2016 IL App (1st) 141674-U
No. 1-14-1674
Order filed May 24, 2016

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ROBERTO ESTRADA, Defendant-Appellant.	)	Appeal from the Circuit Court of Cook County. No. 13 CR-382 The Honorable Kevin M. Sheehan, Judge, presiding.

JUSTICE HYMAN delivered the judgment of the court.
Presiding Justice Pierce and Justice Simon concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant forfeited his claim that the trial court improperly sentenced him to more than the minimum term of incarceration for each conviction of aggravated criminal sexual assault; defense counsel did not object to the trial court's comments during sentencing nor did the motion for reconsideration of sentence include the issue of the trial court's reliance on defendant's false testimony as an aggravating factor. In any event, the trial court properly considered mitigating and aggravating factors and did not abuse its discretion in sentencing.

¶ 2 Defendant Roberto Estrada was charged with four counts of aggravated criminal sexual assault (720 ILCS 5/11-1.30(a)(2), 5/11-1.30(a)(3) (West 2010)) stemming from an attack of a

young woman during the early morning hours of November 16, 2012. A jury found Estrada guilty of all four counts. The trial court merged two counts of aggravated criminal sexual assault and sentenced Estrada to two terms of eight years in prison for each conviction, to be served consecutively.

¶ 3 Estrada argues that the sentencing court wrongly aggravated his sentence based on the mistaken belief that he falsely testified about the conduct of one of the Chicago police officers present at the scene of the attack. Estrada asserts that he never accused the police of planting evidence in an effort to frame him; rather, Estrada's defense attorney argued in closing that the one of the police officers on the scene could have planted evidence to implicate Estrada. The State counters that the sentencing court appropriately considered the aggravating and mitigating factors and imposed consecutive eight-year sentences, two years' over the minimum of six years' incarceration for Class X felonies, and far below the maximum of 30 years. 720 ILCS 5/11-1.30(d)(1) (West 2010).

¶ 4 We give substantial deference to the sentencing decision because the trial judge, having observed the defendant and the proceedings, occupies a better position to consider factors such as the defendant's credibility, demeanor, moral character, mentality, environment, habits, and age. *People v. Snyder*, 2011 IL 111382, ¶ 36 (citing *People v. Alexander*, 239 Ill. 2d 205, 212-13 (2010)). And we will not modify a defendant's sentence absent an abuse of discretion, and we discern no abuse of discretion in the court's sentence. The sentencing court's comments about Estrada's counsel's final argument, which in turn was based on Estrada's testimony, simply acknowledged rejection of Estrada's defense that he had not been at the scene of the attack on the young woman, even though police found two pieces of identification and his cellphone there within minutes of the incident. Accordingly, we affirm.

¶ 5 BACKGROUND

¶ 6 Around 2:00 a.m. on November 16, 2012, M.P. was sexually assaulted while waiting for a bus on the north side of Chicago. M.P. never saw her assailant's face because he grabbed her from behind and threw her to the ground. She testified that she fought back and bit the assailant's hand as he covered her mouth to stop her from screaming. The assailant ran away when a passerby approached. Within a minute or so, Chicago police officers appeared.

¶ 7 John Sippy lived in a townhouse on the corner near the bus stop. He testified that he was awake and working in his first-floor office when he heard noise outside. After looking out the window and realizing what was happening, he dialed 911 and went outside to help. As Sippy approached M.P., he saw a man wearing a dark hoodie run away and climb over a chain-link fence to the next yard. The police arrived almost immediately. Sippy showed the officers the area where the assailant fled. The police then discovered two ID's and a cellphone lying in the grass near the fence.

¶ 8 Chicago Police officer Nelson Crespo and his partner were on patrol in the early morning hours of November 16 when they received a "call for help" from dispatch. They arrived to see two men and M.P., who was sitting on a bench. Crespo spoke with Sippy and then searched the area. Crespo recovered a cellphone, a military ID and an Illinois driver's license from the grassy area close to the fence. Both identifications contained Estrada's name. Crespo testified that he called his sergeant because whenever a violent incident occurs, police officers notify their sergeants. A Sergeant Lessner, who did not testify, arrived after the recovery of the cellphone and identifications.

¶ 9 Chicago police detective Mark Regal and his partner, using information from the IDs, contacted Estrada's sister the following morning. Estrada was not there, and they left their contact information with her.

¶ 10 The same afternoon Estrada came to police headquarters and spoke to Regal and his partner. Regal advised Estrada of his *Miranda* rights before interviewing him. Estrada said that the night before, after leaving a bar, his car was stopped by a police sergeant. The sergeant took Estrada to a different location and let him go. Regal stated that Estrada said he then got into two incidents, but "he couldn't tell me which one happened first." One involved a fight with four male Hispanics but he was not robbed because "he had his cell phone, his wallet, and his I.D.'s after that incident." The other incident occurred when he grabbed "an unknown girl" and pushed her to the ground. Then he ran away, hailed a cab, and found his car.

¶ 11 Regal asked about specific acts that were committed against M.P. Estrada said he could not remember, but that he could not deny them because he could not remember. Estrada said the cellphone and identifications the police had were his and that he did not realize they were missing.

¶ 12 Estrada voluntarily gave a DNA sample. Photographs of scratches on Estrada's face, knee, elbow, and hands were presented and later admitted into evidence.

¶ 13 The following day Regan interviewed M.P., and on November 18 requested Estrada to return to police headquarters. That afternoon Estrada was arrested.

¶ 14 DNA evidence taken from a bite injury on M.P.'s hand showed a mixture of DNA profiles. The major profile matched M.P. and the results could not exclude Estrada as a source of the minor profile.

¶ 15 Defense's Evidence

¶ 16 Three character witnesses attested to Estrada's good character: a former neighbor; an ex-girlfriend; and a long-time close friend.

¶ 17 Estrada testified that after drinking for several hours with friends, he left a bar on the north side around midnight in an intoxicated condition. He decided to drive home, but before he reached the expressway, a Chicago police sergeant, Stephen Lessner, stopped him. Estrada knew Lessner was a sergeant because Estrada recognized the stripes from his experience in the military. Estrada gave Lessner his driver's license and insurance card, and admitted he had been drinking. He also gave Lessner his military ID. Lessner told him to get out and patted him down, taking his cellphone and wallet that were in his pocket. Lessner then drove Estrada to an unfamiliar neighborhood, and lectured him about drinking and driving. Lessner told Estrada to get out, and Estrada started walking but shortly after got into a fight with four men he met on the street. They beat him up but "lost interest" and ran away. Estrada hailed a cab (he had money in his pocket) and found his car. He drove to his friend's house but no one answered the door, so he slept in his car for a while, and then drove to his sister's house in the suburbs.

¶ 18 Estrada's sister gave him Detective Regal's business card. Estrada called him and then went to the police station at Belmont and Western. Regal showed him a photograph of a woman who had been attacked the night before and told him his military ID, driver's license, and cell phone were found at the scene. Estrada denied attacking the woman.

¶ 19 On cross-examination Estrada stated that he gave Lessner his military ID because a police officer who had given him a traffic ticket, after realizing Estrada had been in the Service, told Estrada "next time you get pulled over just give us the ID. The worst thing that is going to happen is that they are still going to give you a ticket. The best thing is they will give you a slap on the wrist."

¶ 20 Estrada also stated that his car was not impounded, that the keys were left in it, and that he found it later after he had the fight with four men. Estrada denied telling Regal that he had pushed a woman to the ground that night.

¶ 21 Estrada was in the Illinois National Guard Reserves, and had taken part in Operation Enduring Freedom in Kuwait while on active duty.

¶ 22 State's Rebuttal

¶ 23 Chicago Police detective Edward Heerdt testified that he and Detective Regal interviewed Estrada on the afternoon of November 16. Estrada told them he was aggressive in that he pushed a woman to the ground the night before. Estrada did not know whether he had sexually penetrated the woman because he could not remember, but he could not deny doing it.

¶ 24 Closing Argument

¶ 25 In closing, defense counsel argued that Estrada testified that he was stopped by Sergeant Lessner who "took and kept a military identification, a telephone, and a driver's license. For what reason we don't know, because we didn't hear from Sergeant Lessner." Defense counsel then commented that Lessner was the person who took the items from Estrada that were later found at the crime scene. Asking the question why Lessner was at the scene in the first place and why these three objects, but not a wallet or "something else," were found, defense counsel suggested that reasonable doubt existed.

¶ 26 After discussing the DNA evidence and the evidence of Estrada's injuries when he was arrested the next day, defense counsel argued that the assistant State's Attorney would question the "big conspiracy" in his closing:

> "Why would there be a big conspiracy? Obviously, he's saying that, well *** Sergeant Lessner came and he took stuff so they could plant it at the scene. And then Detective Regal, he's involved in it. And everybody is involved in a big conspiracy."

¶ 27 The jury convicted Estrada of four counts of aggravated criminal sexual assault.

¶ 28 At the sentencing hearing, Estrada made a statement in allocution admitting to a problem with alcohol. Before imposing sentence, the trial court characterized Estrada's case as "very curious" and enumerated the factors in mitigation: Estrada's service in the military; his honorable discharge; awards he received; character witness testimony from a long-time neighbor, ex-girlfriend, and his "best friend" for sixteen years; and his personal history of being a "model citizen, the family man, the good brother, the good son, the good friend, the person who was kind ***."

¶ 29 In aggravation, the trial court commented on Estrada's condition as "fueled up with alcohol" and that he "victimized" M.P. The trial court went on:

> "You left evidence at the scene linking you to the crime. Ánd when you hit the stand there, even though [defense counsel] says, well, Judge, he doesn't even remember what happened, that's nonsense because you concocted a story on that stand to make it look like that kind officer who let you go when you were driving drunk and merely parked your car somewhere else, that he planted the keys and whatever identification at the scene to hang you. That's a lie. You lied under oath on the stand, and the Court takes umbrage at that."

The trial court called Estrada's testimony "nonsense" and commented that he was "[trying] to piecemeal and fashion some type of defense up there." The judge then concluded: "[t]hat was absolute nonsense. The jury didn't buy it and I didn't buy it."

¶ 30 After commending Estrada for his voluntary military service, the trial court noted that even though his actions were an "aberration or anomaly," he was responsible for his actions. The trial court then merged count one with count three and count two with count four, and sentenced Estrada to two consecutive terms of eight years' incarceration. Estrada filed a motion for reconsideration of the sentence. In denying the motion, the trial court stated it believed the sentence was fair based on the facts and "on the defendant getting on the stand and lying to the jury and to this Court."

¶ 31 ANALYSIS

¶ 32 The Illinois Constitution provides in part that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." (Ill. Const.1970, art. I, § 11.) This court presumes that sentences within the statutory mandated guidelines are proper and will overturn or reduce a sentence: (i) affirmatively shown to greatly depart from the spirit and purpose of the law, or (ii) manifestly contrary to constitutional guidelines. *People v. Boclair*, 225 Ill. App. 3d 331, 335 (1992). A sentence promotes the spirit and purpose of the law when it reflects the seriousness of the offense and gives adequate consideration to defendant's rehabilitative potential. *Id*. "When the appellate court reviews a sentence, it 'should not focus on a few words or statements made by the trial court, but must consider the record as a whole.' " (quoting *People v. Sims*, 403 Ill. App. 3d 9, 24 (2010); citing *People v. Reed*, 376 Ill.App.3d 121, 128 (2007)). *People v. Burgess*, 2015 IL App (1st) 130657, ¶ 227. 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. Sauseda*, 2016 IL App (1st) 140134, ¶ 19.

¶ 33 Estrada argues that the trial court conflated defense counsel's arguments to the jury and Estrada's testimony, resulting in the trial court's belief that Estrada lied under oath and then, based on that misperception, sentenced him to consecutive eight-year terms. Estrada asserts the record reflects he never accused anyone of planting evidence to frame him; rather, defense counsel suggested during closing arguments that the police sergeant who stopped Estrada for DUI was involved in foul play and deliberately planted evidence.

¶ 34 The State responds that Estrada forfeited the sentencing issue because defense counsel made no contemporaneous objection to the trial court's comments during sentencing, and his "posttrial motion" did not include this issue with specificity. Forfeiture aside, the State argues that the trial court appropriately considered Estrada's credibility along with other proper aggravating and mitigating factors.

¶ 35 In the section of the State's brief arguing forfeiture of the sentencing issue, the State asserts the record shows Estrada's counsel did not object to the trial court's comments. The State cites to the portion of the record pertaining to his motion for a new trial that was argued and decided *before* the court proceeded to the sentencing hearing at which time the judge made the comments to which Estrada now objects. Directing this court to an inapplicable portion of the record is either an honest mistake or disingenuous.

¶ 36 The State further argues that Estrada's motion to reconsider his sentence asserted generically that the sentence imposed was excessive and, more specifically, that the trial court failed to consider in mitigation that Estrada's character and attitude indicate he would be unlikely to reoffend. But the motion did not mention the objection raised in this appeal. To preserve a claim of sentencing error for review, a defendant must make both a contemporaneous objection

and file a written post-sentencing motion. *People v. Hillier*, 237 Ill.2d 539, 544 (2010). We agree that the motion did not advance the argument articulated in this appeal and thus was forfeited.

¶ 37 Forfeiture notwithstanding, Estrada asserts that this court should review for plain error. 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 first show that there was a clear or obvious error (*People v. Roman*, 2013 IL App (1st) 102853, ¶ 19) 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. *Wooden*, 2014 IL App (1st) 130907, ¶ 10. The burden of persuasion remains with defendant under both prongs of the doctrine. *Sauseda*, 2016 IL App (1st) 140134, ¶ 11.

¶ 38 To accept Estrada's theory that the trial court's remarks falsely and unfairly accused him of lying, we would have to ignore the logical inference from Estrada's testimony about the traffic stop and ensuing search. Estrada testified that after drinking for several hours, he left the bar intoxicated and started to drive home. Before he reached the expressway, he was stopped by Chicago police sergeant Stephen Lessner to whom Estrada gave his driver's license and insurance card as well as his military ID. Estrada had been recently told by the Chicago police officer during a stop for a traffic violation to present his military ID and he may get "a pass" on a traffic violation. Estrada told Lessner he had been drinking. Lessner frisked him and took his cell phone. Lessner then drove Estrada to an unfamiliar neighborhood, and dropped him off without arresting him. As his ID's and cellphone ended up at the scene, where Estrada testified he had not been that night, this version of events can only be interpreted as implying that Lessner held on to the ID's and cellphone and placed them at the scene.

¶ 39 While Estrada did not explicitly accuse the police of planting evidence at the scene to implicate him, defense counsel argued to the jury that questions were unanswered regarding how Estrada's identification cards and cellphone appeared at the scene. Counsel's representation to the jury necessitates accepting Estrada's version of events as true. By convicting Estrada, who denied involvement, the jury had to reject his testimony.

¶ 40 A defendant has a right to either say nothing or to speak freely, *i.e.*, not address the question of his guilt or innocence, or, instead, use the opportunity to protest his or her innocence. *People v. Ward*, 113 Ill. 2d 516, 532 (1986). By protesting innocence, the trial court can "incorporate the legitimate inferences drawn from this assertion, including whether the assertion was truthful, into the balance in considering the relevant factors bearing on the defendant's character and potential for rehabilitation." *Id*. Stated differently, the judge had the right to "evaluate and consider the defendant's lack of contrition and protestation of innocence in light of the other relevant facts in the case." *Id*.

¶ 41 In *People v. Meeks*, 81 Ill. 2d 524 (1980), where the defendant presented an alibi defense, one of the arguments the defendant asserted on appeal was that "the trial judge improperly considered defendant's *perceived perjury* at trial." (Emphasis added.) *Id*. at 536. In affirming the trial court's sentence, our supreme court stated "Realistically, it is impossible for a judge, in determining what sentence should be imposed, to erase from his [or her] mind the testimony of the defendant" which "can hardly be said to be irrelevant to an appraisal of the defendant's character and his [or her] prospects for rehabilitation. (Citation.)" *Id*. at 536. The supreme court then stated it did not find "that the trial judge's *perception of perjury* was unwarranted, nor that he improperly applied this factor to his sentencing decision." *Id.*. See *People v. Nelson*, 206 Ill. App. 3d 956, 967 (1991) (judge's statement during sentencing that defendant changed his story

under oath and was incapable of telling the truth at any time during the proceedings did not demonstrate hostility).

¶ 42 The State grossly exaggerates when it maintains that Estrada "perjured himself on the stand" by "attempt[ing] to concoct a story" to explain the presence of the identification cards and cellphone. Taking the State's logic another step, every time a trier of fact, whether judge or jury, rejects a witness's testimony, that witness must have committed perjury.

¶ 43 A sentencing court has the opportunity to weigh the mitigating and aggravating factors, including a defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. *Abrams*, 2015 IL App (1st) 133746, ¶ 32. Moreover, we presume, absent some contrary indication, that the trial court considered mitigating evidence. *People v. Burton*, 2015 IL App (1st) 131600, ¶ 38. The presentence investigation report indicated Estrada graduated from high school graduate and had 12 college credit hours. He had no adult criminal record. Estrada's Army discharge certificate indicated he was on active duty for 2 1/2 years, serving in Kuwait for "Operation Enduring Freedom," and listed his military service, awards, and honorable discharge. After his release from active duty he was a member of the National Guard. The trial court commented on Estrada's character as a "model citizen"; a "family man"; a good brother, son, and friend; and "the person who was kind to people at tough times in their life."

¶ 44 A sentencing decision is entitled to great deference. *People v. Coleman*, 166 Ill. 2d 247, 261-62 (1995). The sentences were well within the range provided in the sentencing statute. Aggravated criminal sexual assault is a Class X felony (720 ILCS 5/11-1.30) (West 2010)) and carries a sentence of not less than 6 years' and not more than 30 years' imprisonment, to be served consecutively. 730 ILCS 5/5-4.5-25(a), 5/5-8-4 (West 2010). Moreover, the trial court

considered, as factors in aggravation, M.P.'s bodily injuries and the need to deter others. The trial court contrasted the image of a "model citizen" with that of a victimizer "fueled up with alcohol" before imposing for each count a sentence that added two years to the minimum sentence of six years. The trial court pointed out this was "nowhere near the maximum sentence" where the range was from 12 total years of incarceration to a total of 60 years. As in *Meeks*, where the imposition of the minimum sentence of imprisonment demonstrated the trial judge's "sensitivity to the mitigating factors," here the sentence received was far closer to the minimum than the maximum. We cannot say that it varies greatly from the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. See *People v Jones*, 2014 IL App (1st) 120927, ¶ 56. Estrada failed to show the sentencing court abused its discretion in imposing his sentence.

¶ 45 Because we find no error, we will not consider the issue under the plain error doctrine. Affirmed.