2019 IL App (5th) 170161-U

NO. 5-17-0161

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT



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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Jefferson County. |
| | ) | |
| v. | ) | No. 16-CF-23 |
| | ) | |
| CODY RICHARDSON, | ) | Honorable |
| | ) | Jerry E. Crisel, |
| Defendant-Appellant. | ) | Judge, presiding. |

JUSTICE CATES delivered the judgment of the court.
Justices Chapman and Moore concurred in the judgment.

**ORDER**

¶ 1 *Held*: Trial court did not commit error in sentencing defendant to five years' imprisonment for aggravated criminal sexual abuse.

¶ 2 Defendant, Cody Richardson, pled guilty to one count of aggravated criminal sexual abuse (720 ILCS 5/11-1.60 (West 2014)) and was sentenced by the circuit court of Jefferson County to five years' imprisonment. Defendant argues on appeal that his sentence should be reduced, or remanded for resentencing, because the trial court failed to give adequate consideration to several mitigating factors, and improperly considered hearsay evidence and certain other improper factors in fashioning his sentence. We affirm.

¶ 3 Defendant was arrested for sexually abusing his three-year-old daughter. Defendant was indicted by grand jury and charged with two counts of predatory criminal sexual assault of a child, a Class X felony (720 ILCS 5/11-1.40(a)(1) (West 2014)), for touching the vagina of the victim, who was under 13 years of age, with his mouth and touching the victim's mouth with his penis, when he was 17 years of age or older. Defendant was eligible for a sentence between 12 and 60 years' imprisonment.

¶ 4 On April 13, 2016, defendant entered an open plea of guilty to a reduced count of aggravated criminal sexual abuse, a Class 2 felony, for having committed an act of sexual misconduct with the victim (720 ILCS 5/11-1.60(c)(1) (West 2014)). The counts of predatory criminal sexual assault of a child were dismissed, and defendant's sentencing range was now set at three to seven years' imprisonment.

¶ 5 On July 5, 2016, the court conducted defendant's sentencing hearing. The presentence investigation report presented at the hearing revealed that defendant had no criminal record and was a high school graduate with 114 hours of college credit. Defendant had been working as a paramedic in Mt. Vernon, Illinois, since 2008, and also owned an ammunition business to supplement his income. The State argued that defendant should receive the maximum sentence of seven years' imprisonment because the victim was his daughter and she was only three years old at the time of the offense. Defense counsel urged the court to sentence defendant to probation, noting that the sex offender evaluation report concluded that defendant was likely to comply with the terms of probation and was unlikely to reoffend. The court found as aggravating factors the need to deter others from committing similar crimes as well as defendant's position of

trust with the victim. In mitigation, the court noted that defendant had no history of prior delinquency or criminal activity and had led a law-abiding life. The court rejected as a mitigating factor that defendant's criminal conduct was not likely to reoccur after noting that there may have been other acts committed. The court further noted that defendant did not admit to or accept responsibility for the crime to which he pled guilty. The court sentenced defendant to five years' imprisonment with a two-year term of mandatory supervised release. Defendant filed a motion to reconsider his sentence which the court denied. On appeal, however, it was determined that no Rule 604(d) certificate (Ill. S. Ct. R. 604(d) (eff. Mar. 8, 2016)) had been filed. This court reversed and remanded the case for compliance with Supreme Court Rule 604(d). Defendant filed an amended motion to reconsider sentence with the required certificate. The court, following a hearing, again denied the motion to reconsider. Defendant again appeals his sentence.

¶ 6 We initially note that a trial court is afforded broad discretionary powers in imposing a sentence, and that a trial court's sentencing decision should not be disturbed on appeal absent an abuse of discretion. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). Moreover, a sentence within the statutory limits will not be deemed excessive unless it is greatly at variance with the spirit and purpose of the law, or is manifestly disproportionate to the nature of the offense. *People v. Fern*, 189 Ill. 2d 48, 54 (1999).

¶ 7 Defendant first argues on appeal that his sentence should be reduced or remanded for resentencing because the trial court failed to give adequate consideration to his lack of a criminal record, his employment history, his rehabilitative potential, the family support he has, his remorse and his likelihood of not reoffending. Furthermore, defendant asserts

the court improperly considered the victim's age, which is inherent in the offense, and based the sentence in part on personal knowledge derived from private sources. We disagree. Generally, when faced with the sentencing court's consideration of an improper factor, reviewing courts will remand for resentencing unless it is clear from the record that the weight placed on such an improperly considered aggravating factor was so insignificant that it did not lead to a greater sentence. *People v. Heider*, 231 Ill. 2d 1, 21-22 (2008). Passing reference to factors inherent in an offense during sentencing does not constitute an error or abuse of discretion (see *People v. Newlin*, 2014 IL App (5th) 120518), nor do comments related to the nature and circumstances of an offense imply that the court used them to enhance a defendant's sentence (see *People v. Raney*, 2014 IL App (4th) 130551, ¶ 36). In considering whether a sentence has been properly imposed, we are to consider the record as a whole. *People v. Ward*, 113 Ill. 2d 516, 526-27 (1986). Moreover, a defendant's rehabilitative potential is not entitled to greater weight than the seriousness of the offense. *People v. Alexander*, 239 Ill. 2d 205, 214 (2010). We agree with the State that the trial court here only weighed proper factors in determining defendant's sentence, and did not abuse its discretion in sentencing defendant to five years' imprisonment for aggravated criminal sexual abuse.

¶ 8 The record shows that the court did consider all of the factors in mitigation. The court specifically stated that because of defendant's work history and lack of a criminal record, a sentence of seven years requested by the State would not be imposed. At the same time, the court did not believe defendant's assertions that the crime was unlikely to reoccur or that defendant was likely to comply with terms of probation, as he requested,

because he had not accepted responsibility for his actions. The court also considered the need to deter others and defendant's position of trust over the victim, his own daughter. The court's determination was made in a reasonable manner and there was no error in mentioning the age of the victim. Again, it is not an abuse of discretion to make passing reference to factors inherent in the offense during sentence. *Newlin*, 2014 IL App (5th) 120518. The court made reference to the victim's young age with respect to the statutory factor that defendant held a position of trust over the victim and in stating the fact that the victim fell within the "child under thirteen years of age" element of the offense. See *Raney*, 2014 IL App (4th) 130551. The court further mentioned the victim's age as a reason why it could not find defendant's actions did not cause the victim physical harm. See *People v. Thurmond*, 317 Ill. App. 3d 1133, 1144 (2000); *People v. King*, 151 Ill. App. 3d 662, 663 (1987). The court simply did not connect the victim's age to any aggravating factors. While the court concluded that if it were not for the mitigating factors present, it would have imposed the maximum sentence because the child victim was very young, the court's references to the victim's age were not used to enhance defendant's sentence.

¶ 9 Defendant next asserts the court improperly relied on personal knowledge based on private sources to determine his sentence. We agree that a determination made by the trial court based upon private investigation or based upon private knowledge of the court, untested by cross-examination, or any rules of evidence constitutes a denial of due process (see *People v. Wallenberg*, 24 Ill. 2d 350, 354 (1962)). When the court, however, briefly alludes to relevant matters based on its experience and knowledge as a mere

prelude in handing down a sentence, no error occurs (see *People v. Griffith*, 158 Ill. 2d 476, 497 (1994)). We agree with the State that in this instance the trial court did not rely on private knowledge based on outside sources when mentioning nonspecific case studies regarding sex offender characteristics and incestuous pedophilia. Specifically the court stated: "case studies show that many times people who commit these offenses have absolutely no record of any kind and are also involved in public service of some kind." We agree such comments were a mere prelude to imposing defendant's sentence. The trial court spent the majority of its commentary elaborating on statutory factors for the basis of its decision. See *Griffith*, 158 Ill. 2d at 497. We therefore conclude that the court did not rely on private knowledge based on outside sources and there was no improper basis for the court's sentence.

¶ 10 We further note that defendant did not object to the court's statements during the sentencing hearing. To preserve an alleged error for appeal, defendant must object at the time of trial. See *People v. Colyar*, 2013 IL 111835, ¶ 27. Even if the court did improperly consider private knowledge based on outside sources, defendant bears the burden of showing how his failure to object at trial resulted in prejudice. Absent a showing that an objection would have changed the outcome, the court's decision should not be overturned. *People v. Herron*, 215 Ill. 2d 167, 181-82 (2005). Defendant in this instance has not shown how the failure to object to the unnamed studies affected the outcome of the sentencing.

¶ 11 Defendant next argues on appeal that the court considered improper hearsay evidence in determining his sentence. At the sentencing hearing, the State introduced

into evidence a video interview of the victim. Neither the victim nor the person who conducted the interview testified. The court viewed the recording and considered it in imposing sentence, finding that the evidence showed defendant had committed other acts of uncharged sexual misconduct with the victim. Defendant asserts that the court erred in admitting this evidence when no witness testified to the video recording's accuracy and reliability and defendant was given no opportunity to cross-examine. We agree with the State that the trial court did not consider improper hearsay evidence in determining defendant's sentence.

¶ 12 We first note that the rules of evidence governing trials are relaxed at sentencing hearings. *People v. Jett*, 294 Ill. App. 3d 822, 830 (1998). The only requirement for admission of evidence at sentencing hearings is that the evidence is reliable and relevant, as determined by trial court within its sound discretion. *People v. Foster*, 119 Ill. 2d 69, 96 (1987). A court's decision to admit evidence will not be overturned absent an abuse of discretion, or unless the decision is arbitrary, fanciful or unreasonable. *People v. Hanson*, 238 Ill. 2d 74, 101 (2010). Here there was no abuse of the court's discretion.

¶ 13 We initially note that proof of prior misconduct not resulting in prosecution or conviction is admissible at the aggravation and mitigation phase of a sentencing hearing as relevant to the question of a defendant's character. *People v. Johnson*, 114 Ill. 2d 170, 205 (1986). Additionally, a sentencing court may properly consider any of the facts underlying a count dismissed pursuant to a plea agreement for purposes of determining a defendant's sentence on the remaining counts. See *People v. Palmer-Smith*, 2015 IL App (4th) 130451, ¶¶ 29, 32. The court here properly considered evidence of defendant's

other sexually abusive acts. The admitted video depicted the victim's interview with a counselor, during which the victim described various sex acts defendant committed upon her. The interview was admissible for the purpose of assessing defendant's character, even though it was the substance of a charge dropped in the plea agreement. See *People v. Jackson*, 149 Ill. 2d 540, 548 (1992); *Johnson*, 114 Ill. 2d at 205. More importantly, the court did not place undue weight upon the video interview. In fact, the court made clear that it was sentencing defendant only for the one count of which defendant was convicted.

¶ 14 We further note that the video was properly admitted and considered by the court notwithstanding that it was not cross-examined by defense counsel. Defense counsel allowed admission of the video without objection, and defense counsel as well as the State were both in chambers when the court reviewed the video. Defendant agreed to this method of admitting the video in order to spare the victim and her mother the experience of reliving the trauma. By affirmatively acquiescing to this method of admitting the video, defendant waived any potential claim of error on appeal. *People v. Bates*, 2018 IL App (4th) 160255, ¶ 76. Accordingly, we conclude the video was properly admitted at the sentencing hearing.

¶ 15 Defendant counters in his reply brief that defense counsel was ineffective, and even though raised for the first time in his reply brief, the issue of counsel's ineffective assistance may be addressed if a just result dictates consideration of the issue. See *People v. Thiem*, 82 Ill. App. 3d 956, 959 (1980). Counsel was not ineffective in this instance. Defendant specifically consented to the admission of the video at the

sentencing hearing in chambers without cross-examination in order to spare the victim and her mother the experience of reliving the trauma. Defendant cannot agree to a certain procedure at trial and then fault his counsel when things do not go the way defendant planned.

¶ 16 For the foregoing reasons, we affirm the judgment and sentence imposed by the circuit court of Jefferson County.

¶ 17 Affirmed.