2015 IL App (4th) 130717-U

NO. 4-13-0717

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
June 8, 2015
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
ANTWON D. WEATHERSPOON,	)	No. 13CF168
Defendant-Appellant.	)	
	)	Honorable
	)	John C. Costigan,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Holder White and Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding (1) defendant was not entitled to plain-error review because the trial court did not err in ruling on defendant's motion *in limine*; and (2) the trial court did not improperly consider a factor inherent in the offense at sentencing.

¶ 2 In May 2013, following a bench trial, defendant, Antwon D. Weatherspoon, was convicted of criminal sexual assault and sentenced to seven years' imprisonment. Defendant appeals, arguing the trial court (1) abused its discretion where it waited until minutes before he testified to decide whether his prior convictions would be admissible; and (2) improperly utilized a factor inherent in the offense to aggravate his sentence. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In February 2013, the State indicted defendant on one count of criminal sexual assault (720 ILCS 5/11-1.20(a)(2) (West 2012)), in that he "committed an act of sexual

penetration by putting his fingers in the vagina of [J.R.] knowing at that time she could not give consent." In April 2013, the State indicted defendant on one count of residential burglary (720 ILCS 5/19-3(a) (West 2012)). In May 2013, defendant filed a motion to dismiss the residential burglary charge, which the trial court granted.

¶ 5 A. Motion *in Limine*

¶ 6 On May 13, 2013—the day of defendant's trial—defendant filed a motion *in limine* to bar evidence of his prior convictions for domestic battery and criminal trespass to residence. Defendant's motion claimed any probative value of introducing the prior convictions was far outweighed by the negative prejudicial effect the convictions would have on his right to a fair trial.

¶ 7 The trial court noted defendant had filed the motion *in limine* and the following exchange occurred prior to defendant's trial:

> "THE COURT: Ms. Patton, any anticipation that the State plans to bring up any priors of Mr. Weatherspoon prior to his election to testify in this case?
>
> [THE STATE]: If the defendant does elect to testify we would be asking to bring up—Mr. Brown has it cited as a 2004 domestic battery case, it's actually 2005 CF 777 in which he was convicted of domestic battery on 9/9 of 2005 and also the 2011 case is 2011—those are both McLean County cases—
>
> THE COURT: Just so we can get started with things, you don't plan to mention any priors prior to him testifying, am I correct on that?

[THE STATE]: Oh no, sorry.

THE COURT: So I'll take that up prior to Mr. Weatherspoon making the election to testify so he'll know whether or not."

¶ 8 Defendant's case proceeded to *voir dire*, and after hearing a few questions asked of prospective jurors, defendant elected to proceed to a bench trial. Prior to defendant's election to testify, the trial court ruled on defendant's motion *in limine*.

"THE COURT: All right, thank you. The court has considered the motion in limine and *** the case of *People vs. Montgomery*, 47 Ill. 2d 510, 1971, Supreme Court case, and the factors in the—in conducting the *Montgomery* analysis.

The court notes these are two felony convictions. The court knows that is [*sic*] a central issue in this case is the credibility of witnesses that come before the court. As counsel has mentioned, this case started off as a jury case and has subsequently proceeded to a bench trial at this point in time. The court feels more than capable of going ahead and setting aside the matters that need to be set aside in deciding this case on what it needs to be decided on and the court thinks that the probative value of the prior convictions does outweigh any potential prejudice to Mr. Weatherspoon in having these matters brought up. So the motion in limine will be denied and the State will be allowed to bring up

the two cases that meet the *Montgomery* standards for introduction. So the court will allow that to take place.

Mr. Weatherspoon, I do want you to understand if you do elect to testify, the State will be allowed to bring up these two prior cases to me and inform me that they are in existence and use those to impeach your credibility. That is what they would be seeking to use these cases for. So I do want to inform you that they would be allowed to bring those up before you make your final decision to testify and you understand that, is that right?

[DEFENDANT]: Yes.

THE COURT: Knowing that, if you need more time to consult with Mr. Brown at this point in time to make a decision as to whether you wish to testify sir?

[DEFENDANT]: No.

THE COURT: Knowing everything that you know at this point in time, is it your desire to testify?

[DEFENDANT]: Yes."

¶ 9 B. Evidence Presented At Trial

¶ 10 The following evidence was adduced at defendant's May 13, 2013, bench trial.

¶ 11 1. *J.R.'s Testimony*

¶ 12 The complaining witness, J.R. testified first for the State. J.R. testified, on November 22, 2013 (Thanksgiving), she invited approximately 15 people over to her house for Thanksgiving dinner, including defendant and his girlfriend. She testified she had known

defendant for five or six years and considered him family. She explained he was like a brother, was always willing to help out with her children, and is the godfather to her youngest child. Defendant has been her boyfriend's best friend since elementary school, and his sister was one of her best friends growing up.

¶ 13 On Thanksgiving night, J.R. was drinking Hennessy and Red Bull. She explained everyone ate dinner and had some drinks, but people began leaving somewhere after 12 a.m. (midnight). J.R. explained she was extremely drunk, but she remembered asking defendant and his girlfriend, Rose Brown, to get her cigarettes before they left. The next thing J.R. remembered was being awakened to her pants pulled down and defendant's tongue and fingers inside her vagina. She testified she told defendant to stop, pushed her legs, and told him to leave, but he would not do so. Instead, he climbed on top of her and tried to kiss her and convince her it would be okay because her boyfriend "slept with [his] baby mama years ago." J.R. testified defendant still would not leave and tried to put his penis inside her, saying "let's just do it one time." She told defendant "no, not only one time." Defendant then tried to penetrate her again but she was able to get out from underneath him. J.R. stood up and told defendant she was going to scream for her kids, and defendant jumped out of the window.

¶ 14 2. *People's Exhibit Nos. 1 through 44*

¶ 15 During J.R.'s testimony, the State introduced several text messages between J.R. and defendant into evidence. J.R. testified, prior to the November 23, 2013, incident, defendant sent her several text messages indicating a desire to engage in sexual conduct, but she always turned him down. On November 20, 2013, defendant sent J.R. a text message telling her it would be a "wish an[d] dream come [true]" if they could be together. J.R. responded she looks at

defendant like a brother and it would be "wrong in so many ways." J.R. explained she could never do that to herself, her boyfriend, or Brown (defendant's girlfriend).

¶ 16 In the early morning of November 23, 2013, defendant sent J.R. a text message which read: "U should lock ur bed room door an leave ur window unlock an go the bed naked." J.R. never responded. Later that day, following the incident, defendant sent J.R. another text message, which read, "Sorry *** I no its wrong but I wanted u from day 1." J.R. responded to the text, saying:

> "I can't believe u came in my house like that. I have told u everytime that I dnt see u like that. Ur my babies god father my kids call u uncle and u really goin to come and try to take me. That *** is wrong in every *** way and it really *** changed my life forever. U have lost ur *** mind and u need to stay *** away from me and my kids!!"

Defendant responded J.R. was right, he was sorry, and he knew she would never forgive him. He then explained he did it "out of revenge" because J.R.'s boyfriend had "been with" his ex-girlfriend.

¶ 17 3. *J.R.'s Daughter's Testimony*

¶ 18 J.R.'s 14-year-old daughter, C.M., testified she was at the Thanksgiving party and believed her mom was intoxicated. She explained, at one point, her mom passed out on the couch, so she and defendant helped her walk to her room. While they were in the bedroom, J.R. changed her shirt and went to bed. Defendant then left the house and went home.

¶ 19 4. *Danielle Doggett's Testimony*

¶ 20 Danielle Doggett testified she was also at the Thanksgiving party. She explained J.R. was drinking and estimated her intoxication level at "pretty high." Doggett left around midnight and was awakened around 6 a.m. by a phone call from J.R. J.R. was crying and saying "I can't believe this." Doggett calmed J.R. down enough so she could understand her, and J.R. explained she had awakened to defendant's mouth on her private parts and had told him to leave before she screamed to wake up her kids.

¶ 21 5. *Detective Steve Moreland's Testimony*

¶ 22 Detective Steve Moreland of the Bloomington police department testified he arrested defendant and transported him to the McLean County jail. While en route to the jail, defendant told Detective Moreland the only reason the police were called was because one of J.R.'s kids walked in and J.R. told him to get out or she would scream.

¶ 23 6. *Rose Brown's Testimony*

¶ 24 Brown testified she was at the Thanksgiving party and noticed J.R. grabbing defendant between his legs on several occasions. She explained J.R. gets flirtatious when she drinks, and she has frequently seen J.R. grabbing and dancing with defendant. Brown testified she did not say anything to J.R. that night because she did not want to cause a scene at J.R.'s house with J.R. being drunk, so she and defendant got up to leave. J.R. told them she needed cigarettes, so Brown and defendant went to the store. They went back to J.R.'s house to drop off the cigarettes, and defendant went inside while she stayed in the van. Brown testified she looked inside and saw J.R. standing in her bedroom topless. Defendant then came back outside and they left. Brown testified defendant stayed home with her all night and she did not know anything about any text messages defendant sent J.R.

¶ 25 7. *Defendant's Testimony*

¶ 26 Following the trial court's ruling on his motion *in limine*, defendant testified on his own behalf. Defendant explained he was at the Thanksgiving party and left after midnight to go get cigarettes for J.R. When he came back to the house, J.R. was lying on the couch, so he and C.M. helped her to her bedroom. Defendant then went to the bathroom, where he saw a pack of cigarettes. Defendant explained he sent J.R. the text about leaving her window open from the bathroom because she had asked them to pick her up cigarettes even though she did not need any. After he sent the text, he left the bathroom to give J.R. her cigarettes and saw her standing topless in her bedroom. Defendant handed J.R. the cigarettes and went home.

¶ 27 Defendant testified he went back to J.R.'s house around 5 a.m. He woke her up, took her pants off, and they had oral sex. Defendant explained J.R. never stopped him or pushed him off or said anything. They then started talking and defendant told J.R. it was only going to happen one time. J.R. said "what you mean just one time," and he explained again, "just one time." He told J.R. he knew her boyfriend had sex with his "baby mama," but he could not get an erection so he left out the window so he would not awaken any of the children who were sleeping in the living room.

¶ 28 On cross-examination, defendant admitted he knew J.R. was intoxicated because "she [was] always intoxicated." When asked why he did not come inside the house through the window like he stated he would in the text message, defendant explained he did not have to use the window because the front door was unlocked. When asked whether her bedroom door was locked, defendant stated J.R.'s bedroom door did not lock. He then testified he never told Detective Moreland J.R. said she would scream if he did not stop; J.R. said she would get loud if they had sex and she did not want her kids to hear. Defendant maintained J.R. never told him no, and he believed she consented.

¶ 29 Following defendant's testimony, the State asked the trial court to take judicial notice of defendant's prior convictions for domestic battery and criminal trespass.

¶ 30 B. The Judgment and Posttrial Proceedings

¶ 31 On May 14, 2013, the trial court found defendant guilty of criminal sexual assault. The court stated it reviewed all the evidence and concluded: "[J.R.] was either asleep or at an extreme point of intoxication at approximately five o'clock in the morning when the act started to take place. The court finds she did not give knowing consent to this act taking place."

¶ 32 In June 2013, defendant filed a motion for a new trial alleging the State failed to prove him guilty of criminal sexual assault beyond a reasonable doubt, which the trial court denied.

¶ 33 C. Sentencing

¶ 34 In July 2013, defendant's case proceeded to sentencing. The trial court noted defendant was being sentenced on a Class 1 felony with a sentencing range of 4 to 15 years followed by 2 years of mandatory supervised release (MSR). The State argued defendant was being sentenced on his sixth felony offense and had a "somewhat violent" background, as two of the felony convictions were domestic violence charges. The State then asked for a sentence in a range of 10 to 12 years. In doing so, it asked the court to look at the mental anguish the offense had caused J.R. and to recognize defendant had violated his position of trust with J.R.'s family by coming back to her house and sexually assaulting her. Defense counsel argued defendant did not contemplate his criminal conduct would cause or threaten serious physical harm and stated defendant was willing to compensate J.R. for any mental anguish. Defense counsel noted defendant has several children to care for and asked for a sentence closer to the minimum of four years in prison.

¶ 35 The trial court stated it had considered all relevant factors and sentenced defendant to seven years' imprisonment followed by two years' MSR. In announcing the sentence, the court stated as follows:

> "Mr. Weatherspoon, with regard to your factors in mitigation, the legislature has me look at certain things when issuing a sentence. They say these are some of the things I should look at in aggravation and in mitigation. And certain things with regard to mitigation is [*sic*] I do understand that you have seven children, that there is involvement, from what I understand, in their life at this point in time. I am taking that into consideration. [Defense counsel] indicates that there was no serious physical harm, and I understand physical harm, but emotional harm I think is a different story. The Court understands that there was no physical bruising, that type of thing, that the Court at least heard evidence about, but the Court will address the emotional harm in just a second. So I do understand that. The Court further understands that, as has been indicated today, if there is any therapy for treatment with regard to the victim in this case, that you are willing to compensate her, and I am considering that in terms of favorable aspects to you. The Court also notes that you've been respectful to the Court throughout the Court proceedings, including today, so the Court is also noting that as well.

There are also factors that the Court has to look at in what's called aggravation, meaning they work against you, these factors that the legislature has told me to look at. One is criminal history. We are here on a fifth felony today. There is a long criminal history that the Court is seeing, and two of those instances are domestic instances which the Court is considering as well. The factors that the Court finds somewhat more aggravating is the nature of the offense in this case. You were in a position of trust with [J.R.], and according to [J.R.], which again, I found her testimony credible at trial, she was in no position that evening to give any type of consent, and she had indicated in the past that there was communications in the past to where there was an attempt to have some type of relationship that she had said no to in the past when she wasn't in any type of intoxicated position, and it appears to the Court that she was taken advantage of, especially by the fact that she had said that she had no idea what was going on until she woke up and she realized that penetration with the fingers was taking place at that point in time. She immediately indicated to the Court that she attempted to stop things. And there was a leaving through the window that evening. I understand your position on that, that you left through the window because you didn't want other people in the home to see, so the Court is considering that as well.

> When the Court looks at the overall circumstances of the case, the Court thinks that a sentence on this case of seven years in the Department of Corrections is the appropriate sentence."

¶ 36 In July 2013, defendant filed a motion to reconsider sentence, arguing his sentence was excessive, which the trial court denied.

¶ 37 This appeal followed.

¶ 38 II. ANALYSIS

¶ 39 A. The Trial Court Did Not Abuse Its Discretion In Ruling On Defendant's Motion *in Limine*

¶ 40 Defendant first argues the trial court abused its discretion when it waited until "minutes before" he took the witness stand to rule on his motion *in limine*. Defendant recognizes this claim is forfeited, but he contends we can review it as a matter of plain error under the closely balanced evidence prong of Illinois Supreme Court Rule 615(a) (eff. Jan. 1, 1967).

¶ 41 1. *The Plain-Error Doctrine*

¶ 42 Under the plain-error doctrine, a reviewing court may consider an unpreserved error where "a clear or obvious error occurred" and (1) the evidence "is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error" or (2) the error "is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410-11 (2007). See also *People v. Herron*, 215 Ill. 2d 167, 186-87, 830 N.E.2d 467, 479 (2005). We first consider whether error occurred at all. See *People v. Wilmington*, 2013 IL 112938, ¶ 31, 983 N.E.2d 1015.

¶ 43 2. *The Trial Court Did Not Err In Ruling On Defendant's Motion in Limine*

¶ 44 We review a trial court's ruling on a motion *in limine* for an abuse of discretion. *People v. Patrick*, 233 Ill. 2d 62, 68, 908 N.E.2d 1, 5 (2009). "An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *People v. Hall*, 195 Ill. 2d 1, 20, 743 N.E.2d 126, 138 (2000).

¶ 45 Defendant argues the trial court's failure to make a ruling on his motion *in limine* was arbitrary and without reason because there were no articulable facts to justify its decision to delay the ruling. In support of this argument, defendant cites *Patrick*, 233 Ill. 2d at 73, 908 N.E.2d at 7, where the Illinois Supreme Court held "a trial court's failure to rule on a motion *in limine* on the admissibility of prior convictions when it has sufficient information to make a ruling constitutes an abuse of discretion." We find defendant's reliance on this language from *Patrick* is misplaced.

¶ 46 The sole issue in *Patrick* was "whether a trial court may defer ruling on a motion *in limine* to exclude a defendant's prior convictions from use as impeachment until *after* a defendant's testimony." (Emphasis added.) *Id*. at 65, 908 N.E.2d at 3. In making its determination, the court looked to rulings of several appellate courts and other states' high courts where an abuse of discretion was found when a trial court chose not to make a ruling on the admissibility of prior convictions before defendant chose to testify. *Id.* at 70-73, 908 N.E.2d at 6-7.

¶ 47 Each of these courts placed significant emphasis on the benefit defendants receive from rulings on the admissibility of their prior convictions made *before* they decide to testify. The court in *Patrick* summarized,

> "First, early rulings provide defendants with the information necessary to make the critical decision whether to testify on their own behalf and to gauge the strength of their testimony. [Citation.] Second, early rulings permit defendants and defense counsel to make reasoned tactical decisions in planning the defense by: (1) informing the jury whether the defendant will testify; (2) portraying the defendant in a light consistent with prior convictions being admitted or not admitted; and (3) anticipatorily disclosing prior convictions during the defendant's direct examination, thereby reducing the prejudicial effect. [Citation.]" *Id.* at 70, 908 N.E.2d at 6.

¶ 48 Because the trial court in the present case issued its ruling on defendant's motion *in limine before* defendant elected to testify, *Patrick* does not control the outcome of this appeal. Prior to defendant testifying, the trial court explained, if he chose to testify, the State would be allowed to impeach his credibility with the prior convictions. Knowing this, defendant voluntarily chose to testify on his own behalf. Defendant was able to make "the important decision to testify" after being given the "opportunity to evaluate the actual strength of the State's evidence." *Id.* at 69-70, 908 N.E.2d at 5. This case was a bench trial, not a jury trial. We presume the trial court knew the law and correctly applied it. See *People v. Robinson*, 368 Ill. App. 3d 963, 976, 859 N.E.2d 232, 246 (2006) ("A reviewing court presumes the trial judge in a bench trial knew the law and followed it."). We find no abuse of discretion.

¶ 49 As an additional matter, we find it significant defendant did not present his motion until the date of trial. As we stated in *People v. Owen*, 299 Ill. App. 3d 818, 824, 701 N.E.2d 1174, 1179 (1998),

> "Trial judges are appropriately loath to waste the time of juries, and entertaining motions *in limine* filed immediately prior to or during trial defeats one of the primary advantages of such motions in the first place. That advantage is that if the court and counsel will need to spend a lot of time discussing and resolving a particularly difficult evidentiary issue, that time can be spent before a jury is ever required to come to the courthouse. However, if the jury is waiting while the motion is argued, one of the primary justifications for entertaining a motion *in limine* no longer exists."

¶ 50 Here, although defendant's case ultimately proceeded to a bench trial, the matter was set to be heard before a jury. The trial court conducted a significant portion of *voir dire* before defendant decided to waive his right to trial by jury. Despite the timing of defendant's motion, the trial court took several steps to ensure defendant would not be prejudiced by the delay in this ruling. The court specifically asked the State if it planned to mention any of defendant's prior convictions prior to him testifying and explained it would rule on the motion prior to defendant's election so he would know the consequences of such a decision. After the trial court ruled on the motion, it admonished defendant about the repercussions if he did choose to testify, and defendant stated he understood. Under these particular circumstances, we find no error in the trial court's ruling on defendant's motion *in limine*.

¶ 51 3. *The Evidence Is Not Closely Balanced*

¶ 52 Even assuming, *arguendo*, we were to find error with the trial court's ruling on the motion *in limine*, the evidence in defendant's case is not closely balanced. Defendant argues credibility was the determinative factor in his case and, where credibility is the determinative factor, fairness dictates plain error review under the closely-balanced evidence prong. In support of this argument, defendant cites *People v. Naylor*, 229 Ill. 2d 584, 607, 893 N.E.2d 653, 668 (2008), where the Illinois Supreme Court concluded evidence at a defendant's bench trial was closely balanced because the case was a "contest of credibility" between the defendant and two police officers. We find *Naylor* inapposite.

¶ 53 In *Naylor*, at the close of testimony, the court "was faced with two different versions of events, both of which were credible." *Id.* at 608, 893 N.E.2d at 668. Finding reversible error, the court specifically noted, "Given these opposing versions of events, *and the fact that no extrinsic evidence was presented to corroborate or contradict either version*, the trial court's finding of guilty necessarily involved the court's assessment of the credibility of the two officers against that of defendant." (Emphasis added.) *Id.* at 607, 893 N.E.2d at 668.

¶ 54 In the present case, the trial court was not forced to choose between two credible versions of events because defendant's version was not credible. Unlike in *Naylor*, the State in this case introduced 44 exhibits to corroborate its version of events. These exhibits documented a text message exchange between defendant and J.R., where defendant propositioned J.R. several times and J.R. rejected him because he is "like a brother" to her. Immediately after the offense, defendant sent J.R. a text message telling her he was sorry, but he did what he did to get revenge against her boyfriend for having sex with one of his ex-girlfriends. Even without the admission of defendant's prior convictions, the court was provided enough evidence to find defendant's story incredible.

¶ 55 Nevertheless, to prove defendant guilty of criminal sexual assault pursuant to section 11-1.20(a)(2), the State was required to prove defendant knew J.R. was unable to give knowing consent. 720 ILCS 5/11-1.20(a)(2) (West 2012). J.R. testified she was asleep when the offense occurred. Defendant claimed J.R. was not asleep, but he admitted he knew J.R. was highly intoxicated. As the trial court stated in announcing its judgment, "[J.R.] was either asleep or at an extreme point of intoxication at approximately five o'clock in the morning when the act started to take place." Under either version, the trial court was entitled to find the State proved beyond a reasonable doubt defendant knew J.R. was unable to give knowing consent. See *People v. Lloyd*, 2013 IL 113510, ¶ 39, 987 N.E.2d 386 ("The victims in previous cases prosecuted under this subsection have been found to be *** unable to give knowing consent because they were typically severely mentally disabled, highly intoxicated, unconscious, or asleep."). The evidence against defendant was not closely balanced, and plain-error review is not warranted.

¶ 56 B. The Trial Court Did Not Abuse Its Discretion In Sentencing Defendant

¶ 57 Defendant next argues the trial court abused its discretion by impermissibly considering factors inherent in the offense to impose a harsher sentence. He specifically argues the trial court considered J.R. being unable to consent as a significant aggravating factor despite the fact that being unable to consent is a factor inherent in the offense for which he was convicted. See 720 ILCS 5/11-1.20(a)(2) (West 2012).

¶ 58 The State argues defendant forfeited this argument by failing to raise the issue at sentencing or in a posttrial motion. However, on the merits, the State argues defendant misconstrues the trial court's comments concerning J.R.'s inability to give consent. Defendant responds his argument is reviewable (1) under the second prong of the plain-error analysis, or (2)

as ineffective assistance of counsel for failing to preserve the issue in a posttrial motion. For the following reasons, we agree with the State.

¶ 59 1. *Plain-Error Doctrine*

¶ 60 "[S]entencing errors raised for the first time on appeal are reviewable as plain error if (1) the evidence [at the sentencing hearing] was closely balanced or (2) the error was sufficiently grave that it deprived the defendant of a fair sentencing hearing." *People v. Ahlers*, 402 Ill. App. 3d 726, 734, 931 N.E.2d 1249, 1256 (2010) (citing *People v. Rathbone*, 345 Ill. App. 3d 305, 312, 802 N.E.2d 333, 339 (2003)). The plain-error doctrine is not a general saving clause for all trial errors. Rather, it is a limited and narrow exception "designed to redress serious injustices." *People v. Baker*, 341 Ill. App. 3d 1083, 1090, 794 N.E.2d 353, 359 (2003).

¶ 61 2. *The Trial Court Did Not Consider An Improper Sentencing Factor*

¶ 62 Defendant argues the trial court's consideration of a factor inherent in the offense as an aggravating factor was a "sufficiently grave error" that deprived him of a fair sentencing hearing. In support of this argument, he cites *People v. Conover*, 84 Ill. 2d 400, 404-05, 419 N.E.2d 906, 909 (1981), and claims a factor inherent in the charged offense should not be considered as a factor in aggravation at sentencing.

¶ 63 "A trial court has wide latitude in sentencing a defendant, so long as it neither ignores relevant mitigating factors nor considers improper factors in aggravation." *People v. Roberts*, 338 Ill. App. 3d 245, 251, 788 N.E.2d 782, 787 (2003). In imposing a sentence, the trial judge may not consider in aggravation a factor implicit in the underlying offense for which defendant was convicted. *Conover*, 84 Ill. 2d at 404-05, 419 N.E.2d at 909. Because the legislature has already considered such a factor when setting the range of penalties, "it would be improper to consider it once again as a justification for imposing a greater penalty." *People v.*

Martin, 119 Ill. 2d 453, 460, 519 N.E.2d 884, 887 (1988). However, although a specific act inherent in a charged offense cannot be considered to aggravate a sentence, a judge may still 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. Saldivar*, 113 Ill. 2d 256, 268-69, 497 N.E.2d 1138, 1143 (1986) (quoting *People v. Tolliver*, 98 Ill. App. 3d 116, 117-18, 424 N.E.2d 44, 45 (1981)).

¶ 64 In the present case, defendant was convicted of criminal sexual assault in that he committed an act of sexual penetration knowing J.R. was "unable to give knowing consent." See 720 ILCS 5/11-1.20(a)(2) (West 2012). Defendant claims the trial court's oral sentencing judgment makes it clear he was specifically considering the fact J.R. was unable to consent as a factor in aggravation. The State disagrees and contends the court was merely addressing the nature of the harm suffered by J.R. as a result of the position of trust defendant was in when he committed the offense. We agree with the State.

¶ 65 In discussing factors in aggravation, the trial court explained "*the nature of the offense in this case*" is "somewhat more aggravating." It stated:

> "You were in a position of trust with [J.R.], and according to [J.R.], which again, I found her testimony credible at trial, she was in no position that evening to give any type of consent, and she had indicated in the past that there was communications in the past to where there was an attempt to have some type of relationship that she had said no to in the past when she wasn't in any type of intoxicated position, and it appears to the Court that she was taken advantage of."

¶ 66 Putting these comments in context, we find it clear the trial court was considering the nature and extent of the emotional harm caused by defendant—a man J.R. considered family—when he committed an act of sexual penetration at a time when he knew she was unable to give knowing consent. Defendant took advantage of a woman who trusted him with her children, a woman who he knew was not interested in a sexual relationship, a woman who he knew was "highly intoxicated." Although being unable to consent was an element of the offense, the trial court's sentence specifically addressed the emotional consequences of such an act on a victim who "considered him family." We find no abuse of discretion in the trial court's sentence. We need not address defendant's alternative argument concerning ineffective assistance of counsel.

¶ 67 III. CONCLUSION

¶ 68 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. 55 ILCS 5/4-2002(a) (West 2012).

¶ 69 Affirmed.