2018 IL App (5th) 140329-U

NO. 5-14-0329

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Jackson County.
	)	
v.	)	No. 2013-CF-183
	)	
SHAMAR SCALES,	)	Honorable
	)	William G. Schwartz,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Presiding Justice Barberis and Justice Welch concurred in the judgment.

ORDER

¶ 1 *Held*: The evidence was sufficient to prove the defendant guilty of criminal sexual assault. The victim's testimony was not inherently implausible or against the laws of nature, and there was sufficient evidence to prove that the defendant was aware that the victim was unable to give consent because she was asleep. The court did not abuse its discretion in sentencing the defendant.

¶ 2 The defendant, Shamar Scales, was convicted of one count of criminal sexual assault (720 ILCS 5/11-1.20(a)(2) (West 2012)). According to the victim, she awoke to find the defendant in her bed having sexual intercourse with her. According to the defendant, the victim looked at him and he removed her pajama bottoms with some assistance from her before having intercourse. On appeal, the defendant argues that (1)

the evidence was not sufficient to prove him guilty beyond a reasonable doubt because the victim's testimony was inherently implausible; (2) the evidence was not sufficient to prove that he had criminal intent because he believed that the victim was awake; and (3) the trial court failed to take into account mitigating evidence in sentencing him and impermissibly increased his sentence because he maintained his innocence. We affirm.

¶ 3 The defendant and his sister, Shiranette Scales, were close friends with the victim, S.M., and her brother, Isaiah M. They grew up together near Chicago. As young adults, all four moved to Carbondale to attend college. On the evening of April 11, 2013, another childhood friend visited Carbondale to spend the weekend celebrating his birthday with friends, including the defendant, Shiranette, S.M., and Isaiah. The group spent some time drinking at another friend's apartment, and then went to a bar to continue the celebration. The events at issue took place in S.M.'s apartment during the early morning hours of April 12, after the group left the bar. There is no dispute that the defendant had sexual intercourse with S.M. The only question is whether he knew that S.M. was asleep and unable to give consent.

¶ 4 At the defendant's trial, S.M. testified about the events at issue and about the nature of her relationship with the defendant prior to the assault. She testified that she had known the defendant since she was 10 years old. She considered the defendant and his sister, Shiranette, to be "like family." When S.M. moved to Carbondale for college, Shiranette was already living there. S.M. testified that Shiranette took her "under her wing," and the two became much closer. She testified that when the defendant subsequently moved to Carbondale, both she and Shiranette tried to help him out by

buying him food and allowing him to stay with them. At that point, S.M. shared an apartment with Shiranette and a few other people. S.M. testified that although the defendant did not live with them, he stayed there often. She testified that the defendant typically slept on the sofa, but on rare occasions he fell asleep in either her bed or Shiranette's bed while watching a movie.

¶ 5 In April 2013, when the events at issue occurred, S.M. shared an apartment with her brother, Isaiah, and a male friend, LaNeal Nance. She testified that on the afternoon of April 11, her childhood friend, Deon Reed, arrived in Carbondale to spend the weekend celebrating his birthday with friends. Deon arrived at approximately 2:00 in the afternoon. S.M. had just finished classes for the day and was getting ready to go to work. Her job involved cleaning the engineering building. S.M. testified that she and Deon drank tequila shots at her apartment before she went to work. She estimated that she drank five or six shots, but stated that she did not feel tipsy. S.M. worked from about 4 or 5 p.m. until 8:30 or 9 p.m. One of her coworkers brought a small bottle of champagne to work. During a break at approximately 6 p.m., S.M. and her coworkers shared the champagne. S.M. thought she drank half a glass of champagne.

¶ 6 After work, S.M. went to an apartment in University Village where Deon was staying. There, she drank a bottle of wine, but she did not know how many glasses of wine were in the bottle because she drank directly from the bottle. The group then went to a bar called Callahan's to dance. They arrived sometime after 10 p.m. Asked if she was intoxicated, S.M. stated that she was "tipsy" at first, but she explained that she sobered up as the evening went on because she had to "take care of some people who were just really

belligerent and drunk." Among the people she had to "take care of" were Deon, the defendant, her brother, and her roommate. S.M. testified that she did not have anything more to drink at Callahan's.

¶ 7 S.M. estimated that she left Callahan's at approximately 1:45 in the morning. She stopped at the apartment where Deon was staying before walking home to her apartment. She testified that when she arrived, she saw a car parked in front of her apartment building with the defendant, her roommate, and one other individual sitting inside. She did not consider this to be unusual or alarming. She testified that when she got into the apartment, she found her brother home alone. He had passed out on the floor of his bedroom. S.M. attempted to get Isaiah into bed, but was unable to do so. After that, she ate some food, changed into her pajamas, turned on the television, and went to sleep. S.M. testified that she always closed the door to her bedroom when she slept, and she was certain that she did so that night. She estimated that it was between 2:30 and 2:45 a.m. when she went to bed.

¶ 8 S.M. testified that she was awakened by the sensation of a penis penetrating her vagina. She noted that her pajama bottoms were down around her knees, which is not where they were when she went to bed. S.M. testified that initially, she thought she was dreaming. The person having intercourse with her was behind her, under the covers. S.M. testified that she pretended to be asleep, turned over to face the individual, opened her eyes, and saw that it was the defendant. At this point, she moved away from him, got out of bed, and angrily told him to get out. She noted that she did not specifically tell the defendant to stop having sex with her. She explained that it was unnecessary to do so

because her act of pulling away from him ended the sex. She emphasized that the defendant did not wake her up to ask if she wanted to have sex, and she never told him that it was okay.

¶ 9 S.M. testified that the defendant left, as she told him to do. But before leaving, the defendant made a few comments to her. According to S.M., he said, "Man, you tweakin'. You know what you did." He also told her, "I don't know what you talking about."

¶ 10 On cross-examination, S.M. was asked about how long the intercourse lasted. She replied, "I would say about one to two minutes." Asked how she knew this, she replied, "Cause it was not long. I remember reacting fast." She acknowledged, however, that she did not know exactly how long it went on before she woke up and realized she was not dreaming.

¶ 11 S.M. was also asked on cross-examination whether she was sober when she left Callahan's. She explained that she "came down" and that she did not feel impaired in any way. Asked if that meant she was sober, S.M. replied, "I wouldn't say I was sober 'cause many people feel sober when they take a sobriety test and they are over." She went on to note, however, that she thought she was sober by the time she went to bed.

¶ 12 Much of the defendant's testimony about the sequence of events leading up to the intercourse was similar to S.M's account. He testified that he moved to Carbondale in 2009 to attend college. At the time of trial, in November 2013, he was still a freshman at John A. Logan, a community college. He testified that during his first two years in Carbondale, he lived with his sister and S.M., but in April 2013, when the events at issue occurred, he lived with friends.

¶ 13 The defendant testified that before going to Callahan's on the night of April 11, 2013, he drank shots with S.M., Deon Reed, and some other people. He testified that neither he nor S.M. had a lot to drink. He noted that he had one or two shots, and although he did not know how much S.M. had to drink, he thought that she did not have "that many." The defendant testified that the group arrived at Callahan's at around 11:30 p.m., and they left when the bar closed at 2 a.m. He testified that when the bar closed, they could not find Isaiah. S.M. left Callahan's with other friends, and the defendant got into a car with LaNeal Nance and someone named Damon, and they went to look for Isaiah.

¶ 14 The defendant testified that he, LaNeal, and Damon left Callahan's, they looked for Isaiah in a few places, and then decided to go to the apartment LaNeal shared with S.M. and Isaiah. He estimated that they arrived at 2:45 a.m. Damon dropped off the defendant and LaNeal and then drove away. The defendant testified that he and LaNeal found Isaiah passed out on the bathroom floor. They carried Isaiah to his bed. The defendant then went into S.M.'s bedroom to sleep in her bed with her. The defendant explained that he shared a bed with S.M. frequently and "it wasn't a problem." He testified, however, that they had never previously had a sexual relationship.

¶ 15 It is here that the defendant's account diverges from S.M.'s According to the defendant, when he got into bed with S.M., she turned around and looked at him. He could see that her eyes were open and she was awake. The defendant acknowledged that there was no conversation about sex. He testified, however, that S.M. "allowed" him to pull down her pajama bottoms, digitally stimulate her, and have sex with her. He

explained that he was unable to pull her pajama bottoms all the way down until she rolled over because her hip was in the way. He further testified that during sex, S.M. moved with him and moaned. The defendant testified that the intercourse lasted 10 to 15 minutes, during which time S.M. gave no indication that she did not want to have sex with him.

¶ 16 The defendant testified that as he was about to ejaculate, S.M. suddenly pulled away from him and told him to get out. As a result, he testified, he had to ejaculate into his hand. He acknowledged that he asked S.M., "What are you talking about?" He explained that he was confused. He testified that he then got his clothes and left.

¶ 17 During cross-examination, the defendant admitted that when he went into S.M.'s room, the lights were out and she was under the covers. During redirect examination, the defense counsel asked the defendant, "Well, Mr. Bloodworth asked you if [S.M.] said anything to you, and have you just remembered something she said to you?" The defendant replied, "Yes." He then testified that just before he left, S.M. said to him, "I won't tell anyone what we did."

¶ 18 S.M. was called to testify in rebuttal. She testified that she did not open her eyes and look at the defendant before the sex, she did not help him remove her pajama bottoms, and she did not tell the defendant that she would not tell anyone that they had sex. Asked if the defendant had sex with her for 10 to 15 minutes, S.M. replied, "I have no idea." She then added, "It could have been 15 minutes. I was very moist." She reiterated, however, that she did not know how long the sex lasted. She testified that she did not know whether the defendant ejaculated into his hand. On cross-examination, S.M.

testified that she did not wake up when the defendant pulled down her pajama bottoms. Defense counsel asked, "Do you have some sort of sleep disorder?" S.M. replied, "No, ma'am."

¶ 19 The jury returned a verdict of guilty, and the court ordered a presentence investigation report (PSI). The PSI was filed with the court in January 2014. Terri Copher, the probation officer who prepared the report, described an interview with the defendant. The defendant indicated that he was the first boy in his family to go to college and that he hoped he could "be an inspiration" to other members of his family because of this. He told Copher that he did not believe he did anything wrong and that he felt the jury did not listen to all of the evidence. The defendant complained that "he should be accomplishing his dreams and not wasting his life" in jail. Copher noted that the defendant refused to sign a release form so that she could obtain information from the college he was attending.

¶ 20 An addendum to the PSI was filed in March 2014, adding a written victim impact statement from S.M. In her statement, S.M. said that before the assault, the defendant was "like family" to her. She stated, "This has been the highest level of betrayal I have ever experienced." She described feeling embarrassed and alienated by her status as a "victim." She also described the loss of her friendship with the defendant's sister, Shiranette, who was previously one of her closest friends.

¶ 21 The matter came for a sentencing hearing in May 2014. The trial judge indicated that he had read and considered the PSI. The court then allowed the defendant to give a statement in allocution. The defendant began by telling the court that he came to

Carbondale to go to school. He stated, "I have a mother. I have family members that's females. I did not rape nobody, sir. Sir, I came here for school. Why would I just up and take advantage of a person?" Much of his statement followed this same theme. The defendant went on to tell the judge that he was "being categorized by vicious individuals," and that he was "stuck" and "trapped in a trap." He argued that he needed to be freed from that trap. At this point, the trial judge interjected, asking the defendant, "How did you get stuck? Wasn't it living the wild life in Carbondale?" In response, the defendant insisted that the only thing he was doing in Carbondale was going to school.

¶ 22 The defendant continued to argue that he was innocent. He asked rhetorically, "Why would I throw my life away, sir? Could you please tell me that right now, sir?" The judge responded, "Because you were intoxicated and acting like an idiot, if you want an answer." The defendant continued his argument, pointing out that S.M. had testified that she was not intoxicated. He then said, "What female in her right mind [that] do not have a sleeping disorder—" The judge interrupted and asked the defendant, "So this is all her problem?" The defendant replied, "No, both of us have accountability in this." He continued to argue that S.M. was awake and that she consented to sex through her actions. The judge reminded the defendant that the 12 jurors who heard the evidence found that the sex was not consensual. He then said, "Now, if you don't want to accept that, that's fine, but don't go blaming the victim."

¶ 23 The defendant concluded his statement by asking the court, "Could you please just have mercy on my soul, sir? My life is in your hands and my almighty savior, sir." The judge responded, "Your life is in your own hands, and until you realize what you did,

how you did, and why you did it, you are going nowhere but to hell, young man. You have not accepted one bit of responsibility for this."

¶ 24 The State recommended that the defendant be given a sentence of 15 years, the statutory maximum for the offense. See 720 ILCS 5/11-1.20(b); 730 ILCS 5/5-4.5-30(a) (West 2012). The prosecutor focused on the impact of the sexual assault on S.M. He argued that a 15-year sentence was appropriate due to the serious emotional harm suffered by S.M. (see 730 ILCS 5/5-5-3.2(a)(1) (West 2012)), the need to deter others (see *id*. §5-5-3.2(a)(7)), and the need to protect the public from the defendant. In arguing that the defendant posed a danger to the public, the prosecutor emphasized his lack of remorse and his refusal to cooperate with the probation officer who prepared the PSI.

¶ 25 Defense counsel urged the court to sentence the defendant to the statutory minimum of four years in prison. See 720 ILCS 5/11-1.20(b); 730 ILCS 5/5-4.5-30(a) (West 2012). She acknowledged that the defendant's conduct caused harm to S.M., but she argued that the defendant did not contemplate that his conduct would cause harm. See 730 ILCS 5/5-5-3.1(a)(2) (West 2012). She also argued that the defendant had no history of prior convictions or adjudications of juvenile delinquency (*id*. §5-5-3.1(a)(7)), although she acknowledged that a prior charge of criminal sexual assault was nol-prossed in 2013. Finally, counsel argued that the defendant was unlikely to reoffend, as evidenced by the fact that he "expressed his displeasure with being incarcerated."

¶ 26 The court sentenced the defendant to 13 years in prison without making express findings concerning factors in aggravation and mitigation. This appeal followed.

¶ 27 On appeal, the defendant first argues that the evidence was not sufficient to prove him guilty beyond a reasonable doubt. We disagree.

¶ 28 In reviewing a challenge to the sufficiency of the evidence, we view all of the evidence presented at trial in the light most favorable to the prosecution, and we determine whether that evidence is sufficient for any reasonable trier of fact to find the essential elements of the crime beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). It is the role of the jury, not this court, to resolve conflicts in the evidence and determine the credibility of the witnesses. *Id*. at 261-62. This is because the jury had the opportunity to see and hear the witnesses as they testified and was therefore in a better position to assess their credibility than we are. *People v. Wheeler*, 226 Ill. 2d 92, 114-15 (2007). Thus, a jury's credibility determinations are entitled to great deference. This deference is not unlimited, however, and a jury's decision to accept the testimony of a witness is not conclusive or binding on this court. *Id*. at 115.

¶ 29 Our review must include all of the evidence in the record, whether it is favorable to the State's case or not. *Id*. at 117. This does not mean that we must evaluate "every piece of evidence" and consider "every possible inference that could be drawn therefrom." *Id*. Indeed, we must draw all reasonable inferences from the evidence in favor of the prosecution. We will reverse a conviction only if the evidence is so improbable, unreasonable, or unsatisfactory that it raises a reasonable doubt as to the defendant's guilt. *Id*. at 115; *Collins*, 106 Ill. 2d at 261.

¶ 30 The defendant's sufficiency-of-the-evidence argument has two components. First, he argues that S.M.'s testimony was inherently implausible and defied the laws of nature

and human experience. In essence, he claims that it was impossible for her to have remained asleep while he removed her pajama bottoms and had sex with her for 10 to 15 minutes. As such, he contends, her testimony was wholly incredible and no reasonable jury could have believed it. Second, he argues that there was insufficient evidence of his criminal intent. We reject both contentions. We note that the defendant also argues that there was insufficient evidence of force; however, because he was not charged with using force to commit the offense, we need not consider this argument.

¶ 31 In support of his contention that S.M.'s testimony was too implausible to be believed, the defendant cites *People v. Yeargan*, 229 Ill. App. 3d 219 (1992). We find *Yeargan* distinguishable from the case before us.

¶ 32 There, the complainant testified that she encountered the defendants when she was walking home from a convenience store with her dog and carrying groceries. The defendants were sitting in a parked car near a bar. According to the complainant, the defendants asked her twice for oral sex, but she refused. *Id*. at 221. As she walked on, she noticed that the two men were following her. The complainant testified that they grabbed her and forced her to walk into a nearby garage. *Id*. She testified that she tried unsuccessfully to get her dog to attack her assailants. She explained that her dog was a friendly dog who loved to be petted and had never bitten anyone. *Id*. at 222. She testified that the defendants told her to tie the dog outside the garage before entering, and she complied. *Id*. at 222-23.

¶ 33 The complainant testified that inside the garage, the defendants forcibly removed her clothing, and then they sexually assaulted her multiple times. *Id*. at 230-31.

Significantly, she testified that each defendant ejaculated multiple times during a period of 15 to 20 minutes. *Id*. at 233-34. Also significant was the complainant's testimony that instead of a normal vaginal opening, she had a smaller urethral opening. *Id*. at 230. No semen was found on her clothing or person, and there was no injury to her person, including her urethral opening. *Id*. at 230-31.

¶ 34 The complainant further testified that after the assault, she got dressed quickly, followed the defendants from a distance, and wrote the license plate number of their car on her hand. *Id*. at 222. She then went back to the garage to get her dog. Then she called the police from a nearby gas station and waited for them to arrive. *Id*.

¶ 35 Yeargan, one of the defendants, testified at trial. He testified that he went to a bar with Thompson, the other defendant. He testified that he and Thompson went outside to smoke marijuana. While they were sitting in Thompson's parked car rolling a joint, the complainant approached the car and offered to perform oral sex on them for $5 apiece. *Id*. at 227. The defendants agreed. They got out of Thompson's car and followed the complainant to a garage in an alley. *Id*. According to Yeargan, the complainant and Thompson went into the garage alone. When they emerged five minutes later, the complainant motioned for Yeargan to enter the garage with her. *Id*. He testified that she performed oral sex on him one time in the garage. *Id*. at 227-28. According to Yeargan, the complainant did not remove any of her clothing, and they did not have any other type of sex. *Id*. at 228.

¶ 36 Yeargan further testified that the complainant asked to be paid, but Thompson had already gone back to the bar, and Yeargan did not want to pay for both of them. *Id*. He

testified that he and the complainant walked back to the bar together, and the complainant waited outside for him to get the money from Thompson. *Id*. However, Yeargan explained, Thompson refused to pay unless the complainant entered the bar to ask for her money. Yeargan decided to do likewise. *Id*. He testified that the complainant waited outside the bar for about 30 minutes to an hour, but did not come inside to demand her money. *Id*.

¶ 37 After a bench trial, the court found both defendants guilty of rape. The defendants appealed, arguing that the evidence was not sufficient to prove them guilty beyond a reasonable doubt. *Id*. at 229. In accepting this argument, the appellate court found that the evidence contained "*numerous* areas of doubt which, *when taken together and not alone*, shed significant doubt on the complainant's testimony." (Emphases added.) *Id*. at 229-30. For example, the court noted that the lack of any injury to the complainant's urethral opening contradicted her testimony that both defendants forcibly penetrated that opening multiple times. *Id*. at 230-31. Similarly, the court found that her account of numerous ejaculations was contradicted by the fact that no semen was found on her person or on her clothing. *Id*. at 231. In addition, the court noted that the complainant's allegation of a physical confrontation was contradicted by evidence that her clothes were not torn, her dog did not attack the defendants, and she did not drop or spill her groceries. *Id*. at 232-33. The court emphasized that while any one of these factors, standing alone, would not have been enough to undermine the complainant's credibility, the combination of factors cast "considerable doubt on her testimony." *Id*. at 233.

¶ 38 Finally, the *Yeargan* court found that two particular aspects of the complainant's testimony were "contrary to the laws of human nature and experience." *Id*. First, the court agreed with the defendants that the number of ejaculations the complainant claimed occurred were simply not possible. *Id*. at 233-35. Second, the court noted that according to the complainant, a lot of things happened in a period of only 50 minutes. *Id*. at 232. She testified that she left her sister's house at 12:30 a.m., then walked to a nearby store and bought groceries before encountering the defendants. She testified that she was then propositioned twice, followed for a few blocks, accosted, dragged into a garage, and sexually assaulted multiple times. *Id*. She then got dressed "from a state of total nudity" (*id*. at 233), followed the defendants back towards the bar, and returned to the garage to get her dog (*id*. at 232). It was only after all this transpired that the complainant walked to a nearby gas station to call the police. The police arrived at 1:20. *Id*. The court explained that "the time involved"—50 minutes—"seems somewhat short to accomplish all which the complainant claims occurred." *Id*. at 233.

¶ 39 The defendant argues that the instant case is similar to *Yeargan* in two respects. First, he notes that the *Yeargan* court found that the lack of any injury to the complainant along with the fact that her clothing was not torn was consistent with Yeargan's version of events and inconsistent with the complainant's version. See *id*. at 230. The defendant argues that here, too, there is no evidence of injury to S.M. and that the physical evidence in this case thus supports his version of events.

¶ 40 We are not persuaded. Unlike the complainant in *Yeargan*, S.M. did not testify that the defendant restrained her or used physical force. In fact, she specifically testified

that he did not do so. Here, the sole allegation against the defendant is that he engaged in sexual intercourse with S.M. when he knew she was unable to give knowing consent because she was asleep.

¶ 41 Moreover, unlike the evidence in *Yeargan*, we believe the physical evidence in this case supports both versions of the events at issue. The nurse who was present during S.M.'s sexual assault examination testified that there was no injury to S.M. This was consistent both with S.M.'s account of waking up to find the defendant having sex with her and with the defendant's account of consensual sex. The forensic scientist who tested a sexual assault evidence kit collected from S.M. testified that the vaginal swab she tested contained a large amount of female DNA and a small quantity of male DNA. She further testified that she did not see sperm cells when she looked at the swab under a microscope. Her conclusion was that there was a small amount of semen present without the presence of sperm cells. This was consistent with the defendant's testimony that he ejaculated into his hand, but it was also consistent with S.M.'s testimony that she was moist due to stimulation and did not know whether the defendant ejaculated. Because the physical evidence is consistent with the versions of events described by both S.M. and the defendant, we do not believe it undermines S.M.'s credibility.

¶ 42 Second, the defendant contends that in this case, as in *Yeargan*, S.M.'s claims are contrary to the laws of nature and human experience. Specifically, he claims that absent evidence that S.M. was intoxicated or suffered from a sleep disorder, it would have been impossible for her to have slept through the defendant pulling down her pajama bottoms

and having sex with her for what she admitted may have been as much as 15 minutes. We disagree.

¶ 43 We first note that there is no conclusive evidence that the sex in fact lasted 15 minutes. S.M. initially testified that she thought it lasted for only one to two minutes because she reacted quickly once she became aware of what was happening. However, because she was asleep when it began, she acknowledged that she did not know how long it had gone on before she woke up. On rebuttal, S.M. reiterated that she did not know how long the sex went on before she awoke, but she speculated that the defendant's claim that it went on for as long as 15 minutes was plausible. The defendant testified that the sex lasted 10 to 15 minutes. Although he was not asked to clarify this point, this was likely just an estimate.

¶ 44 We also note that S.M. likely underestimated the extent of her intoxication. She testified that she drank at least five shots of tequila, half a glass of champagne, and an entire bottle of wine over the course of the afternoon and evening. She testified that she did not feel impaired or tipsy by the time she came home and that she thought she was sober by the time she went to sleep. However, it is not uncommon for young people to underestimate the degree of intoxication they experience.

¶ 45 Moreover, we do not find S.M.'s testimony to be inherently implausible even assuming the sex lasted a full 15 minutes and she was completely sober by that time. The undisputed evidence showed that she went to bed very late, sometime after 2:30 a.m., after a long day. She went to classes, worked a physically demanding job for four or five hours, and went out dancing and celebrating with friends for several more hours. In

addition, as we have just discussed, she testified that she drank a lot of alcohol, regardless of the extent to which she sobered up due to the passage of time. It is hardly surprising that she would sleep quite soundly under these circumstances.

¶ 46 It is also important to note that S.M. testified that when she first became aware of what was happening, she thought it was part of a dream. It is not inherently implausible to believe that a person might incorporate a physical sensation into a dream and, as a result, might remain in a state between sleep and wakefulness rather than waking up immediately. In addition, we reiterate that the *Yeargan* court repeatedly emphasized that it reached the conclusion it did due to *multiple* flaws that rendered the complainant's testimony in that case implausible. See *Yeargan*, 229 Ill. App. 3d at 229-30, 233, 235. We do not find S.M.'s testimony to be inherently implausible, nor do we believe that no reasonable jury could find her credible.

¶ 47 The second component to the defendant's sufficiency-of-the-evidence argument is his contention that there was insufficient evidence to prove his criminal intent. As we have already concluded, a reasonable jury could find S.M.'s testimony credible and could therefore conclude that she was unable to consent to the sex because she was asleep. However, the State must also prove beyond a reasonable doubt that the defendant *knew* that she was unable to give consent. See *People v. Fisher*, 281 Ill. App. 3d 395, 403 (1996). The defendant argues that the State failed to prove that in this case. We disagree.

¶ 48 In support of his claim, the defendant emphasizes that S.M. testified "unequivocally" that she was not intoxicated and did not suffer from a sleep disorder. He then notes that she did not voice any objections to sex with the defendant while he pulled

down her pajama bottoms, digitally stimulated her, and had sex with her for up to 15 minutes. We have already rejected the defendant's claim that S.M.'s testimony was inherently implausible and could not have been found credible by a reasonable jury. The defendant's claim that there was insufficient evidence of his criminal intent does little more than rehash that claim.

¶ 49 Nevertheless, there was some evidence in the record from which a jury could have found that the defendant reasonably believed that S.M. was awake even though she was asleep. Although the defendant does not point this out in his brief, he testified at trial that S.M. moaned during sex, and S.M. herself acknowledged that her body produced fluid as a result of stimulation. She also testified that she thought she was dreaming for at least some period of time. As the defendant does point out in his brief, both he and S.M. testified that the sex stopped as soon as she objected.

¶ 50 However, there was also sufficient evidence to support the conclusion that the defendant was well aware that S.M. was sleeping. The defendant admitted that when he entered her room, the lights were out and she was under the covers. In addition, he admitted that they never discussed having sex, even though both S.M. and the defendant testified that their relationship prior to that time was entirely platonic. We conclude that the evidence was sufficient to prove beyond a reasonable doubt that the defendant knew that S.M. was asleep and therefore unable to give knowing consent to sex.

¶ 51 The defendant next argues that the court abused its discretion in imposing a sentence near the upper end of the statutory range. He argues that the court failed to take into account his youth, rehabilitative potential, and lack of a criminal record. He also

argues that the court's statements at the sentencing hearing indicated that the court was imposing a harsh sentence to punish him for maintaining his innocence. We reject both of these contentions.

¶ 52 As the defendant acknowledges, this court may only alter a sentence on appeal if the sentence constitutes an abuse of the trial court's discretion. *People v. O'Neal*, 125 Ill. 2d 291, 300 (1988); *People v. Busse*, 2016 IL App (1st) 142941, ¶20. A sentence within the statutory range is presumed to be appropriate, and we will not overturn such a sentence unless it is "greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense." *People v. Fern*, 189 Ill. 2d 48, 54 (1999). Although this standard is deferential, the court's discretion is not unlimited. *Busse*, 2016 IL App (1st) 142941, ¶27.

¶ 53 In fashioning an appropriate sentence, the court is required to take into account all pertinent factors in mitigation and aggravation. *Id.* ¶22. The court is not required to specify the weight it gave to each sentencing factor. *Id*. ¶24. We must presume that the court considers any mitigating evidence presented to it unless there is affirmative evidence to the contrary. *Id*. ¶22. Such evidence must consist of something other than the sentence itself. *Id*. ¶23.

¶ 54 Here, as noted, the defendant contends that the court failed to take into account mitigating factors such as his youth, lack of a criminal record, and rehabilitative potential. However, he points to no evidence that the court failed to consider these factors other than his sentence. He urges us to find that the court failed to consider mitigating evidence because his sentence, near the upper end of the sentencing range for the offense, is

similar to a sentence that might be imposed on a defendant who is older and has a lengthy record. We are not persuaded for three reasons.

¶ 55 First and foremost, as we have just discussed, the defendant must point to something other than the sentence itself to overcome the presumption that the sentencing court considered all pertinent mitigating evidence. *Id*. Second, while the court is required to consider factors in mitigation, it is not required to give those factors more weight than it gives to aggravating factors, such as the seriousness of the crime. See *People v. Weiser*, 2013 IL App (5^{th}) 120055, ¶32. Indeed, the seriousness of the crime is the most important factor for the court to consider. *Busse*, 2016 IL App (1^{st}) 142941, ¶28.

¶ 56 Third, we do not believe the court was required to find that he had rehabilitative potential. Although the defendant points to his testimony that he was going to school as evidence of his rehabilitative potential, he admitted that after four years he was still a freshman at a community college, and he refused to sign a release form that would have allowed the probation officer preparing the PSI to confirm that he was still enrolled.

¶ 57 Moreover, the defendant's statements to both the sentencing court and the probation officer demonstrated that he had no remorse for his actions. We recognize that a defendant has a right to maintain his innocence, as we will discuss in more detail next. Here, however, the defendant did more than maintain his innocence. He easily could have acknowledged that his actions caused S.M. a great deal of pain while maintaining that he believed that she was awake and had consented to sex. Instead, he blamed S.M. for what happened and asked repeatedly why someone with as much potential as the defendant believed he had would throw away his life by committing a crime. Lack of remorse is

always an appropriate consideration. *People v. Bannister*, 232 Ill. 2d 52, 92 (2008); *People v. Barrow*, 133 Ill. 2d 226, 281 (1989). We do not believe that the court was required to find that the defendant had rehabilitative potential, and we do not believe the court was required to give his youth and lack of prior convictions more weight than it gave the aggravating factors.

¶ 58 There is one more issue we must address before turning our attention to the defendant's claim that the court impermissibly enhanced his sentence to penalize him for maintaining his innocence. The State points out that although the defendant had no prior convictions, the PSI did indicate that he had another recent sexual assault charge that was disposed of by *nolle prosequi* in October 2013. The State posits that the court may have considered this prior history in sentencing the defendant. The State argues that this is an appropriate consideration, while the defendant raises the opposite argument in response.

¶ 59 A sentencing court may consider evidence of criminal conduct that did not result in a conviction. *People v. Jackson*, 149 Ill. 2d 540, 548 (1992); *People v. La Pointe*, 88 Ill. 2d 482, 499 (1981). This is because the standard of proof at a sentencing hearing is less stringent than proof beyond a reasonable doubt. *Jackson*, 149 Ill. 2d at 550; *People v. Rose*, 384 Ill. App. 3d 937, 941 (2008). However, the court must have some type of evidence of that conduct so that it can make a factual determination that the conduct occurred. *Jackson*, 149 Ill. 2d at 551-52 (upholding a sentence where the trial court heard testimony about the defendant's alleged previous conduct and was therefore able to find that it occurred); *Rose*, 384 Ill. App. 3d at 941 (holding that "the underlying *facts* of the previous crime may be considered during a sentencing hearing" so long as evidence of

the previous crime is relevant and reliable (emphasis added)). Although the court may consider hearsay evidence of a previous crime as long as it finds that evidence to be reliable (*Rose*, 384 Ill. App. 3d at 946), the mere fact that he was charged with the offense is not an appropriate consideration because it does not give the court a basis to determine whether the conduct occurred.

¶ 60 Nevertheless, the court was not asked to consider the prior charge, and we may presume that a trial court knows and follows the law. See *People v. Gaultney*, 174 Ill. 2d 410, 420 (1996). We may therefore assume that the court did not consider the charge. We also note that the defendant himself does not argue that the court impermissibly considered the nol-prossed charge; he addresses the question only in his reply brief in response to the State's speculation that the court may have considered the charge. See Ill. Sup. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) (providing that issues not raised in a defendant's opening brief are forfeited).

¶ 61 We now turn our attention to the defendant's final argument. As stated, he argues that the court impermissibly enhanced his sentence to punish him for maintaining his innocence. The defendant correctly contends that a court may not impose a harsher sentence because a defendant maintains his innocence. *People v. Draheim*, 242 Ill. App. 3d 80, 94 (1993); *People v. Speed*, 129 Ill. App. 3d 348, 349 (1984). However, we are not convinced that the court did so in this case.

¶ 62 In support of his argument that the court imposed a harsh sentence to punish him for refusing to admit his guilt, the defendant points to one of the statements made by the court at the sentencing hearing. Specifically, he emphasizes the fact that the court told

him that he was "going nowhere but to hell" unless he realized what he did. We believe that this statement was highly inappropriate, and we note that the court made additional statements during the hearing that were argumentative and inappropriate. However, we have considered the court's remarks in context, and we do not believe they indicate that the court improperly enhanced the defendant's sentence because of his refusal to admit his guilt.

¶ 63 As we discussed previously, the defendant was given the opportunity to make a statement in allocution, and instead of doing so, he used that opportunity to argue that he was innocent, that he should be allowed to pursue his dreams, that S.M. was "accountable" for consenting to sex through her actions, and that he was being unfairly "categorized by vicious individuals." The court criticized the defendant for blaming the victim and failing to take responsibility for the pain that his actions caused her, but the court also expressly told him that it was "fine" if he did not want to accept the fact that the 12 jurors believed he had been proven guilty. As stated earlier, the defendant's lack of remorse was an appropriate factor for the court to consider. Moreover, we will not disturb a defendant's sentence on appeal unless there is an indication in the record that the court would have imposed a lesser sentence if the defendant abandoned his claim of innocence. *Speed*, 129 Ill. App. 3d at 350. Merely commenting on the defendant's lack of remorse is not enough. *Id*. We find no abuse of discretion in the sentence imposed by the court.

¶ 64 For the foregoing reasons, we affirm the defendant's conviction and sentence.

¶ 65 Affirmed.