THIRD DIVISION
April 20, 2016

No. 1-13-2473

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 7838
	)	
EDUARDO PATINO,	)	Honorable
	)	Ellen Mandeltort,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE MASON delivered the judgment of the court.
Justices Lavin and Pucinski concurred in the judgment.

O R D E R

¶ 1 *Held:* Defendant's convictions for aggravated criminal sexual abuse are affirmed where he was not prejudiced by defense counsel's alleged deficient representation, and the trial court did not abuse its discretion in considering his pending sexual assault charges at sentencing.

¶ 2 Following a bench trial, defendant Eduardo Patino was convicted of two counts of aggravated criminal sexual abuse and sentenced to two concurrent terms of three years' imprisonment. On appeal, Patino contends he was deprived of his right to effective assistance of trial counsel where counsel failed to ask him during direct examination how old he thought the victim was at the time he engaged in sexual contact with her. Patino also contends that his sentence is excessive where the trial court improperly considered in aggravation his pending sexual assault charges. We affirm.

¶ 3 Patino was charged with two counts of aggravated criminal sexual abuse in that he knowingly committed acts of sexual penetration upon V.S., *i.e.*, contact between Patino's mouth and the victim's vagina and contact between Patino's penis and the victim's vagina. Both counts stated that V.S. was at least 13 years of age but under 17, and Patino was at least 5 years older than her. 720 ILCS 5/11-1.60(d) (West 2012). Patino conceded at trial that he engaged in sexual contact with V.S., but raised the affirmative defense of mistake of age, alleging that he reasonably believed V.S. to be 17 or older. 720 ILCS 5/11-1.70 (West 2012).

¶ 4 At trial, V.S. testified that she was 15 years old on March 25, 2012. She had a Facebook page at that time. Her Facebook profile page is the first page a person sees when selecting her name, and that page does not contain information such as the high school she attended or her year of graduation. In order to obtain this information, a person needed to select the "about page." Her "about page" stated she was a freshman at Wheeling High School and was in the 2015 graduating class. A photograph of her "about page" from March 25, 2012, was entered into

evidence. The privacy settings for V.S.'s Facebook page were open to the public and anyone could access her "about page."

¶ 5 In January of 2012, V.S. met Patino, who was then 23 years old, on Facebook after he "poked" her, *i.e.*, said hello to her. They communicated with each other via Facebook over the next three months. None of the Facebook messages sent between V.S. and Patino contained V.S.'s age. V.S. told Patino via Facebook messages that she likes "rolling at raves." She clarified that "rolling at raves" meant taking ecstacy at 21 and over clubs. She also told Patino she would go to "Medusa's Club," which was an 18 and over club. Although V.S. told Patino she went to these raves and clubs, she never actually visited them.

¶ 6 On the evening of March 24, 2012, V.S. received a Facebook message from Patino stating that he wanted to "party." V.S. wanted to attend a party at a friend's house, and they agreed to go together. The plan was for V.S. to "sneak" out of her house and Patino agreed to pick her up and drive her to the party. V.S. gave Patino her cell phone number in order to communicate with him after her parents went to bed. V.S. left her house at about 1 a.m. and Patino picked her up.

¶ 7 Before Patino picked her up, V.S. told him on the phone that she was 15 years old, and again mentioned her age when he arrived. V.S. never told Patino that she was anything other than 15 years old. V.S. was wearing make-up at the time Patino arrived at her residence. He drove her to the party where most of the people attending were about 17. Some partygoers were making fun of V.S. "for [her] age because [she] was young," and Patino defended her by saying she was 15 years old.

¶ 8 At about 4:30 a.m., V.S. wanted to go home to avoid getting in trouble with her parents. V.S. asked Patino to drive her home, and he agreed. Before V.S. entered the car, which was parked on the street a few blocks away from the party, Patino stated that he would not drive her home unless she kissed him. V.S. entered the passenger side of the car and Patino entered the driver's side, repeating the statement. V.S. kissed Patino in the car. Patino moved from the driver's seat, went into the well of the passenger seat, and moved V.S.'s seat back. Patino took off V.S.'s underwear and put his mouth on her vagina. V.S. told Patino to stop, but he continued for a few minutes. Patino then got on top of her and put his penis inside her vagina. A police officer drove by and flashed his light into the car. Patino put his pants on and returned to the driver's seat. V.S. put her clothes back on and was scared that she was going to get in trouble with her parents, and get tickets for violating curfew and underage drinking.

¶ 9 V.S. told the officer she was 18 years old and wanted to go home. She lied about her age to avoid getting a ticket for violating curfew. She spoke to a second officer outside of the car and told him her real age and address. The officers took V.S. to the police station, and then she went home before going to the hospital where she was examined.

¶ 10 Officer Richard Giltner was working near 280 2nd Street in Wheeling at about 4:48 a.m. on March 25, 2012. He saw a vehicle parked illegally moving up and down and flashed his spotlight into the interior of the vehicle. Giltner observed a man in the passenger side of the vehicle and two legs in the air. After flashing the spotlight, Patino entered the driver's seat and pulled up his pants. Giltner observed a female in the car adjusting her clothing. A dashboard camera in his squad car recorded the incident and was entered into evidence.

¶ 11 Officer Giltner approached the vehicle and asked for Patino's driver's license, which he provided. The license showed that Patino's birth date was February 12, 1988. After obtaining Patino's license, he asked the female passenger for identification, which she was unable to provide. She related that she was 18 years old, but could not provide a birth date. Giltner did not believe the female passenger was 18 because she looked and sounded younger. When Officer Palomares arrived, the female passenger spoke with him, and then Giltner took her to the police station for further investigation. Palomares took Patino to the station.

¶ 12 The parties stipulated that the DNA extracted from V.S.'s biological evidence was a mix of V.S.'s DNA and Patino's DNA.

¶ 13 Patino denied that V.S. revealed her age to him. When they arranged to meet on the evening in question to go to a party, V.S. explained to Patino that she had to be picked up at an intersection because she was "sneaking out" of her parent's house. V.S. gave Patino her cell phone number and they communicated via text message on March 25, 2012. Patino picked up V.S. at an intersection in Wheeling and drove her to a party. At the party, Patino denied defending V.S. regarding her age. Patino and V.S. stayed at the party for about two or three hours and then V.S. asked Patino to drive her home at about 4 a.m. They went directly to the vehicle, got inside, and Patino told V.S. she had to kiss him if she wanted a ride home, which she did. The kissing lead to sexual contact, and then a bright light shone on the vehicle. Patino realized police officers were outside and he returned to his seat and they both fixed their clothes. V.S. told Patino to leave because she did not want to get into trouble. The police officer had a

conversation with V.S. and Patino. V.S. told the officer she was 18 but did not have any identification. Shortly thereafter, Patino was arrested.

¶ 14 Patino denied ever viewing V.S.'s "about page" on Facebook. He had a Facebook conversation with V.S. on February 21, 2012, during which he stated "come to the club instead of the Turnabout," and V.S. replied, "nah, high school memory." Shown a log of Facebook conversations between himself and V.S., Patino stated his last conversation was, "[t]hen take me and I'll make sure you have the best time out of everyone." Patino admitted the comment was about V.S.'s high school turnabout dance.

¶ 15 Following closing arguments, the court found Patino guilty of both counts of aggravated criminal sexual abuse. The court believed Patino knew V.S. was younger than 17 at the time of the incident, specifically stating, "not only does [V.S.] appear immature, acts immature, but she looks very immature and she looks, quite frankly, quite young." The court found that even if it believed Patino never went on V.S.'s "about page," which was unlikely, upon seeing V.S. it should have been abundantly clear that she was a minor and not close to his age of 24. The court also added that although counsel raised the defense that Patino reasonably believed V.S. to be 17, Patino admitted that he did not know her age.

¶ 16 After the court found Patino guilty, the State filed a motion to revoke his bond, which the court denied. Patino's sentencing hearing was scheduled for April 8, 2013. But on March 20, 2013, the State filed a violation of bail bond petition stating that on March 7, 2013, while Patino was out on bond, he committed additional criminal sexual assaults. The trial court revoked Patino's bond.

¶ 17 At Patino's sentencing hearing held on May 23, 2013, the court first stated that it had read the victim impact statement, two letters that were submitted on behalf of Patino, and the presentence investigation report (PSI). In aggravation, the State entered a certified copy of the record and a copy of the grand jury indictments for the new charges pending against Patino. The certified copy of the record in the pending case consisted of a single-page showing that Patino was charged with four counts of criminal sexual assault, and three counts of aggravated criminal sexual abuse. The indictments showed that on March 7, 2013, Patino committed acts of sexual conduct and penetration upon the victim, R.S., by the use of force or threat of force, knowing that she was unable to give knowing consent, and while she was at least 13 years of age but under 17 years of age and Patino was at least 5 years older than her. The State argued Patino's conduct endangered V.S.'s emotional and psychological well-being, and a sentence of incarceration was necessary to deter others from using the internet to seduce minors. The State further argued that Patino was a danger to the community, given the offenses he was charged with while free on bond.

¶ 18 In mitigation, Patino's father asked the court to be lenient because his son was an excellent student and was never in trouble before. In allocution, Patino apologized and indicated he would respect any decision the court made. Defense counsel argued that Patino had family support and lived a productive life until his arrest. Patino was employed at two jobs and attending college. Defense counsel highlighted the fact that the State failed to provide the court with live testimony regarding the pending charges and that Patino was presumed innocent. Counsel requested that Patino be sentenced to a term of probation.

¶ 19 The court sentenced Patino to two concurrent terms of three years' imprisonment. Although the court indicated it had considered sentencing Patino to probation, the seriousness of the offense coupled with Patino's new charges warranted a prison term.

¶ 20 On appeal, Patino contends he was denied effective assistance of counsel where counsel did not ask him during direct examination how old he thought the victim was at the time he engaged in sexual contact with her. Patino thus maintains that counsel's representation was deficient as counsel failed to establish his affirmative defense of mistake of age, and he was prejudiced by the alleged deficiency.

¶ 21 In order to establish that trial counsel was ineffective, a defendant must satisfy the two-pronged test adopted in *Strickland v. Washington*, 466 U.S. 668, 685-87 (1984). *People v. Albanese*, 104 Ill. 2d 504, 525 (1984). Under this standard, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness, *i.e.*, the deficiency prong, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, *i.e.*, the prejudice prong. *People v. Colon*, 225 Ill. 2d 125, 135 (2007). If it is easier to dispose of such a claim because the defendant suffered no prejudice then this court may proceed directly to the second prong and need not address whether counsel's performance was deficient. *People v. Givens*, 237 Ill. 2d 311, 331 (2010). Here, even assuming that counsel was deficient for not asking Patino during trial what age he believed the victim to be, Patino has failed to demonstrate any probability that the outcome of the case would have been different had counsel posed that single question.

¶ 22 A defendant's reasonable belief that the victim was 17 years of age is an affirmative defense to aggravated criminal sexual abuse. 720 ILCS 5/11-1.70(b) (West 2012); *People v. Jones*, 175 Ill. 2d 126, 131 (1997). Because Patino raised this affirmative defense, the issue at trial was whether it was reasonable for Patino to believe V.S. was at least 17.

¶ 23 The evidence we have summarized above makes it clear that the single question Patino claims his counsel should have asked would have made absolutely no difference in the outcome of the trial. Given the ample evidence supporting the conclusion that Patino either knew in fact or should have known that V.S was under 17, any testimony that he subjectively believed V.S. was not a minor would properly have been rejected by the trial court.

¶ 24 Patino next contends that the trial court improperly considered in aggravation his pending sexual assault charges during sentencing. He specifically maintains that consideration of his pending charges was improper as the State only provided the court with copies of the record, *i.e.*, a single-page document listing the pending charges, and grand jury indictments in the new case, but no live witness testimony.

¶ 25 Initially, we find that although Patino filed a postsentencing motion alleging that his sentence was excessive and did not take into account his history or criminality, he failed to argue that the trial court improperly considered the pending sexual assault offenses he was charged with while he was released on bond. He thus forfeited this issue. See *People v. Woods*, 214 Ill. 2d 455, 470 (2005) (the failure to raise an issue with any specificity in a posttrial motion forfeits the issue).

¶ 26 A reviewing court may bypass normal forfeiture principles and consider unpreserved claims of error in specific circumstances under the plain error rule. *People v. Wooden*, 2014 IL App (1st) 130907, ¶ 10. In the sentencing context, a defendant must show a clear and obvious error occurred and either that the evidence at sentencing was closely balanced, or the error was so serious as to deny the defendant a fair sentencing hearing. *Id*. The first step of plain error review is to determine whether any error occurred. *Id*.

¶ 27 A trial court has broad discretion to determine an appropriate sentence, and a reviewing court may reverse only where the trial court has abused that discretion. *People v. Patterson*, 217 Ill. 2d 407, 448 (2005). The reviewing court should not substitute its judgment for that of the trial court simply because it would have balanced the appropriate sentencing factors differently. *People v. Alexander*, 239 Ill. 2d 205, 214-15 (2010). A sentence within the statutory range does not constitute an abuse of discretion unless it varies greatly from the purpose of the law or is manifestly disproportionate to the nature of the offense. *People v. Stacey*, 193 Ill. 2d 203, 210 (2000). However, the trial court's consideration of an improper factor in aggravation is an abuse of discretion. *People v. McAfee*, 332 Ill. App. 3d 1091, 1096 (2002).

¶ 28 There is no dispute that the three-year sentences imposed in this case for aggravated criminal sexual abuse are the minimum authorized for a Class 2 felony. 720 ILCS 5/11-1.60(g) (West 2012); 730 ILCS 5/5-4.5-35(a) (West 2012) (sentencing range of three to seven years). The only issue is whether the trial court improperly considered Patino's pending charges in aggravation. *McAfee*, 332 Ill. App. 3d at 1096.

¶ 29 Although a trial court may not rely solely on the fact of an arrest or pending charges in aggravation of a sentence, it may consider a defendant's other criminal activity, even if that conduct did not result in a conviction, where the court finds the evidence to be relevant and accurate. *People v. Minter*, 2015 IL App (1st) 120958, ¶ 148. "A mere list of arrests or charges in a presentence report, unsupported by live testimony or *other evidence* at the sentencing hearing, does not meet those standards." (Emphasis added.) *Id*.

¶ 30 The State presented in aggravation a certified copy of the record in the pending case against Patino that arose while he was free on bond. That document shows that Patino was charged with four counts of criminal sexual assault, and three counts of aggravated criminal sexual abuse. The State also presented a copy of the grand jury indictments, which detail the new charges against Patino. The trial court acknowledged that it considered these charges in sentencing Patino.

¶ 31 Citing *People v. English*, 353 Ill. App. 3d 337 (2004), Patino maintains that the court abused its discretion by considering his pending charges absent a witness who could have been subjected to cross-examination. He argues the court's consideration of the copy of the record and the indictments, without live testimony, resulted in unfair enhancement of his sentence.

¶ 32 In *English*, the defendant had a pending charge for aggravated battery at the time of his sentencing hearing on an armed robbery conviction. *Id*. at 338. At sentencing, the trial court considered evidence of the prior criminal conduct that was presented by a live witness and subject to cross-examination. *Id.* at 339-40. The court did not consider any of the other pending

charges as the existence of those charges was inadmissible hearsay. *Id*. at 340. This court affirmed, finding that the trial court properly considered only the live witness's testimony. *Id*.

¶ 33 *English* does not address the circumstances here where the State provided the court with "other evidence" in the form of a certified copy of the record as well as the grand jury indictments in the new case. The grand jury indictments, in particular, consist of more than simply a list of charges. They show the State's evidence was tested by the grand jurors, and deemed sufficient to charge Patino. See *People v. Leavitt*, 2014 IL App (1st) 121323, ¶ 56 (stating that a grand jury protects citizens from unfounded accusations; a grand jury investigates criminal charges, returning indictments after hearing evidence); see also 725 ILCS 5/112-4(a) (West 2012) (providing that the grand jury "shall hear all evidence presented by the State's Attorney").

¶ 34 Moreover, the defendant in *English* committed the new offense *before* he was convicted. *English*, 353 Ill. App. 3d at 338. Here, however, Patino committed his second sex offense while out on bond *after* he was convicted. Patino's actions while out on bond bore on his rehabilitative potential and showed he posed a threat to society. The court thus did not abuse its discretion in considering the new and pending sex offense charges when fashioning an appropriate sentence.

¶ 35 Furthermore, the record does not support Patino's contention that he was denied the opportunity to address the significance of the indictment. The record shows that after a brief exchange between the court and defense counsel, the court in fact allowed counsel to address the new charges, stating "[g]o ahead, Counsel. I'm going to allow him to argue, State. *** You may continue with the argument on what you believe that other evidence is." Defense counsel then

addressed what he believed the facts in the pending case showed. Defense counsel had subpoenaed records, read incident reports, and derived "somewhat of a picture of what *** allegedly transpired." In particular, the alleged victim was picked up by strangers, taken to the hospital, and interviewed by police. The alleged victim was intoxicated and stated that she was previously with Patino, but did not remember what happened. Thus, it is clear defense counsel was not denied an opportunity to challenge the evidence in the pending case, and we find no error in the court's decision to use Patino's pending case as a factor in aggravation. Because Patino has failed to establish error in connection with his sentencing, he cannot take advantage of plain error to overcome his forfeiture of this issue.

¶ 36 Affirmed.