

2014 IL App (2d) 121073-U
No. 2-12-1073
Order filed April 15, 2014

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Lake County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 11-CF-1096
)	
NILSON SOLIS-TOBAR,)	Honorable
)	James K. Booras,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Hutchinson and Spence concurred in the judgment.

ORDER

- ¶ 1 *Held:* Trial court properly considered infliction of serious harm and need to deter others in sentencing defendant for predatory criminal sexual assault of a child as neither are implicit in the underlying offense. Thus, a term of imprisonment of twenty seven years is not excessive.
- ¶ 2 Defendant, Nilson Solis-Tobar, was charged with (1) predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2010)) and (2) aggravated criminal sexual assault (720 ILCS 5/12-14(a)(2) (West 2010)). Defendant was convicted on both counts; however, under the one-act, one-crime rule defendant's conviction on count 2 was vacated and he was sentenced to

27 years' imprisonment for predatory criminal sexual assault. Defendant challenges his sentence as excessive. We affirm.

¶ 3

I. BACKGROUND

¶ 4 At the time of the assault, defendant was 35 years old and the victim, E.M., was 9 years old. On April 6, 2011, E.M., went to play with her next door neighbors after school. After some time, E.M.'s friends went to the store, leaving her alone with defendant. While E.M. and defendant were alone, defendant picked E.M. up, put her on the sofa, pulled down her pants, and inserted his penis into her vagina. When E.M. cried out in pain, defendant removed his penis and told her not to tell anyone.

¶ 5 E.M. went home and showered to clean the blood from the assault. After showering, she placed her bloody underwear in the garbage and hid her bloody sweatpants at the bottom of a laundry basket. She then changed into other clothes, went outside to play, ate dinner, and went to bed.

¶ 6 During the night, E.M.'s mother woke her up and noticed the bleeding. After E.M. told her mother what had happened, her mother called the police. E.M. was taken to the hospital for an examination, where she told the doctor that defendant had twice attempted penetration. A physical examination showed serious injuries consistent with this statement.

¶ 7 Defendant was taken into custody where he confessed to the assault and provided a written statement to that effect. However, at trial, defendant denied his guilt and claimed that it was not his signature on the written admission. Defendant's statement to the police was admitted as evidence.

¶ 8 Defendant was convicted of predatory criminal sexual assault, and a sentencing hearing was held on September 5, 2012. At the hearing, both E.M. and her mother read statements

expressing the pain and suffering they endured from defendant's actions. When defendant was given an opportunity to speak, he first declined to do so; however, he later gave a statement further denying his guilt.

¶ 9 Defendant was eligible for a term of imprisonment between 6 and 60 years. See 720 ILCS 5-12-14.1(b)(1) (West 2010). In deciding defendant's sentence, the judge considered in aggravation that defendant's actions resulted in serious physical and psychological harm and that harsh sentencing would be required for deterrence purposes. The court also considered defendant's statements and allocution denying culpability. In mitigation, the judge considered that defendant had no prior criminal record. Defendant was then sentenced to 27 years imprisonment.

¶ 10

II. ANALYSIS

¶ 11 Defendant challenges his sentence is excessive. We reject the challenge, and affirm.

¶ 12 Where a defendant is challenging the sentence imposed, the trial court's decision is afforded much deference and will only be overturned if the trial court has abused its discretion. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). The power to overturn a sentence should be used " 'cautiously and sparingly.'" *Id.* (quoting *People v. Jones*, 168 Ill. 2d 367, 378, 659 N.E.2d 1306, 1311 (1995)). "A sentence which falls within the statutory range is not an abuse of discretion unless it is manifestly disproportionate to the nature of the offense." *People v. Jackson*, 375 Ill. App. 3d 796, 800 (2007). Defendant's 27-year term of imprisonment is well within the applicable sentence, being half of the maximum possible sentence. 720 ILCS 5/12-14.1(b)(1) (West 2010) ("A person convicted of [predatory criminal sexual assault of a child] *** shall be sentenced to a term of imprisonment of not less than 6 years and *not more than 60 years.*" (emphasis added)). "[A] factor implicit in the offense for which [a] defendant is

convicted cannot be used as an aggravating factor at sentencing.” *People v. Rissley*, 165 Ill. 2d 364, 390 (1995) (citing *People v. Ferguson*, 132 Ill.2d 86, 97, 138 Ill. Dec. 262 (1989)); see also 730 ILCS 5/5-5-3.1, 3.2 (West 2010) (factors in sentencing mitigation and aggravation).

¶ 13 Defendant contends that the imposed sentence of 27 years’ imprisonment is improper because a less lengthy sentence would adequately protect the public and punish him for his actions. Defendant’s specific argument is that the trial court considered improper factors in aggravation. We disagree and find that at least three aggravating factors were present: (1) defendant’s conduct caused or threatened serious harm, (2) the imposed sentence was necessary to deter others from committing the same crime, and (3) defendant lacked remorse for his actions. Defendant contends that factors (1) and (2) are implicit in the offense and should not have been considered in sentencing.

¶ 14 Defendant first argues that the trial court erred in considering the serious harm to the victim as such harm is implicit in the offense. This argument has no merit. Defendant was sentenced for the crime of predatory criminal sexual assault of a child, which occurs when a person over the age of 17 “commits an act of sexual penetration with a victim *** under 13 years of age.” (720 ILCS 5/12-14.1(a) (1) (2010)). Where a crime requires only sexual penetration, harm is not implicit in the offense. See *People v. Kerwin*, 241 Ill. App. 3d 632, 636 (1993). As serious harm is not implicit in the underlying offense for which defendant has been sentenced (*People v. Calva*, 256 Ill. App. 3d 865, 875 (1993)), the trial court properly considered it in determining the appropriate sentence.

¶ 15 Defendant contends that, even if harm is not implicit in predatory criminal sexual assault of a child, the lack of a weapon and the singular, brief nature of the sexual assault show that the harm could not have been serious. This claim is erroneous, as the lack of a weapon does not

preclude a finding of serious harm and, moreover, E.M.'s statement to the doctor (that defendant attempted to penetrate her twice) contradicts the "singular and brief" characterization. Even if defendant's claim is true that the incident was brief and only one assault happened, E.M.'s psychological and physical trauma are no less serious.

¶ 16 A determination of whether an assault caused serious harm takes into account the degree of both physical and psychological injury. *Calva*, 256 Ill. App. 3d at 875. When a juvenile is the victim of a sexual assault, the court can infer that the victim has suffered psychological trauma. *Id.*; see also *People v. Huddleston*, 212 Ill. 2d 107, 135 (2004) ("**[A]side from any physical injury a child may suffer *** children who are sexually assaulted are subject to chronic psychological problems that may be even more pernicious**"); *People v. Burton*, 102 Ill. App. 3d 148, 154 (1981) ("[A] sentencing court may infer that a child/victim of sex abuse has sustained psychological damage."). The physical evidence showed the victim suffered severe physical trauma, including tearing and bruising of her genitals. When she arrived home after the assault, E.M.'s injuries were so severe that both her underwear and sweatpants were bloodied. After hiding her clothes, E.M. showered and went to bed. E.M.'s mother only learned of the assault when she woke E.M. during the night and saw that E.M. was noticeably bleeding, even though the assault had occurred a full seven hours earlier. A subsequent medical evaluation confirmed that E.M. suffered severe physical trauma.

¶ 17 In addition to significant physical injuries, the judge noticed psychological damages and lasting mental scars. At sentencing, E.M. gave a statement to the court, saying she "felt hurt, pain and uncomfortable when the bad man did this to me." She also expressed fear that defendant would cause this pain to another child. Lastly, she wished for "her parents to be okay and for my family to go back to the way we were before," indicating the deep fracture

defendant's actions caused. When E.M.'s mother spoke at sentencing, she said "[t]he fear and insecurity is palpable in E.M." and "E.M. had to recount over and over the horror of her assault. At the hospital, so many people had to come in, see her, check her body and ask her questions. My child was frightened and saying 'Mommy, why me? Why is this happening to me?'" E.M.'s mother described the behavioral change in E.M., stating, "E.M. has changed so much since the day she was attacked. She is not the cheerful, loving, playful little girl that she once was. Now she is always on the defense, guard, and scared." These statements show the far-reaching extent of the psychological trauma that defendant inflicted. While it is true that defendant did not use a weapon, the evidence shows that his actions caused serious physical and psychological harm, regardless. Therefore, the trial court properly considered serious harm as an aggravating factor.

¶ 18 Defendant next contends that the trial court improperly considered deterrence to others as an aggravating factor because it is already an implicit factor in the offense. Defendant does not further elaborate on this argument, other than making the conclusory statement that deterrence is an implicit factor of predatory criminal sexual assault of a child. The only possible interpretation this court can find is that defendant is attempting to claim that the legislature has established a minimum term of imprisonment of six years, thus indicating that such a time is sufficient to deter others from committing the same crime. We reject this argument, as deterrence of others is well-established as a valid factor for courts to consider in sentencing. See *Calva*, 256 Ill. App. 3d at 875 ("Given the abhorrent nature of the crime of aggravated criminal sexual assault and society's interest in protecting children from such acts, the need for deterrence would be an appropriate factor in aggravation"); *People v. Black*, 223 Ill. App. 3d 630, 635 (1992) ("The need to deter others was also a proper factor to consider in aggravation"). We see no plausible argument that

deterrence of others is an implicit factor of predatory criminal sexual assault of a child, and the trial court properly considered deterrence to others as an aggravating factor in sentencing.

¶ 19 Finally, among the applicable aggravating factors, we note defendant's lack of remorse. It is permissible for a judge to consider remorse – or lack, thereof – in determining what constitutes an appropriate sentence. *People v. Ward*, 113 Ill. 2d 516, 529 (1986). In examining the record, we note that defendant's statement at the sentencing hearing maintained his innocence, directly contradicting the statement defendant had given to the police. The trial judge interpreted this as defendant having no remorse for his actions, which *Ward* holds to be a valid aggravating factor for sentencing. *Id.*

¶ 20 In mitigation, the judge considered defendant's lack of prior criminal history. The court found no other applicable mitigating factors. For instance, the court found defendant did not act “under strong provocation” and that defendant was not “unlikely to commit another crime.” 730 ILCS 5/5-5-3.1 (West 2010) (mitigating factors). Therefore, they were not considered as mitigating factors. Other than describing the sexual assault as a brief, singular occurrence, defendant has offered no evidence of other mitigating factors.

¶ 21 The trial court properly considered as aggravating factors defendant's infliction of serious harm, the need to deter others, and defendant's lack of remorse. Where the imposed sentence was less than half of the maximum statutory sentence, the trial court did not abuse its discretion in sentencing defendant to a 27-year term of imprisonment. We affirm defendant's sentence.

¶ 22 III. CONCLUSION

¶ 23 For the reasons stated, we affirm the judgment of the Circuit Court of Lake County.

¶ 24 Affirmed.