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2011 IL App (3d) 090945-U

Order filed November 9, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF  
ILLINOIS,

Plaintiff-Appellee,

v.

ERNESTO PUGA, JR.,

Defendant-Appellant.

) Appeal from the Circuit Court  
) of the 12th Judicial Circuit,  
) Will County, Illinois,  
)  
) Appeal No. 3-09-0945  
) Circuit No. 08-CF-476  
)  
) Honorable  
) Amy M. Bertani-Tomczak,  
) Judge, Presiding.

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PRESIDING JUSTICE CARTER delivered the judgment of the court.  
Justices McDade and Schmidt concurred in the judgment.

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**ORDER**

¶ 1 *Held:* The evidence presented at trial was sufficient for a rational trier of fact to convict defendant of criminal sexual assault. The trial court did not abuse its discretion in sentencing defendant to six years' imprisonment.

¶ 2 Following a bench trial, defendant, Ernesto Puga, Jr., was convicted of criminal sexual assault (720 ILCS 5/12-13(a)(1) (West 2008)) and sentenced to six years' imprisonment. On appeal, defendant argues that: (1) he was not proven guilty beyond a reasonable doubt because the State failed to disprove his defense of consent by the victim; and (2) his six year sentence

was excessive considering the absence of a felony history, that he supported his children, and he was consistently employed since 1984. We affirm.

¶ 3 FACTS

¶ 4 On March 5, 2008, defendant was charged with criminal sexual assault. 720 ILCS 5/12-13(a)(1) (West 2008). The State alleged that on or about January 1, 2008, defendant knowingly placed his penis in the vagina of the victim, C.S., by use of force. Defendant pled not guilty, and the cause proceeded to a bench trial on August 18, 2009.

¶ 5 The evidence at trial established that on the night of December 31, 2007, defendant attended a party at his nephew's house. When defendant returned to his house, early in the morning, he encountered C.S. in his son's bedroom. It was undisputed that defendant and C.S. had sexual intercourse on January 1, 2008; however, the issue of consent was in dispute.

¶ 6 C.S. testified that when she finished work on December 31, 2007, she attended a hotel party around 9 p.m. She had a few beers and then went with her boyfriend at the time, Michael Venegas, to his best friend's aunt's house for a New Year's Eve party. Venegas and C.S. had been dating on and off for about five years and had one child together. Venegas' best friend was Ernesto Puga III (Ernesto), who was also defendant's son. The New Year's Eve party they attended was the same party defendant attended that night. C.S., Venegas, Ernesto, and Ernesto's girlfriend, Sabrina Solis, arrived at the New Year's Eve party around 11:30 p.m. At the party, C.S. had a shot of alcohol with defendant, in addition to having a few beers.

¶ 7 At around 1:30 a.m., C.S., Venegas, Ernesto, and Solis left the party and went to Ernesto's house, which was also defendant's house. After having something to eat, Venegas and C.S. left for Venegas' aunt's house, but got into a fight. C.S. testified that she was upset because

she wanted to get food, but Venegas testified that C.S. was upset because he wanted to go out with his friends. When they arrived at Venegas' aunt's house, C.S. was still arguing with defendant and punched a wall with her right hand. Venegas insisted that they leave and planned to take C.S. to her mother's house. In Venegas' car, C.S. was still upset and punched the dashboard of his truck with her right hand and then kicked it. Venegas had to restrain C.S. from hitting him, but he never hurt her. C.S. testified that she might have hit him once. At that point, Venegas dropped C.S. off at Ernesto's house because it was much closer than her mother's. Ernesto and Solis were at the house and did not mind if C.S. spent the night.

¶ 8 When C.S. was dropped off at Ernesto's house, she got sick and vomited a small amount. Afterwards, Ernesto offered her his bed, while he and Solis stayed on the couch. C.S. recalled shutting the bedroom door and fell asleep under the covers with her clothes on. C.S. testified that neither the television nor any lights were on.

¶ 9 C.S. testified that she awoke to defendant touching her under the covers. The touching started at her lower back and then moved to her vagina. C.S. told defendant to stop. She screamed twice for Ernesto, but then defendant choked her and it became difficult for her to breathe. While struggling with defendant, she fell to the floor. She recalled defendant saying numerous times "I'm taking that pussy." C.S. was on her stomach, and defendant was on top of her trying to take her pants off. C.S. testified that she was 5 foot 3 inches and 115 pounds and defendant was over 6 feet tall and about 235 pounds. During the struggle, C.S. testified that she hit her left arm or hand on the dresser.

¶ 10 While defendant was choking C.S., she had to go to the bathroom, and he allowed her. She testified that defendant grabbed her by the hair and took her to the bathroom, which was

right next to the bedroom. Defendant was not wearing any pants or underwear. He stood inside the bathroom with the door shut until she was finished, and then grabbed her by the hair again and walked her back to the bedroom. C.S. testified that she did not yell for Ernesto at this point because she was scared.

¶ 11 Once they were in the bedroom, defendant pushed C.S. onto the bed, took her pants and underwear off, and then inserted his penis into her vagina. C.S. testified that she said "no," cried, and told defendant Venegas was going to kill him. C.S. testified that it physically hurt when defendant had sex with her. The sex lasted only a few minutes, and then defendant returned to his own bedroom.

¶ 12 When defendant left Ernesto's bedroom around 7 a.m., C.S. put her pants on and called Venegas. Before she was able to talk to Venegas, defendant returned to the bedroom and asked why C.S. was there. C.S. stated that Venegas and her got into a fight. Then defendant told her that no one will know what happened between them because both Ernesto and Solis were asleep. When defendant left again, C.S. called Venegas numerous times, and when she reached him, she told him to pick her up immediately. Venegas arrived 15 minutes later, and C.S. ran out the door, leaving her shoes behind. Venegas asked her what happened to her face, and she said she hated him for leaving her there because she was assaulted by defendant.

¶ 13 After Venegas picked up C.S., they went to C.S.'s mother's house, and all three of them went to the emergency room. A sexual assault kit was taken by the nurse, and C.S. was examined by Dr. Marie O'Conner at around 11 a.m. Dr. O'Conner testified that C.S. had bruising on her face, scratches on her neck, petechia around her eyes, bruising near her right temple, bruising on her right knee, elbow and hand, and bruising on her left wrist. Dr. O'Conner testified

that the petechia around her eyes could be caused from forceful vomiting, but only if it had happened within a couple of hours. She testified that it was more likely caused from being choked or strangled. Additionally, C.S. had subconjunctival hemorrhages in her right eye, which was also evidence of being choked or strangled. Dr. O'Conner testified that there was an older bruise on her right elbow and right hand, but that all the other bruises appeared fresh. C.S. admitted that the injuries to her right hand occurred when she punched the wall and dashboard the night before. Dr. O'Conner performed an internal examination of C.S., which revealed that the interior right side of her vagina had slight abrasions, bruising, and slight swelling. Dr. O'Conner testified that these injuries were recent, caused only a few hours ago, and consistent with forceful insertion into her vagina. A rape kit was taken, and the parties stipulated that the semen recovered from C.S. was determined to be defendant's semen, based on his deoxyribonucleic acid sample.

¶ 14 Defendant admitted at trial that he engaged in sexual intercourse with C.S., but testified that the sex was consensual. He testified that he arrived at the party around 8 p.m., and while at the party, had between four and six beers and a couple of shots of alcohol. Defendant left the party around 5:30 a.m. and went home, where he encountered C.S. asleep in Ernesto's bedroom. Defendant noticed that Ernesto's bedroom television was on, so he went into the room to turn it off. A voice then asked, "where in the hell have you been?" Defendant turned on the light, and was surprised to see C.S. in bed because she had never stayed the night before. Defendant testified that C.S. was under the covers, so he was unable to see if she had any marks or scratches on her. C.S. then told defendant to turn off the light because it hurt her eyes.

¶ 15 Defendant testified that C.S. told him she got into a fight with Venegas, and that he was

cheating on her. C.S. asked defendant to sit down, and they discussed C.S.'s relationship with Venegas. C.S. started rubbing his leg and moved toward his genitals. Defendant testified that he and C.S. were about to have sex when she got up to go to the bathroom. Defendant claimed C.S. was not dressed, so he put on his boxers and followed her to the bathroom. Defendant stood in front of the doorway, with his back facing C.S., so that Ernesto could not see C.S. as she used the bathroom.

¶ 16 Defendant testified that when C.S. returned to the bedroom, she lay on the bed and they began to have sexual intercourse. Midway through intercourse, C.S. seemed upset and started to cry. C.S. said Venegas was going to kill her, but defendant claimed she never told him to stop and never called out for anyone. Defendant began to lose his erection, and as he started to pull his penis out of her vagina, C.S. closed her legs around him and asked him to proceed. Defendant did so, and when he was finished, he got dressed and went back to his bedroom. He came back five minutes later and offered to drive her home after he slept a few hours. Defendant then went to bed, but recalled hearing the front door slam just before he fell asleep.

¶ 17 Shortly thereafter, defendant received a phone call from Venegas accusing him of raping C.S. Defendant told Venegas that the sex had been consensual. Defendant testified that he did not notice any marks on C.S.'s face, but she was covered with blankets and the lights were off.

¶ 18 Defense counsel cross-examined C.S. on the issue of consent and whether C.S. had motivation to lie to Venegas. C.S. testified that she was not receiving financial assistance from Venegas because she was working to support herself and to go to school. She testified that she was not afraid of Venegas or that he would be mad at her for what happened with defendant. C.S. also stated that if she wanted to be with someone other than Venegas, she easily could have

because she lived with her mother and not with Venegas.

¶ 19 Ernesto testified that he was at the party with Venegas and C.S. At the party he witnessed a verbal argument between the two of them because someone had grabbed C.S.'s buttocks that night. About an hour after C.S. and Venegas left to go to Venegas' aunt's house, they returned, and Venegas dropped C.S. off at his house to stay the night. C.S. was crying and intoxicated. He testified that she threw up at his house, but it was sporadic vomiting, often as a result of crying so much.

¶ 20 Ernesto testified that he saw redness on her neck and eyes, petechia around her eyes, and a mark on her forehead. He never spoke to the police, but claimed he told this to the investigator at the public defender's office. The investigator testified that he had no indication that Ernesto saw those injuries on C.S. Ernesto also testified that his bedroom, where C.S. slept, was about 15 feet away from the separate room where he and Solis slept that night. Ernesto admitted that he was "buzzed" that night and had smoked marijuana. He thought he would have heard someone if they were yelling that night, but admitted he did not hear defendant come home or C.S. leave that morning.

¶ 21 Joanne Forsythe, the nurse that collected the rape kit from C.S. at the hospital, testified that C.S. arrived at the hospital around 9 a.m. She recalled C.S. describing the events of the night in question. The recollection confirms C.S.'s testimony, except Forsythe recalls C.S. saying she was able to escape to the bathroom to get away from defendant. Defendant then came to the bathroom and attacked her again. She also claimed C.S. told her she reinjured her right hand when she hit it on the nightstand. This was contradicted by C.S.'s testimony, in which she claimed she hit her left hand on a dresser. Forsythe also testified that when C.S. arrived at the

hospital, she had a bruise on her temple. C.S. stated it was from defendant choking her and pushing her head to the floor.

¶ 22 After hearing all the evidence, the trial court found defendant guilty of criminal sexual assault. At defendant's sentencing hearing, the State presented evidence of defendant's history of violence against women as evidenced by a 2002 charge of domestic battery, which was reduced to battery, involving his former wife. Defendant was also charged in 1998 for battering his former wife, but she never appeared to pursue the claim. Defense counsel offered defendant's lack of felony and limited criminal history. Counsel also presented that defendant had a consistent employment history since 1984, and supported his family. After the trial court reviewed the evidence, the trial court sentenced defendant to six years' imprisonment. Defendant's motion to reconsider the sentence was denied. Defendant appeals.

## ¶ 23 ANALYSIS

### ¶ 24 I. Guilt Beyond a Reasonable Doubt

¶ 25 Defendant first argues that he was not proven guilty beyond a reasonable doubt because the State failed to disprove his defense of consent. Defendant contends that C.S.'s testimony, in which she denied consenting to the sexual encounter with defendant, was not enough to disprove consent because her testimony was impeached based on her motivation lie about cheating on her boyfriend.

¶ 26 If a defense is raised, the State has the burden to disprove it beyond a reasonable doubt. *People v. Haywood*, 118 Ill. 2d 263 (1987). When a defendant challenges the sufficiency of the evidence supporting his conviction, a reviewing court must determine whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the



essential elements of the crime beyond a reasonable doubt. *People v. Collins*, 214 Ill. 2d 206 (2005). Upon review, the trier of fact remains responsible for making determinations regarding the credibility of witnesses, the weight to be given to their testimony, and the reasonable inferences to be drawn from the evidence. *People v. Ross*, 229 Ill. 2d 255 (2008). We will set aside a defendant's conviction only when we find the evidence was insufficient or so improbable or unsatisfactory that a reasonable doubt exists as to defendant's guilt. *People v. Ortiz*, 196 Ill. 2d 236 (2001).

¶ 27 To sustain a charge for criminal sexual assault, the State must prove that defendant committed an act of sexual penetration by the use of force or threat of force. 720 ILCS 5/12-13(a)(1) (West 2008). Defendant may raise consent as a defense to criminal sexual assault. See 720 ILCS 5/12-17 (West 2008) (defining consent as "a freely given agreement to the act of sexual penetration or sexual conduct in question. Lack of verbal or physical resistance or submission by the victim resulting from the use of force or threat of force by the accused shall not constitute consent"). If a defendant raises the question of consent, as defendant did here, the State has the burden to prove beyond a reasonable doubt both the issue of consent, as well as force. *Haywood*, 118 Ill. 2d 263.

¶ 28 Viewing the evidence in the light most favorable to the State, we find the evidence sufficient for a rational trier of fact to find defendant guilty beyond a reasonable doubt of criminal sexual assault. There is no dispute that defendant and C.S. engaged in sexual intercourse. The issue is one of consent. The testimony of C.S. and defendant are similar in relation to the events on the night in question, but are in direct contrast when referring to the sexual encounter. However, based on the record before us, the evidence was sufficient for the

trial court to find defendant guilty. C.S.'s testimony that the sexual intercourse was not consensual was corroborated with the physical evidence gathered in the sexual assault kit, specifically the swelling, abrasions, and bruising on the interior of her vagina. Her testimony was further corroborated by Dr. O'Conner's testimony that C.S.'s internal and external injuries were consistent with physical restraint or sexual assault.

¶ 29 Defendant argues that there was insufficient evidence to find him guilty because, according to defendant, the sex was consensual, C.S.'s external injuries were easily explained by her own violence, Ernesto did not hear C.S. scream his name, and Ernesto claimed he saw marks on her face and neck before the alleged assault. These claims are not supported by the record. C.S. admitted at trial that she injured her right hand when she punched the wall and Venegas' dashboard, but also stated she injured her left hand during the assault when it hit the dresser. There was conflicting testimony from Forsythe that C.S. said she reinjured her right hand on a nightstand, but even ignoring the injury to C.S.'s hands, her other injuries are unexplained by her own violence. Dr. O'Conner stated that the petechia and hemorrhage around C.S.'s eyes could have been a result of vomiting, but the vomiting would need to have been within the past few hours and forceful. It was her opinion that these injuries were more likely a result of being choked or strangled. Based on the testimony at trial, C.S. did not vomit recently. C.S. left the New Year's Eve party around 1:30 a.m. C.S. vomited very little afterward and mostly in reaction to crying, and then went to bed. Defendant testified that he arrived home around 5:30 a.m., and C.S. was already in bed. C.S. first arrived at the emergency room at around 9 a.m, and was not examined by Dr. O'Conner until 11 a.m.

¶ 30 The fact that Ernesto did not hear C.S. scream his name while she was in the bedroom

does not bring into doubt defendant's guilt because Ernesto also did not hear defendant come home that night or hear C.S. slam the door when she left. Additionally, Ernesto's claim that he saw redness on C.S.'s neck and face and petechia around her eyes before the assault was called into doubt because he did not admit such facts to the investigator and defendant admitted that he did not see any injuries.

¶ 31 Furthermore, C.S.'s credibility was not called into doubt based on her motivation to lie, because on cross-examination she testified that she was not dependent on Venegas for money or other support. She also testified that she was not afraid of him and was free to date someone else if she wanted. Therefore, viewing the evidence in the light most favorable to the State, we hold that it is not so unreasonable, improbable, or unsatisfactory that it created a reasonable doubt of the defendant's guilt for criminal sexual assault. See *Ortiz*, 196 Ill. 2d 236.

¶ 32 II. Sentencing

¶ 33 Defendant next contends that his sentence of six years' imprisonment was excessive. Defendant argues that the trial court failed to give proper weight to mitigating factors, specifically his rehabilitative potential; therefore, his sentence should be reduced to the minimum sentence of four years' imprisonment or be remanded for new sentencing.

¶ 34 The Illinois Constitution mandates that all penalties 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. However, the determination and imposition of a sentence involves considerable judicial discretion, and we will not reverse a trial court's sentence unless we find that the court abused its discretion. *People v. La Pointe*, 88 Ill. 2d 482 (1981). A trial court is in a far better position than an appellate court to fashion an appropriate sentence based upon

firsthand consideration of factors such as defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. *People v. Streit*, 142 Ill. 2d 13 (1991). Therefore, we will not substitute our judgment for that of the trial court just because we may have balanced the sentencing factors differently. *Id.* Furthermore, a sentence that is within the statutory range will not be deemed excessive unless it either departed greatly from the spirit and purpose of the law, or it was manifestly disproportionate to the nature of the offense. *People v. Spencer*, 303 Ill. App. 3d 861 (1999).

¶ 35 Here, we find that the trial court did not abuse its discretion in sentencing defendant to 6 years' imprisonment. Criminal sexual assault is a Class 1 felony with a sentencing range of 4 to 15 years' imprisonment. 720 ILCS 5/12-13(b)(1) (West 2008); 730 ILCS 5/5-8-1(a)(4) (West 2008). Defendant's sentence of 6 years' imprisonment is within the statutory sentencing range, and also at the lower end of the range. The record in this case demonstrates that at defendant's sentencing hearing, the trial court was presented with all the mitigating and aggravating factors and specifically stated that it considered all of the evidence in making its determination.

¶ 36 Defendant does not challenge any specific part of the trial court's reasoning. Instead, defendant argues that the trial court did not give proper weight to the following factors: the absence of a felony history, that he is a good father, and his long employment history. However, unless the record affirmatively shows otherwise, the trial court is presumed to have considered all relevant factors, including any mitigating evidence. *People v. Hernandez*, 319 Ill. App. 3d 520 (2001). There is nothing in the record showing that the trial court failed to consider any factor in mitigation, but instead specifically shows that the trial court considered all evidence before it. See *People v. Raymond*, 404 Ill. App. 3d 1028 (2010) (despite defendant's argument

that the proper amount of weight was not given to mitigating factors, the court does not conclude that the trial court did not properly consider them).

¶ 37 Moreover, despite defendant's emphasis on the fact that the objective of sentencing is to restore the offender to useful citizenship, the trial court was not required to give greater weight to defendant's rehabilitative potential than to the circumstances of the offense. See *People v. Brown*, 218 Ill. App. 3d 890 (1991). In light of the record, the trial court properly accounted for the relevant mitigating factors, and defendant's sentence is not manifestly disproportionate to the nature of the offense. See *Spencer*, 303 Ill. App. 3d 861. Therefore, we hold that the trial court did not abuse its discretion in imposing defendant's sentence.

¶ 38 CONCLUSION

¶ 39 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 40 Affirmed.