will. The judge accepted defendant's guilty plea.

¶ 9 The Presentence Investigation (PSI) report indicated defendant had no prior convictions other than traffic infractions. Defendant was born in 1975. He was married and divorced in his early twenties. He was married again in 2003. He and his second wife had a son together and then separated in 2006. In 2007, his second wife made claims that defendant sexually abused their son. The Illinois Department of Children and Family Services determined the allegations to be unfounded. Defendant indicated that he gave up his parental rights to his son due to the repeated allegations of abuse from his former wife.

¶ 10 The PSI report provided defendant's version of events in this case. Defendant indicated that during the first sleepover, the girls were playing truth-or-dare and doing "silly things such as dancing and singing." A.F. dared E.L. to streak through the house with no pants. E.L. was hesitant and refused. Defendant could not remember if he or E.L. dared A.F. to do the same.

A.F. ran through the house with no pants or underwear. Defendant was dared to pull down his pants. He did so but did not pull down his underwear. A.F. pulled his underwear down.

Defendant indicated that although nudity was involved in the incident it was not sexual. During the second sleepover nothing was exposed and nothing sexual occurred.

¶ 11 The PSI report included transcripts of interviews with the victims. They indicated defendant asked if they wanted to play truth-or-double dare, which involved taking off clothes. Defendant made the girls promise to keep it a secret. Defendant initiated the dare of removing clothing. R.L. did not want to participate. Defendant told A.F. and E.L. that if they did it then R.L. would also do it. All the girls removed their clothing, and defendant removed his own clothing. R.L. asked to go home. Defendant told her he could not take her home because her parents were sleeping. R.L. hid in the bathroom. Defendant asked E.L. to sit on his lap when his clothes were removed. Defendant dared himself to touch E.L.'s and A.F.'s private parts, A.F. to touch his private parts, and the girls to touch each others' private parts. Defendant also showed the girls playing cards with pornographic images and asked them to do whatever the card had depicted on it. The girls did not do it. The girls put their clothes back on. When A.F. awoke on the couch in the middle of the night, she observed defendant had E.L. sleeping in his bed.

¶ 12 In her interview, E.L. indicated on a separate occasion defendant took photographs of her with her clothes off and touching herself. Defendant told her to keep it a secret.

¶ 13 In her interview, H.D. (age 9) indicated that, when she had slept over at defendant's home, she and E.L. fell asleep on the couch. Defendant carried them into his bed. She observed defendant touching the midsection of E.L.'s body.

¶ 14 On September 22, 2009, Bradford E. Colen of Associates in Mental Health evaluated

defendant based on his petition for probation. Defendant explained to Colen that the incident involved taking off clothes and some touching but no penetration. Defendant indicated remorse and self-hatred. Defendant admitted that he was a pedophile. Colen diagnosed defendant with a depressive disorder and pedophilia. Colen stated, "he does not make sense to me that he should be on probation." In a follow-up letter, Colen explained that defendant did not seem to understand that what he was doing during the truth-or-dare game was inappropriate.

¶ 15 On October 14 and 21, 2009, Bryan Denure of Midwest Counseling performed a sex offender evaluation on defendant. Defendant admitted to the events, but struggled to take full accountability. He viewed his decisions as getting caught up in the game on an "emotional level" and ceased to see the victims as children. Defendant denied showing the victims pornography and, instead, claimed they found the adult playing cards by accident.

¶ 16 On December 9, 2009, a sentencing hearing took place. Officer Ray Ham testified that, on November 7, 2007, defendant's former wife reported the possibility of defendant sexually abusing their son during a visitation. Defendant's son indicated that he and defendant played naked games under the blankets. Defendant denied the allegations. Defendant's former wife also made allegations of defendant sexually abusing his cousins. Ham interviewed one the cousins. She indicated that, when she was 12 years old and defendant was 22 years old, he gave her a massage and tried to reach down her pants. On another occasion he exposed his genitals to her. The matter had been handled within the family and was not reported to authorities.

¶ 17 Jennifer L., mother of E.L. and S.L., testified that she and defendant dated and lived together for three years prior to the incidents. Defendant watched the girls when she was at work. She testified that one weekend, when she, E.L. and S.L. were out of town, H.D. stopped

by the house looking for E.L. and spoke with defendant. Upon returning from Wisconsin, H.D. informed Jennifer L. that defendant was sending her instant messages. When he was confronted about sending H.D. messages, defendant did not seem to believe that he was doing anything wrong or that he should have to stop. After defendant was charged in this case, Jennifer L. moved E.L. and S.L. to Wisconsin within the week. Jennifer L. submitted a victim impact letter indicating the negative impact of defendant's actions on E.L. and S.L.

¶ 18 The parents of R.L. and A.F. also testified and submitted victim impact statements to indicate how defendant's actions negatively impacted their children's lives. Prior to the incident, the girls were happy, friendly, and outgoing. Since the incident with defendant, the girls have become confused and withdrawn. The parents are angry and have a sense of guilt for their inability to protect their daughters.

¶ 19 Letters were also written in support of defendant. Defendant's supporters indicated that he made a mistake or used poor judgment during the incidents. The PSI report indicated that defendant was steadily employed for almost two years prior to the charges in this case, working as a network administrator from January of 2008 until October of 2009. Defendant also reported a history of six different computer-related jobs from 1997 to 2007. Prior thereto, defendant worked as a school bus driver for two years, from 1994 to 1996.

¶ 20 Defendant gave a statement in court acknowledging that his actions were wrong and inappropriate. After the incident became known on July 27, 2009, defendant sought out counseling and began attending church. Defendant indicated that he loved E.L. like a daughter and knowing that he hurt her and her friends "really hurt." Defendant indicated that "what happened was a mistake" and was "not intentional" and that he "did not intentionally mean to

harm these girls."

¶ 21 The sentencing judge indicated that what the children related in their interviews was "appalling and it wasn't a mistake." The judge found:

"It was a calculated and cunning entrapment of these girls to do his criminal acts. He abused the authority that an adult has with regard to a child. It was complicated by so many things, the introduction of the pornographic deck of cards, *** the denial to R.L. to get the heck out of there, the attempt to use peer pressure, the manipulation, and this occurred over two weekends."

The court found that defendant's acts caused serious harm and noted the need for deterrence. The court also noted the defendant's potential for rehabilitation but that he would "do that in prison."

¶ 22 Defendant was sentenced to three two-year terms of imprisonment, a three-year term of imprisonment, and a five-year term of imprisonment, all to be served consecutively. Defendant filed a motion to reconsider sentence, which was denied. Defendant appealed. This court remanded the case for his attorney's compliance with Illinois Supreme Court Rule 604(d). On remand, defendant presented a second amended motion to reconsider sentence, which the trial court denied. Defendant appealed.

¶ 23 ANALYSIS

¶ 24 On appeal, defendant argues the trial court erred by imposing an excessive sentence. We affirm the sentence.

¶ 25 The Illinois Constitution mandates that all penalties be determined according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. Ill. Const. 1970, art. I, § 11. A reviewing court may not alter a defendant's sentence unless there

was an abuse of discretion by the trial court. *People v. Alexander*, 239 Ill. 2d 205 (2010). A sentence will be deemed an abuse of discretion where the sentence is greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense. *Id.* A trial court's sentencing decisions are entitled to great deference because the trial judge has had a better opportunity, having observed the defendant and the proceedings, to weigh factors such as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. *Id.* A reviewing court must not substitute its judgment for that of the trial court merely because it would have weighed these factors differently. *Id.*

¶ 26 After reviewing the record and the parties' arguments on appeal, we find no abuse of discretion by the trial court in sentencing the defendant. The sentencing range was one to three years of imprisonment for each Class 4 felony and three to seven years of imprisonment for the Class 2 felony. See 730 ILCS 5/5-8-1(a)(5), (7) (West 2008). The sentence was within the applicable sentencing ranges. A sentence that falls within the statutory range does not amount to an abuse of discretion unless it is manifestly disproportionate to the nature of the offense. *People v. Jackson*, 375 Ill. App. 3d 796 (2007).

¶ 27 Defendant argues that the trial court failed to account for his rehabilitative potential, history of steady employment, expression of remorse, and initiative in seeking treatment. However, 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). A trial court is not required to give greater weight to defendant's rehabilitative potential and other mitigating factors than to the circumstances of the offense. See *Alexander*, 239 Ill. 2d 205.

¶ 28 In reviewing defendant's sentence, we presume that the trial court considered all relevant factors in sentencing defendant. Additionally, the record supports this presumption. The trial court explicitly considered defendant's rehabilitative potential. However, the trial court found that defendant's conduct caused serious harm to the victims and was aware of defendant's alleged previous criminal conduct toward his young son and cousin. The court specifically found the following factors in aggravation: (1) defendant's conduct caused serious harm; (2) defendant used his position of trust to commit the crime; and (3) there was a need to deter others from committing the same conduct. See 730 ILCS 5/5-5-3.2 (West 2008) (providing facts in aggravation to be weighed in favor of imposing imprisonment or a more severe sentence). The record shows the trial court appropriately considered all relevant evidence in mitigation and aggravation when sentencing defendant.

¶ 29 Furthermore, the trial court did not err in ordering defendant to serve consecutive sentences. Except where consecutive sentences are mandatory, the court shall impose concurrent sentences unless the nature and circumstances of the offense and the history and character of the defendant indicate that consecutive sentences are required to protect the public from further criminal conduct by the defendant, the basis for which the court shall set forth in the record. See 730 ILCS 5/5-8-4(b) (West 2008). The trial court found that defendant's actions were an intentional "calculated and cunning entrapment of these girls." The nature and the circumstances surrounding defendant's conduct demonstrated a need to protect the public from further criminal conduct by defendant. Therefore, the court's order that defendant would have to fulfill his potential for rehabilitation from prison was appropriate.

¶ 30 In light of the record in this case and the nature of the offense, the trial court did not

abuse its discretion in sentencing defendant. Accordingly, we affirm.

¶ 31

CONCLUSION

¶ 32 For the foregoing reasons, the judgment of the circuit court of Tazewell County is affirmed.

¶ 33 Affirmed.