

No. 1-12-3297

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 09 CR 21625
)	
JOSE CANCHOLA,)	Honorable
)	Charles P. Burns,
Defendant-Appellant.)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Lavin and Epstein concurred in the judgment.

O R D E R

¶ 1 *Held:* Trial court's statements regarding the age of the minor victim and defendant's role as victim's stepfather during defendant's sentencing hearing for predatory sexual assault and criminal sexual assault did not reflect improper double enhancement where the court was commenting upon the seriousness of the offense.

¶ 2 Following a jury trial, defendant Jose Canchola was found guilty of two counts of predatory criminal sexual assault and two counts of criminal sexual assault and was sentenced to an aggregate term of 36 years' imprisonment. Defendant appeals, contending he was improperly

subjected to a double enhancement because the age of the victim and his position as the victim's stepfather were used as an element of the offense and as an aggravating factor during sentencing.

¶ 3 We will limit our discussion of the facts to those necessary for resolving defendant's contention of improper double enhancement. Y.F. testified that she was 23 years old at the time of trial and that defendant was her stepfather during the course of the sexual abuse. Y.F. was two or three years old when defendant and her mother, Rosa, were married. She lived with defendant and their family on Pratt Street in Chicago for many years, until age 14, when they moved to Zion, Illinois. Y.F. and her younger sister, M.O., are defendant's only stepchildren.

¶ 4 Y.F. testified that beginning in May 1999, during the week of Holy Communion, when Y.F. was 11 or 12 years old, defendant had sexual intercourse with Y.F. Within a month later, defendant had oral sex with both Y.F. and her younger sister, M.O., who was 9 or 10 years old at the time. This continued until Y.F. was 18 years old. The acts started when Y.F. did something wrong and then defendant would punish her or strike her, and then he would attempt to apologize by having sex with her. Defendant had sex with Y.F. just about every day, sometimes while Y.F.'s mother was home.

¶ 5 M.O. testified that defendant sexually abused her as well, including oral and vaginal penetration. At one point, while living on Pratt Street in Chicago, defendant sexually assaulted both girls in each others' presence. Defendant abused M.O. from the time that she was about 9 or 10 years old living on Pratt in Chicago until she was about 16 or 17 years old, living in Zion. Defendant was not charged with the abuse of M.O.

¶ 6 Detective Castaneda testified that during the course of his investigation, he interviewed defendant three times. During the interviews, defendant admitted to having vaginal, oral, and

also attempted anal sexual intercourse with Y.F. and M.O. on several occasions, in Chicago and in Zion. Defendant told the detective that the abuse started with M.O. when she was nine years old and that he started abusing the girls around the same time, when they all lived in Chicago.

¶ 7 The jury returned guilty verdicts on four counts: two counts of predatory criminal sexual assault for penis to vagina and penis to mouth contact while Y.F. was a child under 13 of age, and two counts of criminal sexual assault for penis to vagina and penis to mouth contact where defendant held a position of trust, authority, or supervision in relation to Y.F.

¶ 8 During sentencing, the State presented in aggravation Y.F.'s victim impact statement and defendant's two prior convictions for domestic battery in which he was sentenced to conditional discharge. In mitigation, defendant presented letters from his biological children who wrote defendant while he was in jail awaiting trial and sentencing, telling defendant they loved and missed him. Additionally, defendant stated in allocution: "Your Honor, I would like to say that I am not a rapist. I am not a pedophile, or a child molester. I'm not a danger to society or to the community, your Honor. Thank you." The trial court stated the following while making its findings regarding defendant's sentence:

"Judging many of these factors, the Court takes the following matters under consideration: I take into consideration that I believe his abuse continued for a series of years. It occurred during a period of time when the victim in this matter was very, very young, up to the time where she was able to come forward and relate the horrors that she suffered for many years to the authorities.

I take into consideration also that the defendant is the stepfather of the victim. There are certain societal responsibilities that we all have as adults. We also have moral responsibilities as parents and stepparents. And those moral responsibilities are to protect those people that are underneath our care, not, to abuse them, not to prey on them, not to use them as pawns or as toys or little sexual favors.

I take into consideration that I believe this abuse went on repeatedly when the person was of a very young age in grade school and leading into her teen years.

The victim impact statement that I'm considering is *** what the emotional, and physical, and lifelong affects the abuse that was committed by [defendant] has on [Y.F.]. This abuse is with her today. It's something she's carrying, and I would hope at some point in time it would diminish and hopefully dissipate but the bottom line is, [defendant] you stole the innocence of this young girl's life. And this young girl will never ever be the same.

*** I don't believe anything you told me in aggravation (*sic*). I do believe you're a predator. I believe you're a child molester. I saw that girl testify in front of me. And also the jury found her credible herself.

*** [I]t's part of my job not only to punish you, to protect others from people like you and particularly protect people from you.”

The trial court then sentenced defendant to 36 years' imprisonment, 10 years each for two counts of predatory criminal sexual assault and 8 years each for two counts of criminal sexual assault, with three years to life of mandatory supervised release. Defendant filed a motion to reconsider sentence, which the trial court denied, but defendant did not raise the instant issue in that motion. Defendant appeals.

¶ 9 On appeal, defendant contends the trial court improperly considered a factor during sentencing that was inherent in the offenses of predatory criminal sexual assault and criminal sexual assault where the trial court mentioned that Y.F. was 11 years old when the abuse started and that defendant was Y.F.'s stepfather during the course of the abuse.

¶ 10 To preserve a claim of sentencing error, a defendant must object to the error at the sentencing hearing as well as raise the objection in a sentencing motion. *People v. Freeman*, 404 Ill. App. 3d 978, 994 (2010), citing *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). Defendant acknowledges he failed to preserve this issue for appeal where he did not raise the issue in his motion to reconsider sentence, and therefore asks this court to review his claim under the plain error doctrine. See *Hillier*, 237 Ill.2d 539, 544 ("To preserve a claim of sentencing error, both a contemporaneous objection and a written postsentencing motion raising the issue are required."). To show plain error in sentencing, a defendant must 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." *Hillier*, 237 Ill. 2d at 545. However, if there is no error,

there can be no plain error; therefore, we must first determine whether there was error. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007); see also *People v. Chapman*, 194 Ill. 2d 186, 226 (2000). For the reasons that follow, we conclude that there is no plain error.

¶ 11 A factor implicit in the offense for which the defendant has been convicted cannot be used as an aggravating factor in sentencing for that offense. *People v. Phelps*, 211 Ill. 2d 1, 11-13 (2004). Doing so results in an improper "double enhancement." *Id.* The parties dispute the standard of review this court should apply. The State contends that an abuse of discretion standard applies here because defendant is contesting the weight that the trial court gave to the aggravating factor. Defendant, however, argues that the appropriate standard is *de novo* review. We apply a *de novo* standard of review because defendant has asked this court to determine whether the trial court applied an improper factor during sentencing, resulting in a double enhancement, which is an issue of statutory interpretation. See *Phelps*, 211 Ill. 2d at 12 (applying *de novo* review because the double enhancement rule is one of statutory construction); *People v. Guevara*, 216 Ill. 2d 533, 545 (2005) ("The prohibition against double enhancements is a rule of statutory construction, premised on the assumption that the legislature considered the factors inherent in the offense in fashioning the appropriate range of punishment for that offense.").

¶ 12 A person commits predatory criminal sexual assault of a child if the accused was 17 years old or over and commits an act of sexual penetration with a victim who was under 13 years old when the act was committed. 720 ILCS 5/12-14.1(a)(1) (West 2010). Additionally, a person commits criminal sexual assault if he commits an act of sexual penetration with a victim who was at least 13 years but under 18 years of age when the act occurred and the accused was 17

years old or over, and “held a position of trust, authority, or supervision in relation to the victim.”

¶ 13 Where the trial court relies on the victim’s age as a factor in aggravation and the victim’s age is also an element of the offense, this reliance is improper. See *People v. White*, 114 Ill. 2d 61, 67 (1986). Yet, reliance on an improper factor in sentencing does not always necessitate remand for resentencing. *Id.* “Where the reviewing court is unable to determine the weight given to an improperly considered factor, the cause must be remanded for resentencing.” *People v. Johnson*, 347 Ill. App. 3d 570, 576 (2004). Remand is not required, however, where it is clear from the record that “the weight placed on such an improperly considered aggravating factor was so insignificant it resulted in no increase in the defendant’s sentence.” *Id.*

¶ 14 Illinois courts of review have held that in certain circumstances, trial courts did not err in considering the age of the victim in sentencing where the victim’s age was already an element of the offense. See *People v. Thurmond*, 317 Ill. App. 3d 1133, 1144-45 (2000) (finding that the trial court did not err in recognizing that the victim was “particularly young” at the time of the offense and noting that while an act of sexual penetration on a 17-year-old family member is reprehensible, an act of sexual penetration on a 7-year-old family member is even more reprehensible); see also *People v. Spicer*, 379 Ill. App. 3d 441, 468 (2007 (following *Thurmond* and concluding that “[j]ust as a trial court may consider whether a sexual assault victim was particularly young, a trial court may also consider whether a victim was particularly senior”).

¶ 15 Here, defendant argues that the following statement by the trial court means that it considered Y.F.’s age in aggravation, resulting in a double enhancement: “I take into consideration that I believe this abuse went on repeatedly when the person was of a very young

age in grade school and leading into her teen years.” When reviewing the entire statement of the court’s findings, we find that the trial court was commenting upon the significant impact that the abuse had on Y.F., particularly because it occurred over the course of many years. The evidence showed that the abuse occurred from the time Y.F. was about 11 years old until she was 18. The trial court noted also considered Y.F.’s victim impact statement, and considered the emotional, physical and “lifelong affects” the abuse had on Y.F. The court stated, “It’s something she’s carrying, and I would hope at some point in time it would diminish and hopefully dissipate but the bottom line is, [defendant] you stole the innocence of this young girl’s life. And this young girl will never ever be the same.” The trial court properly considered the severity of the abuse and the significant impact that it had, and will continue to have, on Y.F.

¶ 16 The court emphasized the need to not only punish defendant for the many, repeated crimes he committed against Y.F., but it also explained that the court had to protect others from defendant, particularly because defendant continued to deny that he was a “child molester,” “rapist,” or “pedophile,” despite admitting the same to police, and despite being found guilty of multiple offenses of this very nature.

¶ 17 Defendant also contends that the trial court improperly considered his role as Y.F.’s stepfather in aggravation. The trial court stated:

“I take into consideration also that the defendant is the stepfather of the victim. There are certain societal responsibilities that we all have as adults. We also have moral responsibilities as parents and stepparents. And those moral responsibilities are to protect those people that are underneath our care, not to abuse

them, not to prey on them, not to use them as pawns or as toys or little sexual favors.”

The trial court was commenting upon the degree of trust defendant held over Y.F., which leads to consideration of the nature and circumstances of the egregious crimes defendant committed against Y.F. The evidence showed that defendant was the only father that Y.F. had known, and defendant’s abused this relationship when he should have been protecting it and Y.F. See, *e.g.*, *People v. Burke*, 226 Ill. App. 3d 798, 799 (1992) (reviewing court ruled that trial court’s properly considered the defendant’s position as victim’s stepfather as an aggravating factor where the defendant owed the victim a special duty of protection of his children). In addition to considering the severity of the abuse, the trial court also considered the mitigating circumstance that defendant’s absence from his family would have a negative impact on his biological children. The court also considered defendant’s prior convictions for domestic battery.

¶ 18 Individual statements made by the trial court during sentencing cannot be separated out, as defendant attempts to do, in order to argue that the trial court elevated defendant’s role as Y.F.’s stepfather to impose a greater sentence. Rather, these statements must be read in context. We find that, when read in conjunction with the court’s entire statement regarding its findings and with evidence provided in the record, the trial court was commenting upon the seriousness of the offense by highlighting the trauma Y.F. experienced and continued to experience at the time of trial. See *People v. Sims*, 403 Ill. App. 3d 9, 24 (2010) (noting that reviewing courts should consider comments made regarding aggravating factors in connection with the entire record, and finding a seemingly improper comment by the trial court regarding the defendant’s gang member status to be proper because it was “made in the greater context of evaluating the nature and

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seriousness of the offense.”) Accordingly, we find that the trial court did not improperly consider Y.F.’s age or defendant’s role as her stepfather as aggravating factors resulting in a double enhancement.

¶ 19 Based on the foregoing, we affirm the judgment of the circuit court of Cook County sentencing defendant to 36 years’ imprisonment for two counts of predatory criminal sexual assault and two counts of criminal sexual assault to a child.

¶ 20 Affirmed.