

FIRST DIVISION  
January 19, 2016

No. 1-13-3189

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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|--------------------------------------|---|-------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the   |
|                                      | ) | Circuit Court of  |
| Plaintiff-Appellee,                  | ) | Cook County.      |
|                                      | ) |                   |
| v.                                   | ) | No. 12 CR 2784    |
|                                      | ) |                   |
| LAFAYETTE WALTON,                    | ) | Honorable         |
|                                      | ) | Nicholas R. Ford, |
| Defendant-Appellant.                 | ) | Judge Presiding.  |

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PRESIDING JUSTICE LIU delivered the judgment of the court.  
Justice Cunningham and Justice Connors concurred in the judgment.

**O R D E R**

¶ 1 **Held:** The trial court appropriately weighed the probative value of defendant's prior convictions against their prejudicial effect prior to allowing their admission to impeach his credibility; the prosecutor did not improperly bolster the credibility of a State's witness during direct examination where the remark was not an opinion of the witness' credibility; and defendant's 14-year sentence was not excessive.

¶ 2 Following a jury trial, defendant Lafayette Walton was convicted of two counts of aggravated criminal sexual abuse against a minor, B.P. The counts were merged and defendant was sentenced as a Class X offender to 14 years' imprisonment based on his criminal background. On appeal, defendant contends (1) the trial court improperly admitted evidence of his prior convictions to impeach his credibility; (2) he was denied a fair trial because the prosecutor improperly bolstered the testimony of a State's witness; and (3) that his sentence was excessive.

¶ 3 Prior to trial, defendant filed a motion in *limine* to bar the State from using his prior convictions to impeach his credibility should he testify at trial. He argued that according to *People v. Montgomery*, 47 Ill. 2d 510 (1971) (requiring courts to weigh the probative value against the prejudicial effect prior to admission of defendant's convictions), the convictions were more prejudicial than probative and should be excluded. The State disagreed and sought to introduce evidence of three of defendant's prior felonies including (1) a 2010 conviction for aggravated driving under the influence; (2) a 2004 conviction for unlawful use of a weapon by a felon; and (3) a 2001 conviction for aggravated unlawful use of a weapon. The trial court ultimately allowed admission of only defendant's two most recent convictions, finding they were "more probative than prejudicial."

¶ 4 According to the evidence presented at trial, defendant lived in a second-floor apartment with his mother (the victim, B.P.'s, step-grandmother), his mother's husband (B.P.'s biological grandfather), two of B.P.'s younger cousins, and a family friend, Rozzie Jackson. The victim

lived with her parents in the apartment downstairs. She was 14 years old at the time of the offense and considered defendant her "uncle."

¶ 5 B.P. testified that on the night of January 12, 2012, B.P., defendant, Rozzie Jackson, and a family friend, Laquinta Jackson, (the "group"), were sitting at a kitchen table conversing for approximately one hour. Everyone at the table except for the victim was drinking alcohol. At some point during this conversation, while B.P. was present, defendant began talking about sex and eventually exposed his penis and slapped it against the table. After the group finished drinking, they lay together on a mattress on the floor in the living room to watch a movie, where B.P. alleged the inappropriate physical contact between her and defendant began.

¶ 6 B.P. explained that over the course of the evening, defendant touched her breasts and vagina on three separate occasions – once while the group was lying on the mattress in the living room and then twice more later that evening while she was lying in bed with her younger cousins in a separate room. On the third and final incident, B.P. alleged she awoke to defendant inserting his fingers into her vagina. Rozzie Jackson's testimony corroborated B.P.'s account, in that he observed defendant touch the victim's vagina and breasts on the mattress, and twice saw defendant enter and exit the room where B.P. was sleeping with her cousins.

¶ 7 The following day, the victim informed her grandfather and Laquinta of what had occurred the night before, and a sexual assault examination was performed at a hospital later that evening. The examining nurse testified that she observed redness and swelling on the outside of the victim's vaginal area, although B.P. refused a pelvic examination. The parties stipulated that

Dr. Ayofariku performed a sexual assault examination on the victim following the incident and found no obvious signs of trauma.

¶ 8 Defendant testified that at the time of the alleged incident he was 36 years old. He also stated that he was convicted of unlawful use of a weapon in 2004 and aggravated driving under the influence in 2010. While defendant admitted that he was present and drinking at the apartment, he generally denied exposing his penis, talking about sex, or inappropriately touching the victim. According to defendant, after the group finished drinking, he went to his bedroom where he remained the rest of the night. Following defendant's testimony, the State introduced into evidence two certified copies of the aforementioned prior convictions, which the trial court admonished the jury were only to be considered to assess defendant's credibility.

¶ 9 Following closing arguments, the jury found defendant guilty of two counts of aggravated criminal sexual abuse, one count each for separately touching the victim's vagina and breasts. The jury found defendant not guilty of committing an act of sexual penetration for allegedly inserting his finger into the victim's vagina. Defendant's motion for new trial was denied and the cause proceeded to sentencing.

¶ 10 During the sentencing hearing, the State argued, in accordance with the presentence investigation report, that defendant's criminal background subjected him to mandatory Class X sentencing, and requested that defendant be sentenced to consecutive terms for both convictions. In mitigation, defendant presented the testimony of Alex Kotlowitz, who stated he first met defendant in 1985 while conducting research for his book, "There are No Children Here." Defense counsel argued Kotlowitz's book chronicles the "life and childhood of defendant and his

younger siblings." Kotlowitz characterized defendant's childhood as impoverished and violent, and testified that over the course of two years, he observed defendant, *inter alia*, lose three friends in a violent manner, assume the role of head of his household at age 12, and deal with his sister's cocaine and heroin addiction and his mother's mental illness. He also stated that he "love[s] [defendant] like a son" and did not believe he was "some habitual offender in some helpless cause." In allocution, defendant stated that while incarcerated, he has been working to improve himself by reading positive literature and has also formed a mentor group.

¶ 11 After hearing all the evidence presented during sentencing, the trial court ultimately concluded the present offense was "serious and onerous," but declined to impose consecutive sentences. Instead, it merged the counts, imposed a single 14-year sentence and explained:

"I had [defendant] earmarked for a sentence much larger than the one in which he will received [*sic*] today. This is predicated on his allocution, as well as the arguments of his attorneys but I cannot in doing that indicate today that that in any sense of the words [*sic*] eligible for the minimum allowed under the law which would have been six. That would have deprecated the conviction, the circumstances of the [offense] and his very substantial criminal history."

Defendant's motion to reconsider his sentence was denied and defendant now appeals.

¶ 12 Defendant first argues that the trial court improperly admitted evidence of his prior convictions for aggravated driving while under the influence and unlawful use of a weapon to impeach his credibility according to *Montgomery*, 47 Ill. 2d 510. Specifically, defendant argues that (1) the trial court failed to "weigh the probative value of the evidence against its prejudicial

effect" as required by *Montgomery* because the record is devoid of any information regarding the nature and circumstances surrounding the prior offenses, which are necessary factors to consider when performing such test; and (2) that the balancing test requires exclusion of defendant's prior convictions, arguing that the convictions lack any probative value because they do not bear on his credibility as a witness where they are not crimes of dishonesty and do not make the commission of the present offense more or less probable because the convictions are non-sex related and the current offense was a sex crime.

¶ 13 A trial court's decision to allow evidence of prior convictions should not be reversed absent an abuse of discretion. *People v. Jennings*, 279 Ill. App. 3d 406, 410 (1996).

¶ 14 Generally, impeachment of a witness' credibility through evidence of prior convictions is admissible only if the crime was punishable by death or imprisonment in excess of one year, or involved dishonesty or false statement regardless of the punishment. See Ill. R. Evid. 609(a) (eff. Jan 1, 2011); *Montgomery*, 47 Ill. 2d at 516 (adopting the then proposed Federal Rule of Evidence 609). Before admitting evidence of prior convictions, however, the trial court must balance the probative value versus the prejudicial effect. *People v. Williams*, 161 Ill. 2d 1, 38-39 (1994). The evidence is inadmissible if the trial court determines the danger of unfair prejudice substantially outweighs its probative value, or if more than 10 years has elapsed since the date of conviction or release of the witness from confinement, whichever is later. *People v. Williams*, 173 Ill. 2d 48, 81 (1996) citing *Montgomery*, 47 Ill. 2d at 516. The parties do not dispute that defendant's admitted prior convictions were punishable by more than one year of imprisonment or committed within the 10-year time period.

¶ 15 Defendant's overall assertion that the trial court failed to perform the requisite *Montgomery* balancing test is clearly rebutted by the record. When ruling on defendant's motion in *limine* prior to trial, the court stated:

"A Judge in my position is asked to make a determination based on the primary issue of whether or not [the prior convictions] are more probative than prejudicial.

Under the circumstances, I will make a determination that it is this Court's standing each of those is more probative than prejudicial and will be allowed."

Moreover, the court allowed admission of only two of defendant's three prior felony convictions that the State sought to introduce which implicitly shows his consideration of their admission.

¶ 16 More specifically, the core of defendant's assertion is that the trial court improperly balanced the *Montgomery* factors because (1) it was unable to consider the nature and circumstances of defendant's prior convictions because there is no evidence of these factors in the record; and (2) the prior convictions lacked probative value because they had no bearing on defendant's credibility because they were not crimes of dishonesty and because they were non-sex related offenses and the instant offense is a sex crime.

¶ 17 Our circuit courts are given several factors to consider when exercising their discretion under *Montgomery* and performing the requisite balancing test. Such factors may include evidence of the nature of the offense, the circumstances surrounding defendant's prior convictions, its recency and similarity to the present charge, among others. See *People v. Atkinson*, 186 Ill. 2d 450, 456 (1999) ("the trial judge should consider, *inter alia*, the nature of the prior conviction, its recency and similarity to the present charge, other circumstances

surrounding the prior conviction, and the length of the witness' criminal record"), citing *Montgomery*, 47 Ill. 2d at 518. Because the test requires a balancing approach, an absence or existence of evidence regarding any of the applicable *Montgomery* factors goes only to the weight of the prejudicial or probative value of the conviction. Moreover, the record clearly contains evidence of the nature of the prior convictions because it is evident in the name of the offenses themselves. See *e.g. Atkinson*, 186 Ill. 2d at 457-58 (rejecting mere-fact method of impeachment holding *Montgomery* requires the jury to consider "the nature of the past crime" and thus, must be given the name of the prior offense). Thus, we disagree with defendant's assertion that the trial court paid "mere lip service" to the *Montgomery* rule.

¶ 18 Defendant's argument essentially asks this court to reconsider the evidence in the record and perform our own analysis of the balancing factors applicable in *Montgomery*. However, because we review the trial court's admission of defendant's prior convictions for an abuse of discretion, we will not re-perform the balancing test solely because defendant disagrees with the outcome and will only reverse the court's judgment if it was arbitrary or unreasonable. See *Jennings*, 279 Ill. App. 3d at 410; see *People v. Strobel*, 2014 IL App (1st) 130300, ¶ 17. By contrast, whereas here, the record makes clear that the trial court performed the balancing test accordingly, we decline to find error even though the trial court failed to expressly articulate the reasons for its findings. *Williams*, 173 Ill. 2d at 83. Therefore, we conclude the trial court did not abuse its discretion by admitting evidence of defendant's prior convictions for aggravated driving while under the influence and unlawful use of a weapon to impeach his credibility.



¶ 19 Defendant next contends that he was denied the right to a fair trial by an "unbiased \*\*\* trier of fact" because the prosecutor invaded the province of the jury as finder of fact to determine the credibility of the witnesses at trial by bolstering the credibility of a State's witness. Specifically, defendant argues that by admonishing Rozzie Jackson in the jury's presence that he must "testify to the truth," the prosecutor suggested to the jury that the subsequent testimony was, in fact, "the truth." Defendant also argues the trial court erred by failing to provide a limiting instruction immediately following the sustained objection because the general instructions were insufficient to cure the error. Finally, he alleges he was prejudiced by this error because the evidence at trial was closely balanced where the outcome "hinged solely on the credibility of the State's two main witnesses."

¶ 20 A defendant is entitled to a trial by an unbiased jury and is not to be judged based upon the unsubstantiated personal opinions or comments of the prosecution. See U.S. Const., amend. XIV; Ill. Const. 1970, art. I § 2; *People v. Bean*, 109 Ill. 2d 80, 92 (1985). However, an improper remark by the State will only require reversal where prosecutorial comments exceed the boundaries of impartiality to prejudice the defendant by casting doubt regarding whether the guilty verdict resulted from those comments instead of the evidence. See *People v. Montgomery*, 254 Ill. App. 3d 782, 794 (1993); *People v. Castaneda*, 299 Ill. App. 3d 779, 784 (1998).

¶ 21 The parties do not provide any authority that directly addresses bolstering in this context, and the applicable case law tends to focus on bolstering with regard to remarks made during closing arguments. However, the available precedent demonstrates that Illinois courts have found reversible error when the prosecutor vouches for the credibility of a witness by placing the

integrity of his office behind a witness' testimony or expressing his personal opinion of the credibility of a witness. *People v. Emerson*, 122 Ill. 2d 411, 434 (1987). Accordingly, we begin our analysis with the issue of error.

¶ 22 Here, we disagree with defendant that the prosecutor's statement to Rozzie Jackson that "you have to testify to the truth," during direct examination rises to the level of improper enhancement of a witness' credibility because it is not a statement of opinion – it neither characterized nor described the witness' testimony. See, *e.g. People v. Pryor*, 170 Ill. App. 3d 262, 273 (1988) (finding prosecutor's stated opinion to jury that witness' testimony was "right," "believable," or "correct" did not improperly vouch for credibility of witness).

¶ 23 Throughout the course of Rozzie Jackson's testimony, he expressed his unwillingness to testify at trial. After being repeatedly admonished to answer the questions posed, the following exchange occurred:

"Q. Who touched who?

A. Um –

Q. Mr. Jackson, who touched who?

\* \* \*

THE WITNESS: Lafe.

\* \* \*

Q. Lafayette did what? Lafayette did what?

A. He touched –

\* \* \*

THE WITNESS: -- [B.P.]

Q. He touched [B.P.] where?

A. Do I have to say this?

Q. You have to testify to the truth. What happened?

A. I told you I didn't want to do this.

Q. You have to testify to the truth. What happened?

[DEFENSE COUNSEL]: Objection.

THE COURT: Sustained.

Q. What happened?

A. Okay, I seen [*sic*] him touch her breasts down there somewhere."

Based upon this exchange, the record demonstrates the prosecutor's remarks were merely admonishments to a recalcitrant witness rather than an expression of opinion.

¶ 24 Defendant, nonetheless, argues *People v. Walton*, 118 Ill. App. 2d 324, 332 (1969), supports his claim of error. In *Walton*, this court found the trial court improperly interrogated a witness in front of the jury concerning her knowledge that she must tell the truth because it was likely to emphasize the testimony and possibly cause the jury to give it undue weight. *Id.* In this case, however, the prosecutor merely responded to the witness' question as to whether he had to testify to what happened. Furthermore, unlike *Walton*, the allegedly improper remarks were not made by the trial court. This distinction is important because generally a trial court has greater influence over a jury than the advocates and its comments or instructions will carry more weight. See *People v. Sprinkle*, 27 Ill. 2d 398, 400-01 (1963) ("Assuming that most juries view most

judges with some degree of respect, and accord to them a knowledge of law somewhat superior to that of the attorneys practicing before the judge\*\*\*\*"). Thus, we do not find *Walton* to be instructive.

¶ 25 By contrast, we find this court's opinion in *People v. Garcia*, 231 Ill. App. 3d 460, 473 (1992), illustrative of the general principles applicable to the present facts. In *Garcia*, this court held that merely revealing to the jury that a witness has agreed to tell the truth is not improper bolstering if it does not express a personal opinion regarding whether the witness has fulfilled such agreement or insinuate that the State's Attorney has additional information the jury does not. *Id.* Because here, we find the prosecutor's comment was not a statement of opinion, nor does the comment "you have to testify to the truth" convey additional information of which the jury was not previously made aware when the witness was sworn in prior to testifying, the prosecutor's remarks did not rise to the level of error to constitute improper bolstering.

¶ 26 More importantly, the trial court cured any potential error resulting from the prosecutor's remarks when it sustained defendant's objection and provided general instructions to the jury before deliberations to disregard any questions which were withdrawn or to which objections were sustained and that only the jury may determine the credibility of the witnesses and the weight to be given their testimony. See *People v. Willis*, 409 Ill. App. 3d 804, 814 (2011); *People v. Outlaw*, 75 Ill. App. 3d 626, 646 (1979). Although defendant argues on appeal that in order for the error to be cured the trial court should have provided a limiting instruction, defendant failed to request a limiting instruction at trial following the court's sustained objection.

Thus, he has waived any challenge to the court's instructions on appeal. See *People v. Rush*, 401 Ill. App. 3d 1, 16 (2010), citing *People v. Enoch*, 122 Ill. 2d 176, 186 (1988).

¶ 27 In conclusion, because we hold the prosecutor's remarks were not improper in the context of bolstering a witness' credibility and find that the trial court properly responded to defendant's objection thereby curing any other potential error that may have resulted from such comments (see *People v. Perkins*, 247 Ill. App. 3d 778, 786 (1993) (trial court may cure any error resulting from a prosecutor's improper comments by sustaining defense counsel's objection or admonishing the jury)), defendant has failed to establish an actionable claim of error. Thus, we need not reach the issue of prejudice.

¶ 28 Defendant's final contention is that the trial court abused its discretion by sentencing him to a 14-year term of imprisonment and argues the sentence is excessive in light of the nature of the offense and the substantial mitigating evidence. Defendant also briefly argues that the trial court should have considered the severity of his Class X sentence in light of the Class 2 term to which he could have been subjected absent his criminal background.

¶ 29 The trial court has broad discretion in sentencing and a reviewing court may only alter a defendant's sentence if the trial court abused its discretion. *People v. Alexander*, 239 Ill. 2d 205, 214-15 (2010). In order to prove an abuse of discretion, a defendant must show that the sentence was based upon improper considerations or was otherwise erroneous, either because the sentence is "greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *People v. Perruquet*, 68 Ill. 2d 149, 154 (1977); *People v. Stacey*, 193 Ill. 2d 203, 210 (2000). As a Class X offender, defendant was no longer eligible for a Class 2 felony

sentence. Thus, we review the severity of his Class X term of imprisonment within the Class X sentencing range for an abuse of discretion. See 730 ILCS 5/5-4.5-95(b) (West 2012); 730 ILCS 5/5-4.5-25(a) (West 2012). Here, defendant's 14-year sentence fell well within the applicable statutory sentencing range. As such, we accord great deference to the trial court's judgment and will only reverse the judgment upon abuse of discretion. *Perruquet*, 68 Ill. 2d at 154.

¶ 30 Although careful consideration must be given to all mitigating and aggravating factors, the sentencing court should not substitute its judgment for that of the trial court simply because it would have balanced the appropriate sentencing factors differently. *Alexander*, 239 Ill. 2d at 213. A defendant's rehabilitative potential and other mitigating factors are not entitled to greater weight than the seriousness of the offense. *People v. Coleman*, 166 Ill. 2d 247, 261 (1995). When mitigating factors are presented to the trial court, it is presumed these factors were considered, absent some contrary indication other than the sentence itself. *People v. Benford*, 349 Ill. App. 3d 721, 735 (2004).

¶ 31 Defendant first argues the nature of the offense did not warrant the sentence imposed where an "intoxicated defendant exposed his penis, then groped [the] fully-clothed [victim] in plain view \*\*\*." Here, the facts of the case establish that defendant "groped" the breasts and vagina of a 14-year-old member of his extended family multiple times throughout the night after inappropriately exposing his penis and making sexual comments in her presence; and, in so doing, violated the trust of a member of his family who thought of defendant as "an uncle." Therefore, we do not find the trial court abused its discretion by characterizing the nature of the offense as "serious and onerous."

¶ 32 Although defendant also directs this court to *Stacey*, 193 Ill. 2d 203, to identify a situation where the sentence imposed was found to be an abuse of discretion in light of the nature of the offense, our supreme court has expressly declined to compare a sentence to sentences imposed in unrelated cases. See *People v. Fern*, 189 Ill. 2d 48, 62 (1999). Therefore, because we find the facts support the trial court's characterization of the offense as "serious and onerous," we need not distinguish the present case from *Stacey* on its facts. *Id.*

¶ 33 Defendant next argues the trial court failed to consider several mitigating factors when imposing his sentence, including (1) that defendant does not have a history of sexual misconduct; (2) that defendant's childhood was marked by addiction, violence and mental illness; and (3) that defendant has a history of depression and sustained a head injury, among other things.

¶ 34 First, the trial court is not limited to considering prior convictions for the same or similar crimes when imposing a sentence and may consider defendant's entire criminal history, which included several felonies and lesser crimes extending over the course of multiple decades. See *People v. Thomas*, 171 Ill. 2d 207, 229 (1996) (sentencing court properly considered defendant's entire criminal history when assessing rehabilitative potential). Furthermore, evidence of defendant's troubled childhood and history of mental and physical illness was presented to the court for consideration during sentencing. As such, we can presume the trial court considered these factors when determining the sentence. See *Benford*, 349 Ill. App. 3d at 735. Although we acknowledge the trial court failed to expressly mention the specific mitigating factors defendant now argues on appeal were ignored when imposing its judgment, the court is not required to

specify on the record all its reasons for a sentence. See *People v. Canizalez-Cardena*, 2012 IL App (4th) 110720, ¶ 24.

¶ 35 Rather, the record clearly demonstrates the court appropriately weighed the evidence in aggravation in light of the compelling mitigating evidence when it imposed defendant's sentence. See *People v. Powell*, 2013 IL App (1st) 111654, ¶ 35 ("While the trial court cannot ignore evidence in mitigation, it may determine the weight to attribute to mitigating evidence."). The trial court stated:

"I'm going to find the counts will merge. I'm not going to give him separate sentences on two counts of convictions aggravated criminal sexual abuse. I had [defendant] earmarked for a sentence much larger than the one in which he will received [sic] today. This is predicated on his allocution, as well as the arguments of his attorneys but I cannot in doing that indicate today that in any sense of the words [sic] eligible for the minimum allowed under the law which would have been six. That would have deprecated the conviction, the circumstances of the [offense] and his very substantial criminal history."

¶ 36 Therefore, because the record demonstrates the court neither failed to take into account applicable mitigating evidence, nor was it required to give more weight to this evidence than the seriousness of the offense (*Coleman*, 166 Ill. 2d at 261), we do not find the trial court abused its discretion by sentencing defendant to a 14-year term of imprisonment.

¶ 37 For these reasons, we affirm the judgment of the circuit court of Cook County.

¶ 38 Affirmed.