2013 IL App (2d) 111051-U
No. 2-11-1051
Order filed January 8, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. PEDRO GUTIERREZ, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 10-CF-2326 Honorable John J. Kinsella, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Zenoff and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant showed no plain error in his sentence of 18 years' imprisonment (on a 6-to-60 range) for predatory criminal sexual assault of a child: under the circumstances, the trial court was permitted to infer that the victim suffered psychological harm; the court did not improperly rely on the victim's age; and the court was entitled to deem the offense outrageous and repulsive.

¶ 2 Defendant, Pedro Gutierrez, pleaded guilty to one count of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2010)) and was sentenced to 18 years in prison. Following the denial of his motion for reconsideration of his sentence, defendant timely appealed. Defendant argues that the trial court abused its discretion in imposing an 18-year sentence, where,

according to defendant, the court improperly speculated that the victim will suffer long-term trauma, improperly relied on the age of the victim, and improperly found that defendant's conduct was outrageous. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On October 26, 2010, defendant was indicted on five counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2010)). Each count alleged that, on or between June 1, 2010, and August 11, 2010, defendant placed his finger into the sex organ of V.H., who was under 13 years of age. On June 6, 2011, defendant pleaded guilty to count I of the indictment, and the State dismissed the remaining counts.

¶ 5 The factual basis for the plea established the following. Esperanza Lillian Campos would testify that, from June through August 2010, she rented part of her apartment to defendant. Her two daughters lived with her: V.H., who was born on August 23, 2000, and N.H., who was born on November 12, 2002. At some point, V.H. told her that defendant had been touching her inappropriately. "[V.H.] kept telling her this." Eventually, Campos reported the information to the police. V.H. would testify that, when she was nine years old, defendant lived with her and that he had touched her vaginal area with his hands several times during the summer of 2010. V.H. would testify that defendant put his hand inside her underwear and used two fingers to rub her private parts. She would testify that this occurred everywhere in the apartment, except for the bathroom, and that, on one occasion, her sister witnessed defendant touching her. Defendant told V.H. not to tell anyone, but V.H. told her mother. Her mother told V.H. "that she needed the money, but she would make him leave eventually." N.H. would testify that she was seven years old and that she saw defendant touch V.H. Carmen Easton, an investigator from the Du Page County Children's Center,

would testify that she interviewed defendant and that defendant admitted to touching V.H. He stated that the first time that he touched V.H. was accidental, but that later touches were intentional. He touched her about three or four times. He used three fingers to rub between V.H.'s vaginal lips, but he did not penetrate her vagina. Easton would testify that defendant told her that he became sexually aroused when he touched V.H., that he had a problem, that he asked for forgiveness, and that he needed to stay away from little girls.

¶ 6 The trial court found that the factual basis was sufficient to support the charge of predatory criminal sexual assault of a child. The court advised defendant that the offense was a Class X felony, punishable by a term of from 6 to 60 years in prison with lifetime registration as a sex offender. Thereafter, the court found that defendant knowingly and voluntarily pleaded guilty.

¶ 7 The sentencing hearing took place on September 22, 2011. The court began by noting that it had read the presentence investigation report (PSI). The PSI indicated that defendant was 50 years old. He was born in Mexico and came to the United States in 1982. He had been deported three times between 1982 and 1984. He returned to the United States in 1985 and obtained legal residency in 1987. Defendant's criminal history included convictions of driving under the influence and driving during a suspension or revocation. His driver's license was revoked. When interviewed for the PSI, defendant denied touching V.H. and stated that "the children in the house would steal money from him and they threatened to accuse him of touching them if he told anyone they stole money."

¶ 8 The State presented one witness in aggravation, Investigator Easton, who testified that she interviewed V.H. and defendant concerning the offense. Easton's testimony was consistent with the State's statements at the plea hearing concerning her testimony, with a few additions. For instance,

Easton testified that defendant told her that he molested V.H. because he was not used to young girls, as his only sexual relationships had been with prostitutes.

¶ 9 The State asked the court to consider in aggravation that defendant violated V.H. "in the worst imaginable way." The State argued that the court "should consider the degree of harm caused by a pattern of sexual abuse perpetrated against [V.H.], who was a nine-year-old little girl at the time she was sexually molested." The State argued that "[i]n considering the degree of harm caused by this defendant, Illinois Courts recognize at sentencing the long-lasting and sometimes latent effects, psychological effects, that sexual abuse has on young children. The younger the child, often the more latent that these psychological effects manifest." The State further argued that the victim "was nine. She knew and understood what happened to her. She knew it was wrong. The effects on a girl at that age will be devastating throughout her lifetime." The State also asked the court to consider that defendant violated the trust of a family who had given him a place to stay. The State concluded: "Based on the degree of harm caused by the pattern of sexual abuse that we have proved, the defendant deserves a sentence of 20 years in [prison] to deter other sexual abuse and to protect the children of our community."

¶ 10 The defense argued in mitigation that, with the exception of several cases of driving under the influence, defendant did not have a significant criminal history. The defense argued that defendant was a permanent legal resident of the United States who had been working and providing for his family. The defense provided three letters on defendant's behalf: two from former employers, and one from a former coworker. Counsel argued that the offense was a "one-time aberration." With respect to the nature of the offense, counsel pointed out that it did not involve penile contact or oral sex.

¶ 11 Defendant stated in allocation: "Well, the only thing that I want to tell you is ask all the public for forgiveness if I have offended you in anything. And that's it." When asked if he wanted to say anything else, defendant responded: "No. Well, I would like to get out and work. I work to support my mother and my niece's child who I used to send money to."

¶ 12 Thereafter, the court stated as follows:

> "Well, as far as the defendant's comments, certainly, you as an individual, don't offend me. Your crime not only offends me, but offends the whole community and, most certainly, will have long-lasting and permanent ramifications or consequences to the little girl that you abused. And for that, you ought to be ashamed.
>
> I was hoping you would express more shame for what you did. But in the presentence report and reflected by your comments here today, you seem to be minimizing what you actually did.
>
> And the fact that anyone would take advantage in a sexual nature with a little nine-year-old innocent child is quite repulsive to the law and to the community, as well as it should be. The fact that the sexual acts were not as extreme or numerous or egregious as they could have been is somewhat mitigating. But frankly, it doesn't change the very nature of the crime which was you sexually abused a child. And that is as serious a crime as the law recognizes, short of actually taking someone's life.
>
> And in large measure, you did take the innocence of this child who has to now reconcile in the mind of a nine-year-old why men would do the things that she cannot even comprehend or understand. And I hope she is able to sort through those issues with — given time. But it is—the consequences—we who have never experienced these sort of things have

a hard time, I think, often sorting through how it affects a human being. I certainly don't have any great ability to assess that. However, I have seen over the last 30 years, many, many, many manifestations of the consequences which are always significant and sometimes completely devastating to the whole psychological makeup of that person.

And without being able to fully understand how it affects a child as they develop into an adult, it is a very commonly identified problem in how well a human being adjusts mentally to the give and take of life, in essence. It's sad. There is no way to make this right. I wish this little nine-year-old girl could have avoided this entire situation. But she couldn't because the defendant made her, chose her as a victim, chose her to abuse because he could and felt he could get away with it. Fortunately, the abuse came to an end.

The State's recommendation—first, the defense's recommendation of six years, the minimum sentence for such a crime, I think would seriously deprecate the seriousness of this crime and the harm visited upon a nine-year-old child. So, it goes clearly to the Court's thinking that, in evaluating all of the factors in mitigation and aggravation, as the Court is required to do, would not—this case would not lend itself to a minimal sentence.

In observance of the State, their position is certainly, I think, far more reasonable, in terms of reflecting the outrageousness of the defendant's conduct, the repulsiveness of his conduct, the effects on the victim.

The sentence of the Court, however, in weighing and balancing all those things and recognizing the statutory 85 percent that will be served, the sentence of the Court will be 18 years in the Illinois Department of Corrections."

¶ 13 Defendant moved for reconsideration of his sentence, arguing that the sentence was excessive given the facts and circumstances, defendant's criminal history, and the aggravating and mitigating factors. The trial court denied the motion, and defendant timely appealed.

¶ 14 II. ANALYSIS

¶ 15 Defendant argues that the trial court abused its discretion in imposing an 18-year sentence, because it improperly speculated that the victim will suffer long-term trauma, improperly relied on the age of the victim, and improperly found that defendant's conduct was outrageous. In response, the State maintains that defendant forfeited the issues by failing to raise them during the sentencing hearing or in his postsentencing motion. Notwithstanding forfeiture, the State argues that the trial court's sentence was proper.

¶ 16 We agree that defendant has forfeited any arguments concerning the improper consideration of certain aggravating factors that he did not object to below or raise in his postsentencing motion. Nevertheless, an argument not properly preserved can be reviewed if plain error occurred. Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967); *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 7. The plain-error doctrine permits a court of review to consider error that has been forfeited when either

> "(1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence. In the first instance, the defendant must prove 'prejudicial error.' That is, the defendant must show both that there was plain error and that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him. The State, of course, can respond by arguing that the evidence was not closely balanced, but rather strongly weighted against the defendant. In the second instance, the defendant must prove there was plain error and that the error was so serious that

> it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. [Citation.] Prejudice to the defendant is presumed because of the importance of the right involved, '*regardless* of the strength of the evidence.' (Emphasis in original.) [Citation.] In both instances, the burden of persuasion remains with the defendant." *People v. Herron,* 215 Ill. 2d 167, 187 (2005).

Recently, in *Abdelhadi,* this court held that "when a trial court considers erroneous aggravating factors in determining the appropriate sentence of imprisonment, the defendant's 'fundamental right to liberty' is unjustly affected, which is seen as a serious error." *Abdelhadi*, 2012 IL App (2d) 111053, ¶ 7. Thus, we will review defendant's contention for error.

¶ 17 Our constitution requires that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. A reviewing court will not disturb a sentence that is within the applicable sentencing range unless the trial court abused its discretion. *People v. Stacey*, 193 Ill. 2d 203, 209-10 (2000). So long as the trial court " 'does not consider incompetent evidence, improper aggravating factors, or ignore pertinent mitigating factors, it has wide latitude in sentencing a defendant to any term within the statutory range prescribed for the offense.' " *People v. Bosley*, 233 Ill. App. 3d 132, 139 (1992) (quoting *People v. Hernandez*, 204 Ill. App. 3d 732, 740 (1990)). 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. *Stacey*, 193 Ill. 2d at 210. "It is the province of the trial court to balance relevant factors and make a reasoned decision as to the appropriate punishment in each case" (*People v. Latona*, 184 Ill. 2d 260, 272 (1998)), and the reviewing court may not

substitute its judgment for that of the trial court merely because it might weigh the pertinent factors differently. *Stacey*, 193 Ill. 2d at 209.

¶ 18 Here, defendant pleaded guilty to one count of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2010)). He faced a sentencing range of 6 to 60 years (720 ILCS 5/12-14.1(b)(1) (West 2010)). The trial court sentenced him to 18 years in prison, which we note was within the lowest quarter of the range.

¶ 19 First, we find that the court's reference to the harm done to V.H. was not improper. The trial court may consider in aggravation the psychological harm done to a child. *People v. Ulmer*, 158 Ill. App. 3d 148, 151 (1987); *People v. Burton*, 102 Ill. App. 3d 148, 154 (1981); *People v. Lloyd*, 92 Ill. App. 3d 990, 996-97 (1981). There need not be direct evidence in the record establishing psychological harm; the court may infer harm. See *Burton*, 102 Ill. App. 3d at 154 (rejecting the defendant's argument that the court "abused its discretion in considering harm to the victim where the existence or extent of harm was not shown"). Here, defendant lived in V.H.'s home and abused her several times in virtually every room in the house. Although V.H. reported the incidents to her mother, her mother apparently did not report the abuse immediately. Instead, it was not until after V.H. "kept telling [the mother]" about the abuse that the mother contacted the authorities. Under these facts, the court reasonably inferred that V.H. suffered some degree of psychological harm. Defendant's reliance on *People v. Zapata*, 347 Ill. App. 39 956 (2004), is misplaced, because there, in sentencing the defendant, the court relied on its own personal distaste for gang violence as the predominant factor, but the record contained no evidence that the offense was gang-related. Here, the psychological harm was properly inferred.

¶ 20 Next, we find that a review of the transcript from the sentencing hearing makes clear that the court did not improperly consider the victim's age as an aggravating factor. Rather, it was simply the court's manner of referring to the victim. It referred to her as "a little nine-year-old innocent child," "a nine-year-old," a "little nine-year-old girl," and "a nine-year-old child." There is no indication that the court increased defendant's sentence based on the fact that the victim was nine years old (though we note that the victim was younger than the offense requires, increasing to some degree the seriousness of defendant's offense). Nor did the court err in referring to the "outrageousness of the defendant's conduct" and the "repulsiveness of his conduct." While defendant argues that his conduct "was no more outrageous and repulsive than any other predatory criminal sexual assault," that does not necessarily mean that his conduct cannot be considered "outrageous" or "repulsive." See *Ulmer*, 158 Ill. App. 3d at 151 ("[T]he fact that the trial court described defendant's offense as 'most repugnant to society' does not constitute grounds for reversal of the sentence."). It is worth noting that the factual basis of the plea established a pattern of abuse that occurred over a two-month period. Contrary to defendant's claim, this was not a "one-time aberration."

¶ 21 In sum, the crux of defendant's argument seems to be that the only appropriate sentence here would be the minimum sentence of six years, given defendant's "lack of significant criminal history." However, "[t]he 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). 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). Here, the court specifically stated that it was weighing all relevant factors and that a minimum sentence

would "deprecate the seriousness of this crime." The court carefully considered the evidence and imposed a sentence that was less than what the State requested and much closer to the minimum end of the sentencing range than to the maximum. Accordingly, we find no abuse of discretion.

¶ 22 III. CONCLUSION

¶ 23 For the reasons stated, we affirm the judgment of the circuit court of Du Page County.

¶ 24 Affirmed.