2020 IL App (1st) 171493-U

No. 1-17-1493

Third Division
August 26, 2020

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 15 CR 3131
	)	
ANTOINE FORD,	)	Honorable
	)	Mary Margaret Brosnahan,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice Ellis and Justice McBride concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's sentence for predatory criminal sexual assault of a child is affirmed over his contention that the trial court abused its sentencing discretion by relying on an improper factor in aggravation.

¶ 2 Following a jury trial, defendant Antoine Ford was convicted of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2012)) and sentenced to 10 years' imprisonment. On appeal, defendant contends that the trial court abused its discretion at sentencing by relying on a factor implicit in the offense—the psychological harm his actions caused to the victim, S.R. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged, by indictment, with 2 counts of predatory criminal sexual assault of a child and 20 counts of aggravated criminal sexual abuse. Prior to trial, the State nol-prossed 19 counts of aggravated criminal sexual abuse. Because defendant does not contest the sufficiency of the evidence to sustain his conviction, we only recount the facts necessary to address his sentencing error argument.

¶ 5 Prior to trial, the State moved for a hearing pursuant to section 115-10 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10(b)(1) (West 2014)) to determine the admissibility of certain out-of-court statements made by the minor S.R. describing the alleged abuse. These statements included a videotaped interview of S.R. from the Children's Advocacy Center ("CAC") and her statements to Seniqua Johnson. After hearing testimony from Johnson and reviewing the video, the court permitted S.R.'s statements to be admitted but precluded her statements that referred to incidents prior to the charged offense.

¶ 6 At trial, Johnson, defendant's daughter, testified that on February 13, 2012, she was living with defendant, defendant's girlfriend Shaquita Jones, and Jones' daughter S.R., who was eight years old at the time.1 On February 13, Johnson returned to defendant's home to get her uniform for school after having spent the weekend with her mother, Raven Adams. When Johnson entered the house, she saw an arm pushing S.R. out of the room defendant and Jones shared. The door to the room was then closed. S.R. was naked and fell to the floor. S.R. then got up and ran to her room. Johnson followed S.R., who was "scared, shaking, crying" and hiding behind her door.

[1] Johnson did not refer to Shaquita by her last name.

¶ 7 Johnson asked S.R. why she was naked, and S.R. stated that defendant made her take her clothes off, kissed her and touched her. After S.R. put on clothes, she and Johnson left the house and returned to Adams' car. In the car, Adams called the police, and S.R. spoke with Johnson. S.R. stated defendant told her to enter his room and play games. He took her clothes off, kissed her, and touched her. S.R. said, "his front part got bigger." Johnson understood that "front part" referred to defendant's penis. S.R. said she was scared to tell Johnson because S.R. was going to be hurt if she told. While waiting for the police to arrive, Johnson saw an unidentified person standing in the house looking through the window. Jones was not home at the time. After the police arrived, they all went to Children's Comer's Hospital where they met Jones.

¶ 8 On cross-examination, Johnson stated the only person she knew to be in the house at the time was defendant. Johnson did not check if S.R.'s clothes were in defendant's bedroom.

¶ 9 Chicago police detective Joseph Leyendecker testified that on February 16, 2012, he observed a forensic interview with S.R. at the CAC. Leyendecker identified People's Exhibit 3 as an accurate video depiction of the interview and the video was admitted into evidence and published to the jury.

¶ 10 In the video, Lauren Glazer, a forensic investigator, interviewed S.R. S.R. stated that she was eight years old, and lived with her mom and sister, Niqua. S.R. stated that on Monday her stepfather Antoine (defendant) told her to come into his room. There, defendant touched and kissed her. Defendant removed his and S.R.'s clothes, including her shirt, pants and underwear. He said if S.R. told anyone he would "smack" her, hit her, and kill her mother. Then he kissed S.R. on her legs. S.R. indicated it was on her upper thigh. Defendant "squeezed" S.R.'s buttocks with his hand. He touched her "front part" with his hand and "rubbed around on it."

S.R. did not like this and said it felt "icky." Defendant told S.R. to kiss his "front part" with her lips and made her kiss his "front part." The encounter stopped when Johnson came home, and S.R. went back to her own room. Johnson got S.R. to put on clothes and they went outside to Adams' car. Adams called the police and S.R. saw defendant looking through the window. When defendant saw the police car, he left.

¶ 11 S.R.'s testimony in court largely matched the statement she provided at the CAC. S.R. explained that on February 13, 2012, she did not have school and was watching television in the morning. Johnson and her mother were not home. She identified defendant in court as Antoine, the person who called her into his room. She entered the room and defendant told her to take off her clothes. She did not want to take off her clothes but obeyed his command. In the beginning, he told her that if she spoke to anybody, "he was going to kill [her] mother and hit [her]." After she was completely naked, he took off his clothes too. Then he touched her buttocks and started kissing her legs. Defendant told S.R. "to suck his dick." S.R. stated she did not want to do that, and defendant forced S.R.'s head down and placed his penis in her mouth. Defendant pushed S.R.'s head back and forth with his hands until Johnson came home. Defendant then pushed S.R. out of the room. S.R. went to her room, where Johnson met her. After S.R. put on clothes, she and Johnson went to Adams' car. Before Johnson left the house, she got a knife and banged on defendant's bedroom door. While in the car, S.R. saw defendant look through the blinds. S.R. went to the hospital and three days later went to the CAC for an interview. There, she said defendant told her to kiss his "front part" and did not say defendant told her "to suck his dick" because she thought it was inappropriate.

¶ 12 Chicago police detective Manuel De La Torre testified that he interviewed defendant, who he identified in court, on January 20, 2015. The video of this interview was published for the

jury. In the video, defendant stated that, while he was sleeping in his boxers, S.R. walked into his room naked. He woke up when her hair hit his face. He jumped up because S.R. touched and kissed his penis. Defendant pushed her off of him and out of the room, and then closed the door. Johnson was outside his room. Defendant denied kissing any part of S.R.s' body. He attempted to call his mother and went back to bed.

¶ 13 A second interview took place with Assistant State's Attorney Robert Foss on January 20, 2015 and a video of that interview was published for the jury. In this interview, defendant relayed the same information as in his interview with De La Torre. Furthermore, he stated that after the incident, he moved to Iowa for a job and lived there with Jones.

¶ 14 Defendant moved for a directed verdict on count one, predatory criminal sexual assault of a child involving contact between his penis and S.R.'s sex organ. The court granted the motion. The defense rested without presenting any evidence.

¶ 15 The jury found defendant guilty of the remaining count of predatory criminal sexual assault of a child and not guilty of aggravated criminal sexual abuse. Defendant filed a post-trial motion, asking to vacate the verdict of guilty and enter a judgment of acquittal or grant a new trial. The court denied defendant's motion to vacate his conviction, finding the evidence overwhelming.

¶ 16 At sentencing, the State and the defense did not present any additional evidence or witnesses in aggravation or mitigation. The State emphasized the fact that the court heard testimony on the crime and defendant's flight to Iowa in asking for a sentence in the range of 15 to 20 years. Defense counsel argued that defendant came from a good family and his father was present throughout the trial, defendant had no prior history of this sort of crime, and defendant had been gainfully employed. The pre-sentence investigation report contained

information that defendant had one prior conviction for misdemeanor battery in 2004 in Iowa and had four minor children with whom he maintained close relationships. Defendant spoke in allocution and apologized for the inconvenience to the families involved, and stated, "[i]t was all a big misunderstanding that got blew [sic] out of proportion." Defendant denied knowing about the assault until notice was given to him after the incident.

¶ 17 Following allocution, the trial court proceeded with sentencing. In its preliminary comments, the court briefly recounted the evidence, then commented that it would consider all of the factors in aggravation and mitigation. Citing, *People v. Sauseda,* 2016 Ill. App. (1st) 140134, and *People v. Phelps,* 211 Ill. 2d 1 (2004), the court commented that it was aware it could not use an element of the offense as an aggravating factor. Specifically, the court stated:

> "So I don't want anything read into my sentencing hearing that would be an argument that I'm improperly using factors as elements as well as aggravation. I'm aware of the distinctions. It's very difficult to do a sentencing without talking about the facts in the case. But in no way, while I talk about the facts of the case itself, am I using any of these factors as an additional aggravating factor."

The court then proceeded with sentencing and, in referencing "mitigation, Factor No. 1:" stated, "[c]ertainly, there's psychological harm that this victim has and will continue to go through based upon the acts of the day." The court further noted in mitigation the "significant period of time" with which defendant led a law-abiding life, and the hardship of the sentence on his dependents. The court also noted that it was not able to say whether defendant was unlikely to commit another crime. After having considered all of the factors in mitigation and aggravation, the court commented that the state's proposed sentencing range of 15 to 20 years, "based on the facts of this case," was not "coming from left field where:

"[A] little girl that was taken advantage of in such a way. And these are the kind of acts that you can't really take back. She knows things now at such a young age that a child that age should have absolutely no knowledge of. And there's no way to predict what impact it will have on her life going forward, other than this, which is, to me, a certainty: It will have an impact on her going forward and how she views life in general. There's no way to take that away. She was made old beyond her years by the acts of Mr. Ford. And it is still somewhat troubling to the [c]ourt that [defendant] is not, to this day even, admitting ownership or responsibility of that act. He is still indicating that the whole thing was a big misunderstanding. So if that's the view, then it would be very hard to think that he would be able to get any kind of meaningful treatment or change."

¶ 18 The court sentenced defendant to 10 years' imprisonment. Defendant filed a motion to reduce sentence, arguing the court improperly balanced the factors in aggravation against the factors in mitigation. After a hearing, the court denied the motion to reduce sentence. In doing so, the court stated it considered all the statutory factors in aggravation and mitigation.

¶ 19 II. ANALYSIS

¶ 20 On appeal, defendant contends that the trial court erred in sentencing him to 10 years' imprisonment because the court considered an improper factor in aggravation—the psychological harm suffered by S.R.—despite there being no direct evidence of such harm presented at trial or at the sentencing hearing. More specifically, defendant argues that the record does not establish evidence of psychological harm beyond what is inherent in the charge of predatory criminal sexual assault of a child. Accordingly, defendant urges this court to vacate the sentence and remand this case for a new sentencing hearing; one in which psychological harm is not considered as a factor in aggravation. The State does not dispute that

the trial court considered psychological harm to S.R. as an aggravating factor but maintains that the court's consideration of that factor is supported by the record. Thus, the State maintains that defendant's sentence was proper

¶ 21 Here, defendant's 10-year sentence for predatory criminal sexual assault of a child is within the statutory sentencing range of 6 to 60 years (720 ILCS 5/11-1.40(b)(1) (West 2012) and is, therefore, presumed proper. Nevertheless, he argues that because the sentence was based on an improper factor—the sentence must be vacated and the case remanded for resentencing.

¶ 22 As a general rule, a factor implicit in the offense for which a defendant has been convicted cannot be used as an aggravating factor in sentencing for that offense. *People v. Ferguson*, 132 Ill. 2d 86, 96 (1989). The rule, often referred to as a double enhancement, is based on the presumption that our General Assembly considered the factors inherent in the offense in designating the range of punishment. *People v. Phelps*, 211 Ill. 2d 1,12 (2004) (citing *People v. Rissley*, 165 Ill. 2d 364, 390 (1995)). However, the rule "should not be applied rigidly because sound public policy demands that a sentence be varied according to the circumstances of the offense." *People v. Bunning*, 2018 IL App (5th) 150114, ¶ 15. Thus, a sentencing court should not be unrealistically restrained in its attempts to avoid any mention of such inherent factors, treating them as if they were non-existent. See *People v. O'Toole*, 226 Ill. App. 3d 974, 992 (1992) (citing *People v. Willis*, 210 Ill. App. 3d 379, 387 (1991)). The mere mention or consideration of a factor inherent in the offense during sentencing is not necessarily reversible error. See e.g., *People v. McPherson*, 136 Ill. App. 3d 313 (1985) (citing *People v. Martin*, 112 Ill. App. 3rd 486 (1983)).

¶ 23 To determine whether the trial court based the sentence on proper aggravating and mitigating factors, the reviewing court must consider the record as a whole, rather than

focusing on a few words or statements made by the trial judge. *People v. Harmon*, 2015 IL App (1st) 122345, ¶ 125. A sentence based on improper factors cannot be affirmed unless we can determine from the record that the weight placed on such an improperly considered factor was so insignificant as to not lead to a greater sentence. *People v. Rottau*, 2017 IL App (5th) 150046, ¶ 85; *People v. Colclasure*, 200 Ill. App. 3rd 1038, 1046 (1990); see also *People v. Conover*, 81 Ill. 2d 400, 405 (1981). Because double enhancement is a rule of statutory construction, the standard of review is *de novo*. *Phelps*, 211 Ill. 2d at 11 (citing *People v. Robinson*, 172 Ill. 2d 452, 457 (1996)).

¶ 24 Defendant argues that the court's consideration of psychological harm as a factor in aggravation was improper because it is inherent in sexual crimes against children and no evidence of a greater degree of psychological harm was presented. Defendant acknowledges that "some courts have indicated that such harm may be 'inferred' from the facts of the case," but maintains that, in order to do so, the record must include either evidence of actual harm or proof of circumstances beyond that inherent in the offense. The State responds that the record, when viewed as a whole, supports an inference of psychological harm to S.R. They invite our attention to *People v. Bunning*, 2018 IL App (5th) 150114, *People v. Fisher*, 135 Ill. App. 3d 502 (1985), and *People v. Kerwin*, 241 Ill. App. 3d 632 (1993), in support of their contention that courts have found that psychological harm inflicted upon a child victim of a sex crime is a proper factor to consider in aggravation.

¶ 25 In *Bunning*, 2018 IL App (5th) 150114, ¶ 21, the court found that the record supported a reasonable inference of psychological harm to the victim where there was evidence that the victim was in treatment for the harm and her mother testified that the child was "not the same girl" she was before the abuse. In *Fisher*, 135 Ill App. 3d at 506, the court held that no proof

of medically diagnosed harm was necessary where from the record it was apparent that the conduct created a strong probability of harm. There, evidence in the record showed that the defendant threatened to distribute pornographic pictures he had taken of the victim to his high school peers; threatened the victim with castration; the victim became withdrawn after the sexual encounter the incident caused problems for the victim at school and subjected him to daily verbal abuse by his classmates. See also *People v. Nevitt*, 228 Ill. App. 3d 888 (1992) (psychological harm proper consideration where victim's mother testified that victim wakes up from sound sleep crying hysterically and is less responsive to males in her life); *People v. Lloyd*, 92 Ill. App. 3rd 990 (1991) (reasonable inference of harm where record indicates that mother was taking child victim of indecent liberties for counseling); *People v. Burton*, 102 Ill. App. 3rd 148 (1981) (inference of harm permissible where trial court heard testimony of child victim of aggravated incest and observed the child to be very small, very frightened, very insecure and obviously damaged. But see *People v. Kerwin*, 241 Ill. App. 3rd 632 (1993) (finding no error in trial court's consideration of harm to the victim as harm is not inherent in the offense of aggravated criminal sexual assault).

¶ 26 Defendant nevertheless maintains that here, as in *People v. Calva*, 256 Ill. App. 3d 865 (1993), the court's consideration of psychological harm as a factor in aggravation was improper because such harm is inherent in sexual crimes against children and no evidence of a greater degree of psychological harm was presented. We find *Calva* distinguishable.

¶ 27 In *Calva*, the defendant pled guilty to six counts of aggravated criminal sexual assault committed against A.G., a six-year-old girl. *Id*. at 867-68. At sentencing, the trial court noted that defendant's actions "psychologically injured and scarred A.G. for life," and sentenced him to concurrent 40 years extended terms of imprisonment for each of the six convictions. *Id*. at

866. On appeal, this court remanded for a new sentencing hearing after finding that it was improper for the trial court to consider any psychological harm to A.G. because "no evidence was presented that A.G. suffered any psychological harm beyond the harm implicit in any sexual assault against a child." *Id*. at 875. In addition, this court noted that in reviewing the totality of the factors in aggravation "the sentence imposed by the trial court is significantly longer than any reported sentence which was brought to our attention for similar conduct or even for conduct including some additional factors in aggravation. We know of no case which has upheld an extended sentence of 40 years under similar circumstances." *Id*. at 878.

¶ 28 Here, unlike in *Calva*, the court was able to observe S.R. as she testified concerning the offense. Both S.R. and her "sister" Johnson testified that immediately following the offense, S. R. was crying, shaking and scared. S.R. had been told by the defendant that if she told anyone about the assault, her mother would be killed and she (S.R.) would be hit. S.R. was afraid to tell either her mother or Johnson about the incident, for fear that defendant's threats of harm might actually occur. We believe that from that testimony the court could infer psychological harm to S.R. Further, in its preliminary remarks, the court, citing to *Phelps* and *Sauseda*, stated that it would "in no way" use any of the elements of the offense as additional aggravating factors. Clearly, the court was aware of and applied the relevant law in her sentencing deliberations. Accordingly, prior to announcing its sentencing determination, the court recounted each statutory factor in mitigation and aggravation and made specific findings as to each. Moreover, defendant was sentenced to 10 years' imprisonment, a term 50 years below the statutory maximum for predatory criminal sexual assault. 720 ILCS 5/11-1.40(b)(1) (West 2012) (The sentencing range for predatory criminal sexual assault of a victim under 13 years old is 6 to 60 years).

¶ 29 We have reviewed the whole of this record and have considered the trial judge's comments during the sentencing phase of this trial. Based upon our review we believe the psychological harm to S.R. could be properly inferred from the evidence presented. We find no error in the trial court's application of the relevant law, its consideration of the factors in mitigation and aggravation and therefore, in its sentencing determination. Accordingly, we affirm defendant's 10-year sentence for predatory criminal sexual assault of a child.

¶ 30 III. CONCLUSION

¶ 31 For the reasons stated, we affirm the judgment of the circuit court.

¶ 32 Affirmed.