FIRST DIVISION
November 21, 2016

No. 1-14-2410



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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 12 CR 6867 |
| | ) | |
| OMAR ALMARAZ, | ) | Honorable |
| | ) | Mary Margaret Brosnahan, |
| Defendant-Appellant. | ) | Judge Presiding. |

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JUSTICE MIKVA delivered the judgment of the court.
Presiding Justice Connors and Justice Harris concurred in the judgment.

**O R D E R**

¶ 1 *Held:* The trial court did not improperly consider in aggravation a factor that was inherent in the offense of aggravated criminal sexual abuse when sentencing defendant. Conviction affirmed.

¶ 2 Following a bench trial, defendant Omar Almaraz was convicted of aggravated criminal sexual abuse and sentenced to six and one-half years' imprisonment. On appeal, Mr. Almaraz

contends that his sentence is excessive because the trial court improperly considered in aggravation a factor inherent in the offense. We affirm.

¶ 3 BACKGROUND

¶ 4 Mr. Almaraz was charged with aggravated criminal sexual abuse in that he was 17 years of age or older and committed an act of sexual conduct upon M.C. when he touched his hand to M.C.'s vagina for the purpose of sexual arousal or gratification, and M.C. was under 13 years of age. 720 ILCS 5/11-1.60(c)(1)(i) (West 2012).

¶ 5 At trial, M.C.'s mother testified that on March 16, 2012, she lived with Mr. Almaraz, who was then her ex-boyfriend, along with her two teenage sons, and her five-year-old daughter, M.C, in a three-bedroom apartment at 2825 South Kostner Avenue in Chicago. When M.C.'s mother returned home at approximately 3 a.m. on March 16, she saw Mr. Almaraz, who appeared nervous, exiting her bedroom, where M.C. also slept. Because they had broken up, Mr. Almaraz was supposed to be sleeping on the couch. M.C.'s mother entered the bedroom and saw that M.C. was awake and the lights were on. She noticed M.C.'s diaper was on backwards. M.C. told her mother that Mr. Almaraz had touched her vagina with his finger and that it hurt. M.C.'s mother called the police, who came and arrested Mr. Almaraz. M.C. was taken to the hospital.

¶ 6 M.C. testified that on the last date Mr. Almaraz lived with the family, he removed her diaper and touched her vagina "inside and outside" with his hand and finger. M.C. testified that Mr. Almaraz had touched her vagina five times before, while she was on the couch. M.C. did not tell her mother that Mr. Almaraz had touched her five other times, but testified that she believed her mother knew.

¶ 7 Detective Myrna Muniz testified that, after reading Mr. Almaraz his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), Mr. Almaraz initially denied the allegations against him. Subsequently, however, Mr. Almaraz admitted to putting his hand inside of M.C.'s "Pamper," and that he was sexually aroused as he rubbed his hand on her vagina. Mr. Almaraz also admitted to touching M.C.'s vagina while she was on the couch, two weeks prior to the incident in question. Mr. Almaraz gave a typewritten statement to an assistant State's Attorney. The statement was consistent with what he told police after he initially denied the allegations. Detective Muniz communicated with Mr. Almaraz in Spanish and translated for the assistant State's Attorney.

¶ 8 The State then proceeded by stipulation. It presented transcripts from the pretrial hearing on the State's motion to admit M.C.'s prior statements to Forensic Interviewer Lauren Glazer, the DVD from that interview and M.C.'s statements to emergency room doctor Ephriam Grimes. The parties stipulated that Dr. Grimes testified that, at approximately 3:45 a.m. on March 16, 2012, he was the attending physician in the emergency room and interviewed M.C. She told him that Mr. Almaraz got into bed with her and touched her vagina and behind with his finger. The parties further stipulated that Ms. Glazer testified that she interviewed M.C. on March 16, 2012. The DVD recording of the interview, which was admitted into evidence, showed that M.C. stated that Mr. Almaraz put his finger inside her vagina and that he had done this before.

¶ 9 Mr. Almaraz testified on his own behalf through an interpreter. On March 16, 2012, Mr. Almaraz was 24 years old. He went to a bar for four to five hours after work that evening, got "a bit" drunk, and then went home. Mr. Almaraz saw M.C. awake and watching television in her mother's bed. He entered the bedroom, changed the channel and watched television for two

minutes. He then left the room as M.C.'s mother returned home. Mr. Almaraz ate and was going to sleep on the couch when the police arrived and arrested him. He denied taking M.C.'s diaper off, touching her, or telling police that he touched her. He further stated that he only signed the written statement because a detective told him no one would believe him and it would be better for him to sign it, because he could then go home the same day. Mr. Almaraz also claimed that the statement he made, which was translated back to him, did not say that he touched M.C.

¶ 10 In rebuttal, Detective Muniz testified that she never told Mr. Almaraz that no one would believe him or that he could go home if he signed the written statement. Detective Muniz also testified that he read his statement to Mr. Almaraz, translating it word for word for him.

¶ 11 Following closing argument, the trial court found Mr. Almaraz guilty of aggravated criminal sexual abuse. In doing so, the court stated that the State's witnesses were credible, while Mr. Almaraz's testimony was self-serving and fabricated.

¶ 12 At sentencing, the State acknowledged that Mr. Almaraz did not have any prior felony convictions. However, it emphasized the aggravating nature of the facts of the case. In particular, the State asserted that Mr. Almaraz preyed on an innocent five-year-old child who was wearing a diaper, and that this was not the first time he abused her. The State requested that the court sentence Mr. Almaraz to the maximum term of seven years' imprisonment. In mitigation, defense counsel argued that Mr. Almaraz had significant family support, no intention of contacting M.C.'s mother or her family again, work experience as a laborer, an alcohol problem, and, most importantly, no criminal history. Defense counsel also noted that, as a result of this conviction, Mr. Almaraz would most likely be deported, eliminating any chance of him hurting anyone else in the community.

¶ 13 Following arguments in aggravation and mitigation, the court stated that it had reviewed the presentence investigation report (PSI) and all of the other relevant statutory sentencing factors. The court noted that it was aware of the prohibition against using a single factor as both an element of the offense and in aggravation, and that it was not going to improperly use an element of the offense in aggravation. In discussing the specific statutory factors in mitigation and aggravation, the court emphasized that it did not believe Mr. Almaraz considered how his conduct harmed the victim. It found no indication that Mr. Almaraz was provoked, no justification or excuse for his conduct and that Mr. Almaraz's conduct was not induced or facilitated by anyone. The court stated it could not comment with any certainty on whether Mr. Almaraz's criminal conduct was likely to recur. It did note that crimes against children are usually repeated and Mr. Almaraz admitted that he committed similar acts before. The court therefore had "no confidence saying [Mr. Almaraz] would not re-offend with respect to children." It noted that Mr. Almaraz's lack of a criminal background was a significant mitigating factor, which it weighed against the facts of the case. The court stated that Mr. Almaraz's family would endure hardship while he was in prison.

¶ 14 The court further stated:

> "What this little girl has gone through at the hands of [Mr. Almaraz] is something that she is going to remember for the rest of her life.
>
> In terms of what occurred, whether [Mr. Almaraz] was under the influence of alcohol or not, I don't know. But certainly, if the answer to that were yes, that does not excuse the behavior. Perhaps if [Mr. Almaraz] was not under the influence of alcohol,

some better judgment may have kicked in. It may not have. There is no way this court would know.

I find the crime committed against the victim was a significant one."

The court indicated that, although the State was requesting the maximum sentence of seven years, it would not impose the maximum because doing so would not take into consideration the fact that Mr. Almaraz had no criminal background. The court sentenced Mr. Almaraz to six and one-half years' imprisonment.

¶ 15 Mr. Almaraz filed a motion to reconsider sentence, arguing that his sentence was excessive in view of his background, and that the court improperly considered in aggravation matters that were implicit in the offense. The trial court denied Mr. Almaraz's motion to reconsider and this appeal followed.

¶ 16 ANALYSIS

¶ 17 On appeal, Mr. Almaraz maintains that, in sentencing him to just six months short of the maximum, the trial court erred by impermissibly considering facts in aggravation inherent in the offense of aggravated criminal sexual abuse. Mr. Almaraz maintains that the court considered in aggravation that this was a "significant" crime that was something M.C. would "remember for the rest of her life." Mr. Almaraz asserts that the court must have relied heavily upon these factors because it imposed a sentence close to the maximum and the court had also said it would give "significant weight" in mitigation to the fact that Mr. Almaraz had no prior criminal history.

¶ 18 In sentencing a defendant, the court cannot consider a factor that is an element of the offense as an aggravating factor. *People v. Sauseda*, 2016 IL App (1st) 140134, ¶ 13 (citing *People v. Phelps*, 211 Ill. 2d 1, 11-12 (2004)). When a court at sentencing considers a factor that

is an element of the offense, the result is an improper "double enhancement." *Phelps*, 211 Ill. 2d at 11-12. However, the rule prohibiting double enhancement is not meant to be rigidly applied, as sound public policy dictates that a sentence be varied based on the circumstances of the offense. *Sauseda*, 2016 IL App (1st) 140134, ¶ 13 (citing *People v. Spicer*, 379 Ill. App. 3d 441, 468 (2008)). Moreover, in reviewing a sentence, this court should not focus on a few statements made by the trial court, but must consider the record in its entirety. *Sauseda*, 2016 IL App (1st) 140134, ¶ 13 (citing *People v. Reed*, 376 Ill. App. 3d 121, 128 (2007)).

¶ 19 The parties dispute the standard of review this court should apply in evaluating whether an improper double enhancement occurred here. Mr. Almaraz maintains that the legal question of whether the court relied on an improper factor in sentencing is reviewed *de novo*. The State contends that "since a review of this record shows that the sentencing court did not rely on an improper factor in sentencing him, this court should apply an abuse of discretion standard." We think they are both correct.

¶ 20 First, because Mr. Almaraz contends that the trial court applied improper factors during sentencing, resulting in a double enhancement, we review the factors the court considered at sentencing to ensure that such consideration did not result in an impermissible double enhancement. This is a legal question, which we consider *de novo*. See *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 49 (reviewing *de novo* the question of whether a trial court relied on an improper factor in imposing a sentence); *People v. Shanklin*, 2014 IL App (1st) 120084, ¶ 91 ("Although the trial court has broad discretion in imposing a sentence, the determination of whether the trial court made a double enhancement error is a question of law reviewed *de novo*") (Internal citations omitted.). If there is no legal error, we then review the sentence to ensure that

there was no abuse of the court's discretion. *People v. Simmons*, 2016 IL App (1st) 131300, ¶ 170.

¶ 21 Aggravated criminal sexual abuse, a Class 2 felony, has a sentencing range of three to seven years' imprisonment. 720 ILCS 5/11-1.60(g) (West 2012); 730 ILCS 5/5-4.5-35(a) (West 2012). The portion of the statute under which Mr. Almaraz was found guilty required an act of sexual conduct by a "person 17 years of age or over" with a "victim who is under 13 years of age." 720 ILCS 5/11-1.60(c)(1)(i) (West 2012).

¶ 22 In imposing sentence, the court stated that it reviewed its notes of the trial proceedings, the PSI, and all the relevant factors in sentencing. The court then proceeded to address the statutory factors in aggravation and mitigation. Mr. Almaraz highlights that the court stated that "the crime committed against the victim was a significant one" and that what M.C. went through "is something that she is going to remember for the rest of her life." Mr. Almaraz asserts that these factors are inherent in the charged offense because they are implicit in every case of aggravated criminal sexual abuse of a child under the age of 13.

¶ 23 Mr. Almaraz appears to argue that if a trial court makes any mention of a sentencing factor inherent in the offense, this demonstrates the court improperly considered that factor in sentencing. This court has held otherwise. See *Sauseda*, 2016 IL App (1st) 140134, ¶ 15 ("A trial court is not required to refrain from any mention of sentencing factors that constitute elements of the offense"). We explained in *Sauseda*, "[a] reasoned judgment regarding the proper penalty to be imposed must be based on the particular circumstances of each case." *Id.* ¶ 17. "Relevant factors for the trial court's consideration include the defendant's demeanor, habits, age, mentality, credibility, general moral character, social environment, and the nature and

circumstances of the offense." *Id*. (citing *People v. Saldivar*, 113 Ill. 2d 256, 268-69 (1986)). Here, the court's comments at sentencing show that the court properly sentenced Mr. Almaraz based, in part, on the nature and circumstances of the case. It did not improperly consider the inherent elements of aggravated criminal sexual abuse in sentencing.

¶ 24 The court specifically stated that it was weighing Mr. Almaraz's lack of a criminal history "against the facts of the case that [it] heard during the course of the trial." These facts were that M.C. was five years old, Mr. Almaraz came into her room in the middle of the night when her mother was not at home, he pulled down her diaper in order to touch her vagina with his hand and finger and he admitted he had sexually abused M.C. before. The trial court's commentary on the nature and circumstances of Mr. Almaraz's crimes did not result in its improperly using elements of the offense as factors in aggravation.

¶ 25 Furthermore, the severity of Mr. Almaraz's offense depends on the degree of harm he inflicted on M.C. *Id*. ¶ 17; see also *People v. Brewer*, 2013 IL App (1st) 072821, ¶ 57 ("the fact [a defendant's] conduct threatened or caused serious harm is not a factor inherent in the crime itself but is a proper aggravating factor to be considered during sentencing even in cases where serious bodily harm is implicit in the offense"). Here, the serial abuse is evidence of severe harm, and the court's comment that it had no confidence that Mr. Almaraz "would not re-offend with respect to children," reflects that it was considering the repeated nature of Mr. Almaraz's acts. The trial court thus properly considered the severity of Mr. Almaraz's conduct when it sentenced him to six months short of the maximum.

¶ 26 In reaching this conclusion, we reject Mr. Almaraz's contention he should not have received nearly the maximum sentence where he had no criminal background and where there

was no evidence that this was an unusually traumatic instance of the crime. The trial court determined that Mr. Almaraz's lack of a criminal history warranted only a six month reduction below the maximum requested by the State. The "existence of mitigating factors does not mandate imposition of the minimum sentence nor preclude imposition of the maximum sentence." *Brewer*, 2013 IL App (1st) 072821, ¶ 57.

¶ 27 Further, the record clearly establishes that the trial court reduced Mr. Almaraz's sentence based on his lack of a criminal history, where the trial court specifically stated:

> "[T]he State is asking for the maximum sentence on this case. I feel that if I were to give the maximum sentence of seven years in the Department of Corrections, I would not be weighting at all the fact that he has no background.
>
> So giving what I believe is appropriate weight in this case balanced out against the facts I heard, the Court will sentence [Mr. Almaraz] to six and a half years in the Illinois Department of Corrections."

¶ 28 Having determined that the trial court did not consider an improper factor, we will review the sentence imposed for an abuse of discretion. Even if no improper facts were considered, we can reverse a sentence imposed where it "varies greatly from the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense." *People v. Jones*, 2014 IL App (1st) 120927, ¶ 55. We cannot, however, substitute our judgment for that of the trial court just because we might have weighed the sentencing factors differently. *Id.* We do not think a six and one-half-year sentence in this case was an abuse of the trial court's sentencing discretion.

¶ 29 For the foregoing reasons, we find that the trial court properly sentenced Mr. Almaraz to a prison term within the appropriate sentencing range for a Class 2 felony and did not improperly

consider a factor inherent in the charged offense in aggravation. We affirm the judgment of the circuit court.

¶ 30 Affirmed.