SIXTH DIVISION
MAY 11, 2012

No. 1-10-3586

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.	)	09 CR 06906
	)	
NICHOLAS BOYER,	)	Honorable
	)	Frank Zelezinski,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE ROBERT E. GORDON delivered the judgment of the court. Justices Garcia and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: Where the State presented sufficient evidence to prove the defendant guilty of aggravated battery of a child beyond a reasonable doubt, the conviction was affirmed. Where the sentencing court may consider the victim's age as an aggravating factor even if the victim's age is an element of the offense, the sentencing was affirmed.

¶ 2 Following a bench trial, defendant Nicholas Boyer was convicted of aggravated battery to a child, age 2. The trial court then denied defendant's posttrial motion for a new trial. After hearing aggravation and mitigation, defendant was sentenced to 11 years in the Illinois

Department of Corrections. Defendant then presented a "Motion to Reconsider/Reduce Sentence" which the trial court denied.

¶ 3 Defendant now appeals his conviction and sentence claiming that: (1) the State failed to prove him guilty of aggravated battery of a child beyond a reasonable doubt and (2) the trial court improperly considered the age of the victim as an aggravating factor during the sentencing hearing where it was also an element of the offense.

¶ 4 BACKGROUND

¶ 5 Denina Smith, the victim's aunt, testified on behalf of the State that she babysat for the victim three or four times per week. Denina testified that she babysat the victim on March 26, 2009, and during her time with the victim she did not observe any injuries, bruises or swelling on his person. Denise Gant, the victim's grandmother, also testified on behalf of the State that on March 27, 2009, she observed the victim at 4 a.m. and did not observe any bruises on the victim. However, she testified that she observed bruises on the victim's body and a bloody lip when he arrived back home from defendant's home the next day.

¶ 6 Meyoshi Gant, the victim's mother, testified on behalf of the State that she did not observe any bruises or injuries on the victim when defendant picked up the victim between 12:30 and 1 p.m. on March 27, 2009. Defendant was dating Meyoshi at the time, and agreed to babysit for the victim while Meyoshi was at a hair salon. Defendant resided in Calumet City while Meyoshi and the victim resided on the south side of Chicago with Denise Gant. Defendant picked up the victim from Chicago and took him to Calumet City, where defendant lived with his sister.

¶ 7 Meyoshi testified that, while at the hair salon, she received a telephone call from defendant around 3 p.m. to inform her that the victim was hit in the face with a football but was fine. A short time later, Meyoshi received another phone call from defendant requesting permission to take the victim for a motorcycle ride, which Meyoshi refused to allow. A few minutes later, defendant telephoned her advising that the victim had fallen off the motorcycle and injured his thigh.

¶ 8 Meyoshi testified that, after she finished at the salon, she telephoned defendant at 10 p.m. requesting him to drop off the victim at her home. Defendant told Meyoshi that the victim was sleeping and he did not want to waken him and would bring the victim home in the morning.

¶ 9 Meyoshi testified that, on March 28, 2009, she telephoned defendant at 10 a.m. and was told the victim fell off the bed and suffered a bloody nose. Meyoshi insisted that defendant return the victim home immediately, and the victim was returned at 1 p.m. that afternoon. The victim was limping and had a bloody lip. After Meyoshi undressed the victim she observed swollen feet and bruises on his body. Meyoshi transported the victim to the University of Chicago Comer Children's Hospital emergency room, where they catalogued 38 different injuries to the victim. Among these injuries was a fracture on the victim's skull and a leg injury which required a full-leg cast.

¶ 10 Detective Piezul testified for the State that he and Detective Rapacz of the Calumet City Police Department took defendant into custody and read him his *Miranda* warnings on March 31, 2009. While in custody, the detectives interviewed defendant, who admitted that the victim sustained injuries while under his care. Defendant told the detectives that when he placed the

victim on the driver's seat of his motorcycle, the victim fell off the vehicle. Defendant did not observe the fall, only the victim lying on the ground on his right side because he was looking in another direction at the time. Defendant told the detectives that the victim's bloody lip occurred when he was struck in the face with a foam football. Defendant also told the detectives that he struck the victim on the back of the neck with an inflatable bat while playing baseball to direct the victim to the ball.

¶ 11 Detective Piezul testified that defendant related that he observed the victim walking funny after a haircut, but could not explain what caused the injuries to the victim's feet and thigh. Defendant also said that the victim fell out of bed on the morning of March 28, 2009, and suffered a bloody nose. When the detectives asked defendant whether he struck the victim with anything other than the bat, defendant then stated that he struck the victim on the back of the neck because the victim was playing with his weights.

¶ 12 Detective Rapacz testified for the State that he returned to defendant's residence to obtain photographs of the basement and garage where defendant resided, and of the motorcycle located in the garage. Detective Rapacz testified that the photographs showed that the motorcycle was missing its seat, and that the motorcycle leaned to its left when the kickstand was down. The detective also testified that the height of where the motorcycle seat would be was two feet seven inches from the ground, and the height of the bed was two feet and two inches to the carpeted area.

¶ 13 Dr. Kelley Staley, a medical physician board-certified in pediatrics, testified on behalf of the State that the victim sustained a "depressed skull fracture on the right side of his skull

involving the temporal bone." She testified that a depressed skull fracture normally results from a focal force with a pointed object, compared to a more generalized blunt force that causes a linear skull fracture. Dr. Staley found the skull fracture was not consistent with a child falling off a bed or a motorcycle. Dr. Staley also opined that the injuries to the victim's feet and ankles were also not accidental based on the amount of bruising located bilaterally on the tops of the feet. She explained that it would entail a significant effort to injure a child's feet in this manner, when a child is able to walk or run away.

¶ 14 Dr. Staley also opined that the bruises on the victim's left inner thigh and right hand were not accidentally caused based on their peculiar pattern. She opined that when a bruise shows clear-cut markings horizontally across the bruise, it is indicative of an object with that particular pattern that struck the child, and not a pattern observed in accidental bruises. In addition, the bruises above the victim's right knee and on his right inner thigh were not typical of accidental injuries found on children of the victim's age. Dr. Staley opined that children usually hit objects with their knees and shins as they are running, not with parts of their body that are above the knee.

¶ 15 Dr. Staley identified the large oval-shaped bruise on the outer part of the victim's left thigh as a loop mark. She testified a loop mark signifies that the child was struck by an object similar to a belt or a doubled-over utility cord, where the buckle or the loop would cause the pattern of injury observed on the thigh. She opined that such bruise patterns are not caused by accidental injuries.

¶ 16 Dr. Staley testified that a depressed skull fracture is a serious injury. When a skull

fracture involves the temporal bone, there is a risk of injuring or severing a major artery that feeds the brain. Dr. Staley also testified that the victim may have sustained a fracture to his left leg that was not disclosed on x-ray, and as a result the orthopedic physician placed the victim's left leg in a full-leg cast.

¶ 17 Dr. Staley did not believe that defendant's account of his time and events with the victim adequately explained the injuries to the victim. She opined that a foam football must be forcefully thrown to cause a bloody lip. She found that the skull fracture was inconsistent with falling from a two-foot high bed onto a carpeted floor because the injury implies the victim's head struck a very pointed force. She opined that children at two years old can brace themselves when they fall; therefore the skull fracture was unlikely the result of falling out of a bed.

¶ 18 Dr. Staley also testified that defendant's account of the victim falling off of the motorcycle was inconsistent with the victim's skull fracture. Since defendant claimed the victim had landed on his right arm and his face, it would cause scrapes to the victim's forehead, but not the skull fracture on the side of the victim's head. Furthermore, Dr. Staley stated there was nothing in defendant's statements to explain the loop mark on the child's thigh or the bruises she observed on the victim's hands and feet. She therefore opined that, within a reasonable degree of medical certainty, the victim's injuries were intentionally inflicted and not due to accidental causes.

¶ 19 On cross-examination, Dr. Staley testified that there is nothing in the medical records indicating the victim was observed as being in pain. She opined that the time frame for the occurrence of the victim's skull fracture was anywhere from an hour to 72 hours prior to the

emergency room visit on March 28, 2009. The medical records indicated that no surgery or treatment outside of observation was required for the skull fracture. Dr. Staley admitted that she did not know the mechanism for the cause of the victim's injuries, only that it was most likely caused by child abuse. She opined that the victim did not have any deep tissue musculature hematoma, but would not describe the bruises as superficial.

¶ 20 After the State rested its case, the defense called Dr. Leslie Zun, a medical doctor board-certified in emergency medicine. Dr. Zun is a member of the Mt. Sinai Child Protective Services committee, trained in pediatric child abuse. Dr. Zun reviewed the medical records from the University of Chicago Comer Children's Hospital, including the social worker notes, and a summary of defendant's statements prepared by Detective Pieczul.

¶ 21 Dr. Zun agreed that the medical records illustrated that the victim had a depressed skull fracture, as well as 38 other listed injuries. He placed the time frame of the injuries from just before the victim's arrival at the emergency room to a couple of days prior. He testified that the skull fracture could have resulted from a fall off the motorcycle by the child striking his head on the motorcycle pedal. With respect to the other injuries on the victim's body, Dr. Zun opined that the majority of the injuries could have occurred accidentally.

¶ 22 Dr. Zun opined that the depressed skull fracture was not life-threatening because it was not associated with an intercranial injury, bleeding, or contusion of the brain. He found that the victim's left ankle was placed in a cast due to a soft tissue injury. He testified children frequently sustain similar ankle injuries from play activity, and hospitals would place a child's leg in a cast if the initial x-ray was inconclusive. On cross-examination, Dr. Zun admitted that his report

indicated the victim's injuries could have been caused by accidental trauma or inflicted abuse.

¶ 23 After both the State and the defense rested and delivered closing remarks, the trial court found defendant guilty of aggravated battery of a child and aggravated battery. The trial court held a sentencing hearing on November 1, 2010. At sentencing, the trial court reviewed the pre-sentence investigation report, which listed defendant's weight as 207 lbs and his age as 30 years at the time of the offense. In aggravation, the report revealed that defendant was found guilty of aggravated unlawful use of a weapon in 2005. The report also indicated that defendant was never married but had fathered four children. The trial court considered the mitigating factors to be a lack of violence in defendant's criminal history, along with a good work record, education, and the fact that he has children of his own.

¶ 24 The trial court stated in sentencing: "Secondly, I do look at the victim here, and certainly unquestionably this is an innocent victim. The little boy was two years old, and if only he could tell us what happened, it probably would have settled all matters here much more easily, but he could not. I can only look to the fact that he was given to Mr. Boyer, as testimony goes, as a healthy baby and came back to the mother as a not healthy baby without going into detail of what occurred to him." After considering the aggravation and mitigation factors, the trial court sentenced defendant to 11 years in the Illinois Department of Corrections on count 1, aggravated battery of a child. On November 29, 2010, defendant filed his notice of appeal, and this appeal followed.

¶ 25 ANALYSIS

¶ 26 Defendant appeals claiming: (1) that the State failed to prove him guilty of aggravated

battery of a child beyond a reasonable doubt and (2) that the trial court improperly considered the age of the victim as an aggravating factor during the sentencing hearing, when it was also an element of the offense. For the reasons below, we affirm defendant's conviction and sentence.

¶ 27 I. Sufficiency of the Evidence

¶ 28 A. Standard of Review

¶ 29 The United States Supreme Court held in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), that, when considering if evidence is sufficient to sustain a conviction, a reviewing court must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in original.)

¶ 30 The Illinois Supreme Court has "adopted the Jackson formulation of the standard of review for claims that the evidence was insufficient to sustain a conviction." *People v. Cunningham*, 212 Ill. 2d 274, 278-79 (2004). "The Jackson standard applies in all criminal cases, regardless of the nature of the evidence." *Cunningham*, 212 Ill. 2d at 279. In applying this standard, we "must allow all reasonable inferences from the record in favor of the prosecution." *Cunningham*, 212 Ill. 2d at 280.

¶ 31 B. Elements of Aggravated Battery

¶ 32 To prevail at trial, the State must prove beyond a reasonable doubt each element of aggravated battery to a child:

> "Any person of the age 18 years and upwards who intentionally or knowingly, and without legal justification and by any means, causes great bodily harm or

permanent disability or disfigurement to any child under the age of 13 years or to any severely or profoundly mentally retarded person, commits the offense of aggravated battery of a child." 720 ILCS 5/12-4.3 (West 2008).

¶ 33 On appeal, defendant claims the State failed to prove beyond a reasonable doubt that: (1) all the injuries to the victim occurred during the time he was under the defendant's care, (2) defendant intentionally or knowingly caused great bodily harm to the victim, (3) the extent of the injuries on the victim amounted to great bodily harm, and (4) that defendant had any particular malice or motive to harm the victim.

¶ 34 1. Time Frame of Injuries

¶ 35 The mandate to consider all the evidence on review does not necessitate a point-by-point discussion of every piece of evidence as well as every possible inference that could be drawn therefrom. *People v. Wheeler*, 226 Ill. 2d 92, 117 (2007). Moreover, "the trier of fact is not required to disregard inferences which flow normally from the evidence and to search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt." *People v. Hall*, 194 Ill. 2d 305, 332 (2000). Our supreme court has stated that "[t]he trier of fact need not *** be satisfied beyond a reasonable doubt as to each link in the chain of circumstances." *Hall*, 194 Ill. 2d at 330. "[W]e must ask, after considering all of the evidence in the light most favorable to the prosecution, whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *Wheeler*, 226 Ill. 2d at 117.

¶ 36 In the present case, we find that the record contains sufficient evidence of the time frame of the injuries. The victim's aunt, mother, and grandmother all testified the victim did not have

any injuries prior to March 27, when defendant picked him up. The mother and grandmother of the victim both testified they observed injuries to the victim immediately after defendant dropped off the victim. Defendant told a number of bizarre stories to the detectives and the victim's mother that were inconsistent. Dr. Staley opined that the injuries were consistent with abuse of the child. Considering this evidence in the light most favorable to the prosecution, we find that it was reasonable for the trial court to conclude that victim's injuries occurred while in the custody of defendant as a result of the abuse.

¶ 37 2. Intent or Knowledge

¶ 38 Whether a person acted intentionally or knowingly with respect to bodily harm resulting from one's actions is a question that, due to its very nature, is often proved by circumstantial evidence, rather than by direct proof. *People v. Rader*, 272 Ill. App. 3d 796, 803 (1995). A "defendant is presumed to intend the probable consequences of his acts, and great disparity in size and strength between the defendant and the victim, as well as the nature of the injuries, may be considered in this context." *Rader*, 272 Ill. App. 3d at 263.

¶ 39 In the case at bar, we cannot say the trial court erred in finding defendant acted knowingly beyond a reasonable doubt. Although defendant never admitted knowledge or intent, the severity and number of injuries, as well as the difference in size and age between defendant and victim, tend to show defendant acted knowingly. At the time of the offense, defendant was 30 years old while the victim was only 2 years old. The defendant is 6 feet tall and weighed over 200 pounds while the victim was a normal 2-year old boy. The State's expert witness testified that the injuries were most likely the result of abuse rather than accidental. She also testified that

defendant's account of the events could not explain the type and severity of the injuries to the victim. In light of the evidence, the trial court did not act irrationally in finding defendant acted knowingly or intentionally. *Jackson*, 443 U.S. at 319 (the issue is whether any rational trier of fact could have found guilt beyond a reasonable doubt).

¶ 40 3. Great Bodily Harm

¶ 41 In the context of aggravated battery, great bodily harm has been held not susceptible of precise legal definition. *People v. Figures*, 216 Ill. App. 3d 398, 401 (1991). It requires an injury of a greater or more serious character than ordinary battery. *Figures*, 216 Ill. App. 3d at 401. The determination of whether great bodily harm has occurred centers upon the injuries the victim received. *Figures*, 216 Ill. App. 3d at 401. The question of whether a victim's injuries constitute great bodily harm is one to be decided by the trier of fact. *Figures*, 216 Ill. App. 3d at 401.

¶ 42 In the case at bar, the undisputed evidence established that the victim suffered a depressed skull fracture and 38 other specific injuries. The State's medical expert testified that both the skull fracture and the leg injury were serious injuries. While the defense expert testified that the injuries were not serious, the weight to be given the witnesses' testimony, and the credibility of the witnesses, are the responsibility of the trier of fact. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006); *People v. Evans*, 209 Ill. 2d 194, 211 (2004). Given the nature, extent, and the number of injuries, we find a rational trier of fact could have concluded the victim suffered great bodily harm.

¶ 43 4. Motive or Malice

¶ 44 Defendant's argument that the State failed to present evidence of motive does not render the trial court's decision irrational. It is well-established that the State is not obligated to prove motive in order to sustain a conviction. *People v. Gonzalez*, 388 Ill. App. 3d 566, 586 (2008). In light of defendant's statements to police, it was a reasonable inference that defendant was upset with the victim for "messing around with his weights." Even if we agreed with defendant that this was an unreasonable inference, we do not agree that the State failed to prove defendant guilty beyond a reasonable doubt in light of all the evidence presented.

¶ 45 II. Improper Factor at Sentencing Hearing

¶ 46 A. Standard of Review

¶ 47 "[A] trial judge's sentencing decisions are entitled to great deference and will not be altered on appeal absent an abuse of discretion." *People v. Illgen*, 145 Ill. 2d 353, 379; *People v. Jackson*, 375 Ill. App. 3d 796, 800 (2007). "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." *Jackson*, 375 Ill. App. 3d at 800.

¶ 48 B. Analysis

¶ 49 Defendant claims that: (1) the trial court improperly considered the age of the victim in aggravation since it was already an element of the offense, and (2) a sentence of 11 years was excessive.

¶ 50 Aggravated battery of a child requires, as an element of the offense, that the victim was a child under the age of 13. 720 ILCS 5/12-4.3 (West 1992). "As a general rule, the consideration

of a factor which is necessarily implicit in an offense cannot be used as an aggravating factor in sentencing." *People v. Spicer*, 379 Ill. App. 3d 441, 467 (2008) (quoting *People v. Burge*, 254 Ill. App. 3d 85, 88 (1993)). "Stated differently, a single factor cannot be used both as an element of an offense and as a basis for imposing 'a harsher sentence than might have otherwise have been imposed.' " *People v. Phelps*, 211 Ill. 2d 1, 11-12 (2004) (quoting *People v. Gonzalez*, 51 Ill. 2d 79, 83-84 (1992)). "Such dual use of a single factor is often referred to as 'a double enhancement.'" *Phelps*, 211 Ill. 2d at 12 (quoting *Gonzalez*, Ill. 2d at 85).

¶ 51 In support of his claim that the trial court erred in sentencing him, the defendant cited *People v. White*, 114 Ill. 2d 61 (1986), which our supreme court called a "textbook example of double enhancement." *Phelps*, 211 Ill. 2d at 12. The supreme court explained that: "In *White*, this court held that *** the victim's age cannot form the basis for an extended-term sentence where the defendant is convicted of aggravated battery of a child." *Phelps*, 211 Ill. 2d at 12. However, *White* is distinguishable from the case at bar because, in the case at bar, age was not used as the basis for an extended-term sentence. The trial court in the case at bar sentenced defendant within the statutory maximum for aggravated battery.

¶ 52 Although it is a "general rule" that an element of the offense should not also be used as a sentencing factor, "this rule should not be applied rigidly." *Burge*, 254 Ill. App. 3d at 88; *Spicer*, 379 Ill. App. 3d at 468. "The rule that a court may not consider a factor inherent in the offense is not meant to be applied rigidly, because sound public policy dictates that a sentence be varied in accordance with the circumstances of the offense." *Spicer*, 379 Ill. App. 3d at 468 (quoting *People v. Cain*, 221 Ill. App. 3d 574, 575 (1991)). Thus, a sentencing court may consider "the

degree of harm threatened" in an armed robbery although threatened harm is implicit in the offense (*Burge*, 254 Ill. App. 3d at 89); and the degree of harm in an aggravated criminal sexual assault, although "serious harm *** [is] an element implicit in the crime." *People v. Smith*, 215 Ill. App. 3d 1029, 1038 (1991).

¶ 53 In assessing the degree of harm, a sentencing court may consider "whether the victim is particularly young" (emphasis omitted) even though the victim's age is an element of the sexual assault count for which the defendant was convicted. *People v. Thurmond*, 317 Ill. App. 3d 1133, 1144 (2000) (emphasis omitted). In *Thurmond*, the sexual assault victim was only 12 years old. *Thurmond*, 317 Ill. App. 3d at 1136. The appellate court held that "the trial court did not err by recognizing that [the victim] was particularly young at the time of the offense." *Thurmond*, 317 Ill. App. 3d at 1144-45. The appellate court stated "there is a difference between being under age 18 and being significantly under age 18." *Thurmond*, 317 Ill. App. 3d at 1144.

¶ 54 Just as a trial court may consider whether a sexual assault victim was particularly young, a trial court may also consider whether an aggravated battery victim was particularly young. In the case at bar, the trial court did not err when it considered that the victim was 11 years below the age required in the statute. The victim in the case at bar was two years old at the time of the offense; and the age required for aggravated battery of a child is 13. 720 ILCS 5/12-4.3 (West 2008).

¶ 55 The statutory range for aggravated battery of a child is between 6 and 30 years. 720 ILCS 5/12-4.3(b) (West 2008). Although the sentencing court in the case at bar chose to give a sentence five years over the statutory minimum, the sentence was well below the statutory

maximum. Defendant admits that the sentencing court acknowledged defendant's lack of history of violence, good work record, education, and his own children as mitigating factors, while using the age of the victim and a prior felony as aggravating factors. Given the considerations used by the sentencing court, we cannot say the sentence was manifestly disproportionate to the nature of the offense.

¶ 56 CONCLUSION

¶ 57 For the foregoing reasons, defendant's conviction and sentence are affirmed.

¶ 58 Affirmed.