FIRST DIVISION
DECEMBER 7, 2015

No. 1 -13-3891

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. 12 CR 14168
	)	
LEON GUTIERREZ,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's 21-year sentence for the Class X felony of aggravated criminal sexual assault is affirmed; the fines and fees order was ordered corrected to reflect the court's award of presentence incarceration credit, the offset of certain fines against that credit, and vacation of the $250 DNA analysis charge.

¶ 2 Following a bench trial, defendant Leon Gutierrez was found guilty of aggravated criminal sexual assault and sentenced to 21 years in prison. On appeal, defendant contends that his sentence was excessive where the trial court failed to sufficiently consider his rehabilitative potential. Defendant also requests that we: (1) amend the order assessing fines and fees to reflect

the amount of his presentence custody credit; (2) offset certain fines from that credit, including fines that he argues were improperly imposed as fees; and (3) vacate the $250 DNA analysis charge. We affirm defendant's sentence and order corrections to the fines and fees order.

¶ 3 The facts adduced at trial established that the 25-year-old complainant, A.B., was drinking with friends at a bar on Chicago's north side in the early morning hours of July 4, 2012. At about 3 a.m., she left the bar and began to walk home. As she walked along Lake Shore Drive, a man approached her from behind. He grabbed her and pushed her to the ground, and she hit her head. The man had his hands on her throat, choking her. She felt her pants slipping down and something going in her mouth.

¶ 4 Christopher Casibang, his brother, and his friend Michael were walking along Lake Shore Drive and observed a bicycle lying on the pathway. They walked past a woman and a man, whom they later learned were A.B. and defendant. A.B. was leaning on a window ledge and defendant was leaning over her. The woman's pants were below her knee. Casibang and the other two men stopped when Casibang heard the woman emit "a scared cry." Two other men, Mauro Villanueva and David Gombert, came walking along and saw defendant and A.B. Villanueva noticed that A.B. was struggling to get away. Gombert phoned the police. Casibang conferred with Villanueva and Gombert. He then approached defendant, tapped him on the shoulder, and asked, "Hey, bro, is everything ok?" Defendant replied, "Yeah, dude, everything's okay." "I got this." Casibang asked A.B. whether she knew defendant. She looked very scared. He asked her again whether she knew defendant. She shook her head no and tried to scream but could not. A struggle ensued, defendant ran away, and Casibang and Michael followed and subdued him, pinning him to the ground until police arrived.

¶ 5 A.B. ran into the lobby of a nearby apartment building and huddled in a corner, hysterical and crying; she was hyperventilating and could not catch her breath. She was afraid to leave the building, even after the police arrived and coaxed her to come with them. A.B. was taken to a hospital, where she was treated. She had extensive bruising on her neck, a big bruise where she hit her head, scratches and bruises on her leg, arms and torso, and a black eye. Hospital emergency room personnel utilized a sexual assault kit. Photographs of A.B.'s injuries were taken at the hospital and were admitted at trial.

¶ 6 Following defendant's arrest, he provided a written statement to two police detectives and an assistant State's Attorney. Defendant stated that he had been drinking that night and was riding his bike near Lake Shore Drive when he noticed a girl walking on the sidewalk and was attracted to her. He approached her, got off his bike and pushed it as he walked next to her, talking to her. Then he dropped his bicycle on the sidewalk, picked up the girl and carried her to a window ledge on a nearby building. Defendant pulled down the girl's pants, and she fell to the ground. Defendant pulled down his pants and placed his penis in her mouth. He grabbed the girl around her head with both his hands so the girl did not fall down. The girl was crying. When defendant saw some guys close by, he spoke to the girl so the guys would think he and the girl knew each other and would leave them alone. Defendant stated he was sorry for what he did and offered to help pay for the girl's hospital bills and counseling.

¶ 7 Subsequent to defendant's arrest, the police retrieved video surveillance footage from cameras mounted outside on two nearby buildings and cameras inside the lobby of the building where A.B. sought refuge. The videos were played at trial, and the various video clips depicted the entire course of events from the beginning, showing defendant riding his bike and then

walking next to A.B., to when police officers handcuffed defendant and placed him in a police vehicle. The court also viewed video from inside the building lobby, depicting the frightened A.B. being coaxed out of the lobby by two female police officers.

¶ 8 Analysis of the contents of the sexual assault kit revealed that no semen was found on the swabs, and tests for saliva were inconclusive. Defendant could not be excluded as a possible contributor of a partial minor male deoxyribonucleic acid (DNA) profile from four swab samples collected from areas of A.B.'s body where she stated she was kicked or licked by defendant, compared to an oral swab taken from defendant.

¶ 9 The court found defendant guilty on Count 2 (aggravated criminal sexual assault causing bodily harm) and Count 8 (aggravated battery, strangling). Defendant's motion for a new trial was denied. A presentence investigation (PSI) report showed that defendant was 40 years old, divorced, and the father of three daughters. The PSI detailed defendant's history of alcohol abuse since the age of 14, with alcohol being involved in most of his prior arrests, including multiple DUI arrests. The report noted that "[t]he only treatment that he has received is attending AA meetings in 2009 and in 2012 at Sheridan Correctional Center." Defendant reported some childhood "physical abuse at the hands of his mother," but no neglect, DCFS involvement or runaway situations. Defendant's father, who died in 2013, abused alcohol during his life. Defendant graduated from Farragut High School, after which he attended an 18-month training program at Lincoln Tech to become an auto mechanic. He had a consistent employment record. At the time of defendant's arrest in 2012, he was employed by Jiffy Lube and was earning about $2,200 a month. He previously worked as a server in restaurants in the Chicago area, and also worked at an oil refinery and a restaurant in Houston, Texas.

¶ 10 Defendant's criminal history was extensive. In 1993, he was found guilty of DUI and sentenced to 18 months conditional discharge. Two weeks later he was found guilty of driving on a suspended or revoked license and sentenced to jail. In 1998 he was found guilty of driving on a suspended or revoked license and was sentenced to jail. In March 1999, he was found guilty of domestic battery and was sentenced to one year conditional discharge. In 2003, he was found guilty of DUI and driving on a revoked or suspended license and was sentenced to 150 days in jail and two years probation. Later in 2003, while on probation, he pled guilty to DUI and was sentenced to 114 days in jail, time considered served. His probation was revoked and he was sentenced to 160 days in jail. In 2004, in Texas, he pled guilty to possession of a controlled substance and was sentenced to 90 days confinement. In 2005, he was convicted of drinking alcohol on the public way and sentenced to one day in jail. In February 2007, he was found guilty on two separate counts of DUI and received suspended jail sentences and probation for each offense. In 2007, while on probation, he pled guilty to aggravated DUI and was sentenced to three years in prison. In October 2009, he pled guilty to aggravated DUI and was sentenced to six years in prison. He was on mandatory supervised release (MSR) for that offense when he committed the instant crime in 2012.

¶ 11 The State argued that the victim had bruises about her body and suffered penetration of defendant's penis in her mouth. The State informed the court of defendant's criminal history including his 2009 Class X conviction that made him eligible for an extended prison sentence. The State argued that defendant's prior convictions and sentences had not deterred him from committing subsequent offenses.

¶ 12 In mitigation, defense counsel informed the court that alcohol had played a negative role in defendant's life, including this incident, and that the only treatment he had received for this was Alcoholics Anonymous (AA) in 2009 and 2012 at Sheridan Correctional Center. Counsel stressed defendant's education and good employment history, and the fact he bought a house when he was just 24 and sold it when he was 30. Counsel argued that defendant had three young children and wanted to be part of their lives.

¶ 13 Defendant gave a statement in allocution, in which he apologized for what happened. He stated that he had been close to his late father, who was dying of liver cirrhosis at the time of the July 2012 offense. On the night of the offense, defendant got drunk because he could not face the reality that his father was going to die. Defendant stated he was going to AA but said, "I just stopped going and I was taking my dad to the hospital once a week." His father died in January 2013. Defendant missed his father's funeral because he was drunk. He said that after prison, he wanted to "[g]o to AA, live if I could just go to AA every single day of my life. Every week and twice a week I can stay in AA for the rest of my life and get some real help."

¶ 14 In sentencing defendant, the court began by stating that it had "looked at the presentence investigation [report], paid attention to the arguments presented in sentencing and in aggravation and mitigation," and listened to defendant's statement in allocution. The court also stated it had "taken into account the statutory factors in aggravation, also statutory factors in mitigation and non[-]statutory factors in mitigation." The court determined it would not impose an extended sentence. Defendant was sentenced on Count 2, aggravated criminal sexual assault, to 21 years in prison and a 3-year term of MSR. No sentence was imposed on the aggravated battery count. The

court awarded defendant presentence custody credit of 478 days and imposed $809 in fines, fees and costs. Defendant filed a motion to reconsider sentence, which the court denied.

¶ 15 On appeal, defendant does not challenge his conviction; he contests only his sentence, including the prison term, presentencing incarceration credit, and certain monetary charges. Defendant first contends that the trial court abused its discretion in imposing an excessive sentence of 21 years in prison by failing to sufficiently consider and act upon mitigating evidence demonstrating rehabilitative potential. He asks this court to reduce his sentence or, alternatively, to vacate his sentence and remand for a new sentencing hearing. The State responds that the sentence was within the applicable statutory range and was based on all relevant factors in aggravation and mitigation, and that it was appropriate given the violent nature of the offense, defendant's extensive criminal conviction history, and his eligibility for an extended-term sentence.

¶ 16 Generally, the trial court is in a better position than a court of review to determine an appropriate sentence based on the particular circumstances of each case. *People v. Kennedy*, 336 Ill. App. 3d 425, 433 (2002). The trial court has broad discretionary powers in imposing a sentence. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). We accord the trial court great deference with respect to its role in balancing factors in aggravation and mitigation in order to craft a proper sentence. *People v. Burnette*, 325 Ill. App. 3d 792, 807-08 (2001), citing *People v. Illgen*, 145 Ill. 2d 353, 379 (1991). Therefore, a reviewing court may not modify a defendant's sentence absent an abuse of discretion. *Alexander*, 239 Ill. 2d at 212. If the sentence imposed is within the statutory range, it will not be deemed excessive unless it is greatly at variance with the

spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. *People v. Fern*, 189 Ill. 2d 48, 54 (1999).

¶ 17 A sentencing judge imposes criminal penalties according to the seriousness of the crime and with the objective of restoring the offender to useful citizenship. Ill. Const. 1970, art. I, § 11. This requires courts to do more than consider rehabilitative factors, but to actually act on those factors. *People v. Jackson*, 2014 IL App (1st) 123258, ¶ 48. However, the sentencing court is not required to give greater weight to a defendant's rehabilitative potential than it affords the seriousness of the offense. *Id.*; *People v. Coleman*, 166 Ill. 2d 247, 261 (1995). The rehabilitative potential of a defendant is only one of the factors needed to be weighed in deciding a sentence. *People v. Evans*, 373 Ill. App. 3d 948, 968 (2007). In fact, the seriousness of the offense is considered the most important factor in determining a sentence. *Id.* We presume, in the absence of evidence to the contrary, that the sentencing court considers mitigation evidence when it is presented. *People v. Burton*, 184 Ill. 2d 1, 34 (1998); *Jackson*, 2014 IL App (1st) 123258, ¶ 53. The trial court is not required to detail precisely for the record the exact process by which it determined the penalty, nor is it required to articulate consideration of mitigating factors. *People v. Quintana*, 332 Ill. App. 3d 96, 109 (2002). A defendant's rehabilitative potential may be so minimal that it need not be reflected in the sentence the court actually imposes. *People v. Shumate*, 94 Ill. App. 3d 478, 485 (1981).

¶ 18 After reviewing the record, we conclude defendant has failed to demonstrate that the sentencing court failed to give the proper weight to evidence in mitigation of sentence. The mitigating factors which defendant claims the sentencing court failed to consider adequately were his education, work history, difficult upbringing, lack of prior violent crime history, severe

alcoholism addiction, acceptance of responsibility and expression of remorse. Each of these factors was known to the trial court, either from the PSI or argument of counsel or defendant's statement in allocution. The trial court expressly stated at the outset of imposing sentence that it had read the PSI report, heard the arguments presented by counsel in aggravation and mitigation, specifically noted it had listened to defendant's statement in allocution, and had considered the statutory factors in aggravation together with all factors in mitigation of sentence. Even if the court did not explicitly set out each factor it considered in mitigation of defendant's sentence, we may presume that the trial court weighed all relevant factors in determining a sentence. *People v. Payne*, 294 Ill. App. 3d 254, 260 (1998). Here, the presumption was not overcome where the record contains no explicit evidence that mitigating factors were not considered by the court. See *People v. Flores*, 404 Ill. App. 3d 155, 158 (2010).

¶ 19 Defendant contends, nevertheless, that the sentencing judge abused his discretion in imposing what he deems is an excessive prison sentence because the judge failed to sufficiently consider, and act upon, what defendant characterizes as "significant evidence of [his] rehabilitative potential." We disagree. The evidence of rehabilitative potential here was minimal and was balanced against aggravating factors that supported the imposition of a term greater than the minimum, including the serious nature of the offense (the victim was choked and sustained other injuries), defendant's extensive criminal record, and his eligibility to be sentenced to an extended prison term. Defendant was convicted of the instant Class X felony in 2012 after previously having been convicted in 2009 of a Class X felony and, consequently, he was eligible to receive an extended term of imprisonment. Thus, the permissible prison sentence ranged from 6 to 60 years in prison. 730 ILCS 5/5-5-3.2(b)(1) (West 2012). Where, as here, a sentence

imposed is within the statutory range, this court may find an abuse of discretion only when the sentence is "greatly at variance with the purpose and spirit of the law." *People v. Sharp,* 2015 IL App (1st) 130438, ¶ 134. Here, the sentencing judge declined to impose an extended sentence but instead imposed a sentence that was little more than one-third the possible maximum allowable sentence, even though defendant had been serving a period of MSR from his 2009 Class X conviction when he committed the present offense.

¶ 20 Defendant relies on several cases where the trial court was held to have abused its discretion by imposing an excessive sentence despite the defendant's young age, drug addiction, unstable upbringing, no prior convictions or lack of violent criminal record, and rehabilitative potential. The State responds that in *Fern*, 189 Ill. 2d at 62, our supreme court rejected the use of comparative sentencing from unrelated cases as the basis for claiming that a specific sentence is excessive or that the sentencing court abused its discretion. We agree with the State. Further, although defendant claims on appeal that his prior convictions were all non-violent, the record shows that in 1999 he was found guilty of domestic battery. Moreover, the sentencing judge was not compelled to ignore the violent nature of the instant case, where the victim sustained physical and emotional injury.

¶ 21 Based on the above facts and in light of defendant's prior criminal history and long-time alcohol abuse, we find his sentence was not manifestly disproportionate to the nature of the offense and that the court did not abuse its discretion in sentencing him to 21 years for aggravated criminal sexual assault. The sentence was clearly within the statutory guidelines and was neither at variance with the spirit and purpose of the law nor manifestly disproportionate to

the offense. Accordingly, we find no abuse of sentencing discretion and we decline to reduce defendant's sentence or to remand the cause for a new sentencing hearing.

¶ 22 Defendant next contests the imposition of certain fees. We review the propriety of a trial court's imposition of fines and fees *de novo*. *People v. Price*, 375 Ill. App. 3d 684, 697 (2007).

¶ 23 Initially, defendant contends, and the State agrees, that he is entitled to a $2,390 credit, based on a statutory $5-per-day credit for enumerated fines assessed against him, for the 478 days of presentence custody that the trial court awarded him. 725 ILCS 5/110-14(a) (West 2012). However, defendant's fines and fees order does not reflect the credit or appropriate reductions applied against certain fines. The order should be amended to reflect the $2,390 credit, which should be applied against the four fines listed on the order: $10 Mental Health Court (55 ILCS 5/5-1101(d-5) (West 2012)); $5 Youth Diversion/Peer Court (55 ILCS 5/5-1101(e) (West 2012)); $5 Drug Court (55 ILCS 5/5-1101(f) (West 2012)); and $30 Children's Advocacy Center (55 ILCS 5/5-1101(F-5) (West 2012)).

¶ 24 Defendant further contends he was assessed three additional fees which are actually fines that should be offset by the presentence custody credit: the $2 Public Defender Records Automation fee pursuant to section 3-4012 of the Counties Code (the Code) (55 ILCS 5/3-4012 (West 2012)); the $2 State's Attorney Records Automation fee (55 ILCS 5/4-2002(a) (West 2012)); and the $25 Court Services (Sheriff) fee (55 ILCS 5/5-1103) (West 2012).

¶ 25 This court has had cause to consider the distinguishing characteristics of a fine and those of a fee or cost:

> "A 'fine' is a pecuniary punishment imposed as part of a sentence on a person convicted of a criminal offense. (Citation.) A

> 'cost' is a charge or fee taxed by a court ***. Unlike a fine, which is punitive in nature, a cost does not punish a defendant in addition to the sentence he received, but instead is a collateral consequence of the defendant's conviction that is *compensatory in nature*. (Citation.) A 'fee' is a charge for labor or services, especially professional services. (Citation.)" (Emphasis added.) *People v. White*, 333 Ill. App. 3d 777, 781 (2002). Accord *People v. Jones*, 223 Ill. 2d 569, 581-82 (2006).

¶ 26 The first two charges which defendant challenges as being fines, not fees, are the $2 Public Defender Records Automation fee and the $2 State's Attorney Records Automation fee. We have considered and rejected this same argument previously, holding that both of these charges constitute fees, not fines. *People v. Bowen*, 2015 IL App (1st) 132046, ¶¶ 62-65. We have no reason to depart from that holding here.

¶ 27 The third charge challenged by defendant as being a fine, not a fee, is the $25 Court Services (Sheriff) assessment because "[t]he assessment does not compensate the State for the cost of prosecuting [him]." The opening sentence of section 5-1103 states that the court services fee is "dedicated to defraying court security expenses incurred by the sheriff in providing court services or for any other court services deemed necessary by the sheriff to provide for court security ***." The fee is payable in civil cases at the time the initial pleading is filed. The fee is also assessed in criminal cases upon any judgment of conviction. *People v. Adair*, 406 Ill. App. 3d 133, 144 (2010). The statute states in pertinent part: "All proceeds from this fee must be used to defray court security expenses incurred by the sheriff in providing court service. *** The fees

shall be collected in the manner in which all other court fees or costs are collected and shall be deposited into the county general fund for payment solely of costs incurred by the sheriff in providing court security ***." Based on the plain language of the statute, we have held that the legislature's clear intent in enacting the Court Services fee was to defray the expense of courtroom security. *Id.* It is a charge for the labor or services of the sheriff who provides courtroom security. In addition to being assessed in criminal cases after guilty findings, the fee is assessed in all civil cases at the outset of litigation when a civil pleading is filed; assessment is not limited to specific cases as a "civil penalty." Consequently, the fee is not a fine where it is not punitive in nature, and it cannot be offset by the custody credit earned by defendant.

¶ 28 Finally, defendant contends, and the State agrees, that the $250 State DNA ID System analysis charge pursuant to section 5-4-3(j) of the Unified Code of Corrections (730 ILCS 5/5-4-3(j)) (West 2012)) must be vacated because defendant had prior felony convictions that would have required a specimen of his DNA to be taken. The State represents that defendant currently is registered in the DNA database. Consequently, defendant was not required to submit another sample or pay another DNA analysis fee. *People v. Marshall*, 242 Ill. 2d 285, 302 (2011).

¶ 29 Pursuant to Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999) and our authority to correct a mittimus without remand (*Bowen*, 2015 IL App (1st) 132046, ¶ 68), we direct the clerk of the circuit court to correct the fines and fees order to reflect a presentence custody credit of $2,390 from which to satisfy his $10 Mental Health Court fine, $5 Youth Diversion/Peer Court fine, $5 Drug Court fine, and $30 Children's Advocacy Center fine; we vacate the portion of the order imposing a $250 State DNA ID System analysis fee. We affirm the judgment of the circuit court of Cook County in all other respects.

¶ 30 Affirmed; fines and fees order corrected.