2011 IL App (2d) 100470-U
No. 2-10-0470
Order filed December 2, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 08-CF-560
AURELIO DURAN,	)	Honorable Theodore S. Potkonjak,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Hudson and Birkett concurred in the judgment.

ORDER

Held: (1) The State proved defendant guilty beyond a reasonable doubt of predatory criminal sexual assault of a child, as the circumstantial evidence indicated that the victim was sexually penetrated and defendant's incriminating statement indicated that he penetrated her; (2) the trial court did not abuse its discretion in sentencing defendant to the maximum 30 years' imprisonment for predatory criminal sexual assault of a child: the court considered the mitigating evidence but reasonably discounted it in light of the aggravating evidence, including the seriousness of the crime and defendant's substantial criminal history; the court did not err in considering corroborated and reliable hearsay, such that there was no plain error or ineffective assistance of defense counsel; (3) the trial court erred in imposing a public defender reimbursement fee when the court had not provided the required notice and hearing on defendant's ability to pay; we vacated the fee and remanded for the notice and hearing, despite the expiration of the 90-day period in which such hearing could be held.

¶ 1 Defendant, Aurelio Duran, appeals from the trial court's order sentencing him to 30 years' incarceration for predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2002)). He contends that there was insufficient evidence to convict him, that his sentence was excessive and was based on hearsay, and that the court improperly imposed a public defender fee without a determination of his ability to pay. The State concedes that the court improperly imposed the fee. We affirm the conviction and term of incarceration and remand for a hearing on Duran's ability to pay the fee.

¶ 2 I. BACKGROUND

¶ 3 In November 2008, Duran was indicted on one count of predatory criminal sexual assault of a child, with the indictment alleging that, between July 17, 2001, and July 16, 2002, he placed his penis in the vagina of K.D. when K.D. was under the age of 13 and Duran was over the age of 17.

¶ 4 On March 22, 2010, a jury trial was held. K.D., who was 17 at the time of trial, testified that Duran was her father. She said that her parents separated around 2005 and that she had not spoken to Duran since then. K.D. testified that, when she was nine years old, she woke up one morning alone in the house and felt pain between her legs. She said that it took her a couple of hours to be able to walk straight. K.D. also found a minimal amount of blood on her pajamas and sheets. She laundered the sheets and threw the pajamas in the garbage. Later, Duran came into her room, closed the door, and told her, "whatever happened last night, don't tell anybody." K.D. had never had vaginal pain before and she did not begin menstruation until she was 12 years old. She testified that she did not tell anyone at the time because she was afraid that no one would believe her.

¶ 5 In the spring of 2007, K.D. told cousins what had happened and asked them to keep the information to themselves. Santitos Medina, K.D.'s cousin, testified that K.D. told her "she got

raped." The cousins told their mother, who reported the matter to K.D.'s mother. One of K.D.'s cousins testified that K.D. told her that K.D. was raped.

¶ 6 K.D.'s mother took K.D. to see a doctor, who testified that she was able to determine that K.D. had no hymen, a membrane that typically ruptures when a girl has her first sexual intercourse. The presence of a minimal amount of blood and vaginal discomfort was also consistent with the rupturing of the hymen and with the vaginal penetration of a young girl by an adult male. However, there was no way to medically determine how the hymen was removed.

¶ 7 Duran was found guilty, and his motion for a new trial was denied. At the sentencing hearing, the State presented evidence that K.D. suffered lasting emotional harm from the assault and that Duran was previously investigated for a July 14, 2005, incident of domestic abuse that occurred when his children were present. He also later violated an order of protection. One of the officers who testified about that investigation derived his information from an incident report filed by another officer who did not testify, and a hearsay objection was overruled. The presentence investigation report (PSI) stated that an order of protection was issued against Duran on July 15, 2005, based on numerous allegations of domestic abuse, and Duran told the investigator that he and his wife went through a bad time, they had an argument, and he went to jail. A copy of the petition for the order of protection was attached to the PSI and included a written statement from K.D.'s mother that was generally consistent with the incident report as described by the testifying officer.

¶ 8 Duran had a criminal history spanning 20 years that included driving under the influence, two counts of operating a motor vehicle without a license, driving while uninsured, disorderly conduct, domestic abuse, battery, and domestic battery. The battery conviction was the result of a plea where the original charge was child abuse against K.D. In the present case, Duran made a

statement and did not accept responsibility. Instead, he suggested that K.D. and her mother were liars. He argued that he had a steady employment history and a minimal criminal history.

¶ 9 The court discussed the aggravating and mitigating factors and sentenced Duran to the maximum term of 30 years' incarceration. A public defender fee was also imposed without a hearing on Duran's ability to pay. Duran moved to reconsider the sentence and did not include any complaint about hearsay at the sentencing hearing. The motion was denied, and he appeals.

¶ 10 II. ANALYSIS

¶ 11 A. Sufficiency of the Evidence

¶ 12 Duran contends that the State failed to prove him guilty beyond a reasonable doubt because it failed to show that he penetrated K.D.'s vagina.

¶ 13 "A criminal conviction will not be set aside unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt." *People v. Collins*, 106 Ill. 2d 237, 261 (1985). In considering a challenge to the sufficiency of the evidence, it is not the function of this court to retry the defendant. *Id.* Rather, " 'the relevant question is 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.) *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The trier of fact must assess the credibility of the witnesses and the weight of their testimony, resolve conflicts in the evidence, and draw reasonable inferences from that evidence, and this court will not substitute its judgment for that of the trier of fact on these matters. *People v. Ortiz*, 196 Ill. 2d 236, 259 (2001).

¶ 14 A criminal conviction may be based on circumstantial evidence, as long as it satisfies proof beyond a reasonable doubt of the charged offense. *People v. Hall*, 194 Ill. 2d 305, 330 (2000). In a case based on circumstantial evidence, the trier of fact need not be satisfied beyond a reasonable

doubt as to each link in the chain of circumstances if all the evidence considered collectively satisfies the trier of fact beyond a reasonable doubt that the defendant is guilty. *Id.*

¶ 15 In the current matter, a rational trier of fact could have found Duran guilty of predatory criminal sexual assault of a child beyond a reasonable doubt. The jury was presented with strong circumstantial evidence that Duran penetrated K.D. Specifically, K.D. testified that, after waking up alone in her house, she experienced vaginal pain and bleeding, both consistent with a ruptured hymen, shortly before Duran made an incriminating statement. In addition, Medina, K.D.'s cousin, testified that K.D. told her she "got raped." The jury could have found this testimony credible, and we will not substitute our judgment for that of the trier of fact. See *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224-25 (2009) (noting that the responsibility of determining the credibility of witnesses and weighing the evidence rests with the trier of fact; and a reviewing court will not substitute its judgment for that of the trier of fact).

¶ 16 Duran relies on *People v. Letcher*, 386 Ill. App. 3d 327, 336 (2008), to argue that the evidence was too vague to support the State's case. In *Letcher*, the victim made only general references to touching in unavailable places and was not asked about penetration. We held that those circumstances alone were not enough to establish guilt beyond a reasonable doubt. *Id.* *Letcher*, however, is distinguishable. Here, there was circumstantial evidence that penetration actually occurred. Collectively, all of the evidence, viewed in a light most favorable to the State, allowed a rational trier of fact to conclude that penetration was proved beyond a reasonable doubt. Accordingly, we affirm the conviction.

¶ 17 B. Excessive Sentence

¶ 18 Duran contends that his 30-year sentence was excessive, first arguing that the court failed to consider mitigating evidence and what he characterizes as a minor criminal history.

¶ 19 "[T]he trial court is in the best position to fashion a sentence that strikes an appropriate balance between the goals of protecting society and rehabilitating the defendant." *People v. Risley*, 359 Ill. App. 3d 918, 920 (2005). Thus, we may not disturb a sentence within the applicable range unless the trial court abused its discretion. *People v. Stacey*, 193 Ill. 2d 203, 209-10 (2000). A sentence is an abuse of discretion only if it is at great variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense. *Id.* at 210. We may not substitute our judgment for that of the trial court merely because we might weigh the pertinent factors differently. *Id.* at 209.

¶ 20 In determining an appropriate sentence, relevant considerations include the nature of the crime, the protection of the public, deterrence, and punishment, as well as the defendant's rehabilitative prospects. *People v. Kolzow*, 301 Ill. App. 3d 1, 8 (1998). The weight to be attributed to each factor in aggravation and mitigation depends upon the particular circumstances of the case. *Id.* "The seriousness of the crime is the most important factor in determining an appropriate sentence, not the presence of mitigating factors." *People v. Quintana*, 332 Ill. App. 3d 96, 109 (2002). The trial court has no obligation to recite and assign a value for each factor presented at a sentencing hearing. *People v. Brazziel*, 406 Ill. App. 3d 412, 434 (2010). A sentencing judge is presumed to have considered all relevant factors unless the record affirmatively shows otherwise. *People v. Hernandez*, 319 Ill. App. 3d 520, 529 (2001).

¶ 21 Here, there is no dispute that the sentence was within the applicable statutory range, as Duran was subject to 6 to 30 years' incarceration. 720 ILCS 5/12-14.1(b)(1) (West 2002); 730 ILCS 5/5-8-1(a)(3) (West 2002). Although Duran contends that the trial court failed to consider mitigating evidence, the trial court referenced Duran's arguments concerning employment and criminal history and reasonably discounted them. Duran also attempts to characterize his criminal history as minor,

but that was not the case. He had a lengthy history of criminal charges and convictions, including charges of acts of violence against K.D. Based on the aggravating evidence, particularly the seriousness of the crime, the trial court's sentence was not an abuse of discretion.

¶ 22 Duran also argues that it was plain error for the trial court to consider hearsay during the sentencing proceeding and that his counsel was ineffective for failing to preserve the issue.

¶ 23 To preserve a claim of sentencing error, the defendant must object at the sentencing hearing and raise the objection in a postsentencing motion. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). Forfeited arguments related to sentencing issues may be reviewed for plain error. *Id.* at 545. To establish plain error, a defendant must show either that: "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the strength of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Thus, to obtain relief under the plain-error rule, a clear or obvious error had to have occurred. *Hillier*, 237 Ill. 2d at 545. Likewise, since an attorney's performance is deficient only if it falls below an objective standard of reasonableness, counsel cannot be ineffective for failing to preserve the issue if there was no error in considering the evidence. See *People v. Johnson*, 218 Ill. 2d 125, 139 (2005).

¶ 24 "It is well established that the ordinary rules of evidence are relaxed during sentencing hearings." *People v. Varghese*, 391 Ill. App. 3d 866, 873 (2009). "Evidence may be admitted so long as it is both relevant and reliable." *Id.* "The source and type of admissible information is virtually without limits." *Id.* "Merely because testimony contains hearsay does not render it *per se* inadmissible at a sentencing hearing." *Id.* "A hearsay objection at sentencing goes to the weight

of the evidence rather than its admissibility." *Id.* "Determining the reliability of hearsay rests within the sound discretion of the trial court." *Id.* Double hearsay should be corroborated, at least in part, by other evidence. *People v. Blanck*, 263 Ill. App. 3d 224, 236 (1994). However, even uncorroborated hearsay may be admissible when it is not inherently unreliable, such as when it was compiled as part of an official police investigation and was never directly challenged. See *People v. Foster*, 119 Ill. 2d 69, 98-99 (1987).

¶ 25 Here, the evidence was double hearsay, but it was also corroborated in part by other evidence. Duran admitted that something happened with his wife that caused him to go to jail, and his wife's petition for a protective order was generally consistent with the hearsay that was presented. The evidence also was not inherently unreliable, as it was gathered as part of a police investigation and Duran did not directly challenge it. At sentencing, Duran generally stated disparaging things about his ex-wife and accused her of making false allegations of sexual abuse, but he did not specifically deny the material in the police report or suggest that the officer had misstated anything. Accordingly, no error occurred. Because no error occurred, there also was no plain error or ineffective assistance of counsel.

¶ 26 C. Fee

¶ 27 Duran contends, and the State agrees, that the public defender fee must be vacated because it was imposed under section 113-3.1(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/113-3.1(a) (West 2008)) without a hearing on Duran's ability to pay.

¶ 28 Section 113-3.1(a) provides:

> "Whenever under either Section 113-3 of this Code or Rule 607 of the Illinois Supreme Court the court appoints counsel to represent a defendant, the court may order the defendant to pay to the Clerk of the Circuit Court a reasonable sum to reimburse either the county or

> the State for such representation. In a hearing to determine the amount of the payment, the court shall consider the affidavit prepared by the defendant under Section 113-3 of this Code and any other information pertaining to the defendant's financial circumstances which may be submitted by the parties. Such hearing shall be conducted on the court's own motion or on motion of the State's Attorney at any time after the appointment of counsel but no later than 90 days after the entry of a final order disposing of the case at the trial level." 725 ILCS 5/113-3.1(a) (West 2008).

¶ 29 "[S]ection 113-3.1 requires that the trial court conduct a hearing into a defendant's financial circumstances and find an ability to pay before it may order the defendant to pay reimbursement for appointed counsel." *People v. Love*, 177 Ill. 2d 550, 563 (1997). The hearing is required even where a cash bail bond has been posted, because the existence of a bond is not conclusive evidence of an ability to pay. *Id.* at 560-63. "The hearing must focus on the foreseeable ability of the defendant to pay reimbursement as well as the costs of the representation provided." *Id.* at 563.

¶ 30 "The hearing must, at a minimum, provide defendant with notice that the trial court is considering imposing a payment order and give defendant an opportunity to present evidence of his ability to pay and other relevant circumstances." *People v. Spotts*, 305 Ill. App. 3d 702, 703-04 (1999). "Notice" includes informing the defendant of the court's intention to hold such a hearing, the action the court may take as a result of the hearing, and the opportunity the defendant will have to present evidence and be heard. *Id.* at 704. "Such a hearing is necessary to assure that an order entered under section 113-3.1 complies with due process." *Id.* Rules of forfeiture do not apply. *Love*, 177 Ill. 2d at 564.

¶ 31 In *Love*, despite the passage of 90 days, our supreme court remanded the matter for a hearing when one had not been held. *Id.* at 565. We have followed suit. See, *e.g.*, *People v. Schneider*, 403

Ill. App. 3d 301, 304 (2010); *Spotts*, 305 Ill. App. 3d at 705. "We view the supreme court's practice to remand such cases as binding." *Schneider*, 403 Ill. App. 3d at 304.

¶ 32 Here, the fee could not be imposed without notice and a hearing before the trial court. Thus, we vacate the fee and remand for notice and a hearing on the matter.

¶ 33 III. CONCLUSION

¶ 34 We affirm Duran's conviction and sentence of incarceration. However, we vacate the public defender fee and remand to the circuit court of Lake County for a hearing on Duran's ability to pay the fee.

¶ 35 Affirmed in part and vacated in part; cause remanded.