

No. 1-11-3607

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

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 09 CR 3330
)	
GEORGE ROSADO,)	Honorable
)	Kenneth J. Wadas,
Defendant-Appellant.)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Justices Palmer and Taylor concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court's statement regarding the age of the minor victim during defendant's sentencing hearing for aggravated criminal sexual abuse did not reflect improper double enhancement where the court was commenting upon the seriousness of the offense. Affirmed.

¶ 2 Following a jury trial, defendant George Rosado was convicted of aggravated criminal sexual abuse and was sentenced to seven years' imprisonment. Defendant appeals, contending he was improperly subjected to a double enhancement because the age of the victim was used as an element of the offense and as an aggravating factor during sentencing.

¶ 3 Defendant was charged with aggravated criminal sexual assault, criminal sexual assault, aggravated criminal sexual abuse, criminal sexual abuse, aggravated kidnapping, and kidnapping against R.G., who was 14 years old at the time of the charged offenses. R.G. testified during the State's case-in-chief that she was in the eighth grade in December 2008, and 17 years old at the time of trial. At the time of the offense, she lived in the second floor apartment at 5318 South Rockwell with her mother, stepfather, and brothers. While on Christmas break from school, she was babysitting her little brothers. She heard a knock at the back door of the apartment, at the door located in the kitchen. She recognized defendant at the back door as the person who lived in the basement apartment of her building.

¶ 4 R.G. opened the door and stepped onto the back porch area where defendant told her that he wanted to "f*** her." R.G. said "no," and defendant asked her to go downstairs with him and told her if she did not, he would hurt her mother. Defendant then grabbed her by her waist, picked her up, and flung her over his shoulders. He carried her downstairs to a vacant apartment on the first floor. Although R.G. struggled with defendant, he was able to overcome her efforts to resist him and pull her pants down. Defendant then had sexual intercourse with R.G. After intercourse, defendant told R.G. that he ejaculated in her vagina. R.G. testified that defendant did not wear a condom. Defendant left the first floor apartment and R.G. returned home. R.G. did not tell anyone about the incident because she was afraid that defendant would hurt her mother, as he had threatened.

¶ 5 About one month later, R.G. felt sick. R.G.'s mother, Pompaya G., testified that in December 2008 she noticed that her daughter was depressed, looked sick, would not eat, was nauseous, and vomited. On January 27, 2009, Pompaya took R.G. to a doctor where they learned

that R.G. was pregnant. R.G. told her mother about the incident with defendant and her mother contacted the police. R.G. had an abortion on February 11, 2009.

¶ 6 Dr. Carlos Baldoceca, who was qualified as an expert in obstetrics and gynecology, testified that he performed R.G.'s abortion. He removed fetal tissue from R.G.'s aborted fetus, which was turned over to detectives. Shawn Weiss, a forensic scientist, was qualified as an expert in forensic DNA analysis and testified that there was a 99.99% probability that defendant was the biological father of R.G.'s aborted fetus.

¶ 7 On January 28, 2009, at about 1:45 a.m., Assistant State's Attorney Holly Kremin interviewed defendant at the police station, where defendant gave a statement. Defendant's statement was admitted into evidence and published to the jury. In his statement, defendant admitted that he lived in the basement apartment of the building while R.G. and her family lived on the second floor. He never spoke to R.G., but she would "address him with her eyes," and would lick her lips. Defendant assumed that R.G. wanted to have sex. He knew that R.G. was in elementary school but testified that they had consensual sex in the first floor apartment. He used a condom from Puerto Rico, which he stated were not known to be effective. After defendant finished having sex with R.G., he returned to his basement apartment; he had not spoken to R.G. since that day.

¶ 8 The State rested and defendant's motion for a directed verdict was denied. Defendant rested without testifying or presenting evidence. The jury found defendant guilty of aggravated criminal sexual abuse for penis to vagina contact, and acquitted him of the remaining counts. The trial court denied defendant's motion for a new trial.

¶ 9 During defendant's sentencing hearing, the trial court noted that it reviewed defendant's pre-sentence investigation report (PSI). The State then argued in aggravation that defendant was

found guilty of having sex with R.G., who was 14 years old at the time of the incident. At the time of his arrest, defendant had one prior felony, for which, the trial court noted, defendant's probation was terminated unsatisfactorily. Additionally, the State explained that although defendant's PSI indicated that defendant had a difficult childhood because he went back and forth between his mother and father, defendant did not indicate that he suffered any abuse throughout his life. The State also argued that the "biggest aggravating factor" in the case was that "defendant not only had sex with the 14 year old girl, but he got her pregnant[,] and argued that R.G. also had an abortion due to defendant's actions, all of which is "incredibly aggravating." The State then asked that defendant be sentenced either close to the maximum or to the maximum sentence available.

¶ 10 In mitigation, defense counsel argued that as soon as defendant was arrested, he admitted to the police that he had sex with R.G. Counsel also argued that the jury did not believe R.G. when she testified that defendant threatened to hurt her, and forced her to have sex with him. Counsel argued that R.G. lied, and that defendant's impregnating R.G. was not an aggravating factor, although it is unfortunate. The offense was having sex with a child, which counsel argued, defendant has admitted all along. Counsel requested that defendant be sentenced to the statutory minimum of three years, and be given credit for time served, which was 914 days. Because the jury's findings indicated that defendant was not found to have forced R.G. to have sex, counsel argued defendant should not receive the maximum sentence.

¶ 11 The trial court made its findings:

"Probation, in my view, is not appropriate. The defendant's track record is poor. He has a prior criminal background. He didn't complete a probation and went to the penitentiary for one

year. What's aggravating here is the age of the victim. Is there trauma that lingers over something like this; the experience? I'm sure there is. Her demeanor on the witness stand indicated to me that she was somewhat emotionally distraught over these facts, what occurred to her, and I don't think the minimum sentence is appropriate. I don't think the maximum sentence is appropriate. Defendant is sentenced on Count 4 to seven years in the Illinois Department of Corrections."

The trial court then found that defendant had 914 days of time actually served and indicated that because defendant was convicted of criminal sexual abuse, defendant would receive day-for-day credit, and therefore would only serve half of the seven year sentence. Defendant appeals his sentence.

¶ 12 On appeal, defendant argues that he was subjected to an improper double sentencing enhancement because R.G.'s age was used as an element of the offense of aggravated criminal sexual abuse and again as a factor in aggravation in sentencing. It is a well-settled proposition that "to preserve a claim of sentencing error, a defendant must object to the error at the sentencing hearing as well as raise the objection in a postsentencing motion." *People v. Freeman*, 404 Ill. App. 3d 978, 994 (2010); citing *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). Defendant acknowledges he failed to preserve this issue for appeal, and therefore asks this court to review his claim under the plain error doctrine. See *People v. Enoch*, 122 Ill. 2d 176 (1988) (in order to preserve an error for appeal, the error must be objected to and included in the post-trial motion). To show plain error in sentencing, a defendant must show either that: "(1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to

deny the defendant a fair sentencing hearing." *Hillier*, 237 Ill. 2d at 545. However, if there is no error, there can be no plain error; therefore, we must first determine whether there was error.

Piatkowski, 225 Ill. 2d 551, 565 (2007); see also *People v. Chapman*, 194 Ill. 2d 186, 226 (2000).

¶ 13 "A double enhancement occurs when either (1) a single factor is used both as an element of an offense and as a basis for imposing a harsher sentence than might otherwise have been imposed, or (2) the same factor is used twice to elevate the severity of the offense itself." *People v. Guevara*, 216 Ill. 2d 533, 545 (2005); citing *People v. Phelps*, 211 Ill. 2d 1, 11-13 (2004); see also *People v. Siguenza-Brito*, 235 Ill. 2d 213, 232 (2009).

¶ 14 The parties dispute the standard of review this court should apply. The State contends that an abuse of discretion standard applies here while defendant contends that *de novo* review is appropriate because the issue involves the application of law to uncontested facts. We agree with defendant and apply a *de novo* standard of review because defendant has asked this court to determine whether the trial court applied an improper factor during sentencing, resulting in a double enhancement, which is an issue of statutory interpretation. See *Phelps*, 211 Ill. 2d at 12 (Applying *de novo* review because the double enhancement rule is one of statutory construction) and *Guevara*, 216 Ill. 2d at 545 ("The prohibition against double enhancements is a rule of statutory construction, premised on the assumption that the legislature considered the factors inherent in the offense in fashioning the appropriate range of punishment for that offense.").

¶ 15 "A person commits aggravated criminal sexual abuse if that person commits an act of sexual penetration or sexual conduct with a victim who is at least 13 years of age but under 17 years of age and the person is at least 5 years older than the victim." Aggravated criminal sexual

abuse is a Class 2 felony. 720 ILCS 5/12-16(d) (West 2008) (re-codified as 720 ILCS 5/11-1.60(d), (g) (eff. Jan. 1, 2013).

¶ 16 Our supreme court has held that where the trial court relies on the victim's age as a factor in aggravation and the victim's age is also an element of the offense, this reliance is improper. See *People v. White*, 114 Ill. 2d 61, 67 (1986). Reliance on an improper factor in sentencing does not always necessitate remand for resentencing. *Id.* "Where the reviewing court is unable to determine the weight given to an improperly considered factor, the cause must be remanded for resentencing." *People v. Johnson*, 347 Ill. App. 3d 570, 576 (2004). However, remand is not required where it is clear from the record that "the weight placed on such an improperly considered aggravating factor was so insignificant it resulted in no increase in the defendant's sentence." *Johnson*, 347 Ill. App. 3d at 576.

¶ 17 Further, Illinois courts of review have held that in certain circumstances, trial courts did not err in considering the age of the victim in sentencing where the victim's age was already an element of the offense. See *People v. Thurmond*, 317 Ill. App. 3d 1133, 1144-45 (2000) (finding that the trial court did not err in recognizing that the victim was "particularly young" at the time of the offense and noting that while an act of sexual penetration on a 17-year-old family member is reprehensive, an act of sexual penetration on a 7-year-old family member is even more reprehensible); see also *People v. Spicer*, 379 Ill. App. 3d 441, 468 (2007) (following *Thurmond* and concluding that "[j]ust as a trial court may consider whether a sexual assault victim was particularly young, a trial court may also consider whether a victim was particularly senior").

¶ 18 Here, the trial court stated during the sentencing hearing that "[w]hat's aggravating here is the age of the victim." Along with this statement, the court emphasized R.G.'s lingering trauma as evidenced by her emotionally distraught demeanor on the witness stand and the nature of the

sexual offense committed upon her. However, the court also noted that another aggravating factor was defendant's prior criminal background, which included that defendant unsatisfactorily completed probation and was sentenced to imprisonment for one year. This court considered all of the circumstances surrounding the trial court's consideration of factors in aggravation and mitigation – including defendant's presentence investigation report and argument by State and defense counsel. We find that, when read in conjunction with the statements that followed, the trial court was merely commenting upon the seriousness of the offense by highlighting the trauma R.G. experienced and continued to experience at the time of trial. See *Thurmond*, 317 Ill. App. 3d at 1144-45 (noting the elevated "reprehensible" nature of sexual offense upon a 7-year-old as compared to a 17-year-old victim); see also *People v. Sims*, 403 Ill. App. 3d 9, 24 (2010) (noting that reviewing courts should consider comments made regarding aggravating factors in connection with the entire record, and finding a seemingly improper comment by the trial court regarding the defendant's gang membership to be proper because it was "made in the greater context of evaluating the nature and seriousness of the offense"). Therefore, we find that the trial court did not improperly consider R.G.'s age as an aggravating factor resulting in a double enhancement.

¶ 19 Defendant cites four cases which he contends support his argument that R.G.'s age should not have been considered as an aggravating sentencing factor where the age also constituted an essential element of the offense of aggravated criminal sexual abuse. He cites *People v. Johnson*, 347 Ill. App. 3d 570, 576 (2004); *People v. Ferguson*, 132 Ill. 2d 86, 98-99 (1989); *People v. Campos*, 155 Ill. App. 3d 348, 361-63 (1987); *People v. White*, 114 Ill. 2d 61, 68 (1986).

¶ 20 This court cannot rely on *Johnson's* analysis as illustrative of the improper consideration of a victim's age because there was no indication in *Johnson* that the trial court's findings in aggravation were based on anything more than a solitary comment made by the State during its argument in aggravation. Namely, the State requested an extended-term sentence because the "public needs to be protected from people like this, people who will jump into bed with a nine year old." 347 Ill. App. 3d at 573. Further, the trial court found that the defendant had a potential for rehabilitation, a factor in mitigation. *Id.* Here, the trial court made specific findings on the record in aggravation and none in mitigation, permitting this court to fully review its findings.

¶ 21 *Ferguson* is distinguishable because the reviewing court determined there were no other factors in aggravation to justify imposition of an extended term sentence, aside from the improperly considered factor. *Ferguson*, 132 Ill. 2d at 100. *Campos* is distinguishable because the State did not present any evidence in aggravation, and aside from the trial court's consideration of the victim's minor age, the trial court made no findings in aggravation. *Campos*, 155 Ill. App. 3d at 355.

¶ 22 Finally, *White* is more analogous to the State's position, than defendant's. In *White*, the trial court considered several factors in aggravation and the appellate court found that the weight the trial court placed on the victim's age was insignificant and did not result in a greater sentence; therefore, remand for resentencing was not necessary. *White*, 114 Ill. 2d at 67-68.

Consequently, we find the trial court did not subject defendant to an improper double enhancement in sentencing and therefore, there was no plain error.

¶ 23 Based on the foregoing, we affirm the judgment of the circuit court of Cook County sentencing defendant to seven years' imprisonment for aggravated criminal sexual abuse.

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¶ 24 Affirmed.