2014 IL App (4th) 130300-U

NO. 4-13-0300

FILED
December 2, 2014
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Coles County
ISAAC D. PHILLIPS,	)	No. 11CF20
Defendant-Appellant.	)	
	)	Honorable
	)	James R. Glenn,
	)	Judge Presiding.

PRESIDING JUSTICE POPE delivered the judgment of the court.
Justices Knecht and Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion in sentencing defendant to 21 years' imprisonment; however, we amend the mittimus to reflect an indeterminate mandatory supervised release term of three years to natural life.

¶ 2 In April 2011, defendant, Isaac D. Phillips, pleaded guilty to one count of predatory criminal sexual assault of three-year-old X.S. In August 2011, the trial court sentenced defendant to 21 years' imprisonment. Defendant appeals, arguing the court abused its discretion in sentencing him to 21 years in prison. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In April 2011, the State charged defendant by information with one count of predatory criminal sexual assault of a child. 720 ILCS 5/12-14.1(a)(1) (West 2010).

¶ 5 During defendant's April 2011 plea hearing, the parties notified the trial court

defendant had agreed to plead guilty to predatory criminal sexual assault of a child in exchange for the State's agreement not to file additional charges related to child pornography. There was no agreement as to sentence.

¶ 6 Defendant was admonished he was pleading guilty to a Class X felony and was ineligible for probation. The trial court explained the sentencing range was 6 to 60 years' imprisonment, followed by a period of mandatory supervised release (MSR) of three years to natural life. Defendant acknowledged he understood. The State then provided the following factual basis:

> "Back on January 13th of this year, Detective Sam Gaines of the Mattoon Police Department met with a mother of a victim whose initials are X.S. She advised that her three-year-old daughter had exhibited abnormal sexual behavior.
>
> Detective Gaines met with X.S., and she reported that [defendant] had played a game called mommy and daddy with her and that he had placed his finger in her vagina.
>
> Subsequent to that, Detective Gaines met with the defendant and he provided the same and additional information, including that [defendant] had placed his penis into the vagina of X.S."

¶ 7 Defendant stipulated to the State's factual basis. The trial court accepted defendant's guilty plea, ordered a presentence-investigation report (PSI) and the preparation of a sex-offender-specific evaluation, and set the matter for sentencing.

¶ 8 The PSI reflected defendant had no prior history of criminal convictions. He was cooperative and accepted responsibility for his offense. Defendant recognized he needed help and requested he be placed in a facility where sex-offender treatment was available. Defendant reported strong family support. He graduated from high school and had a good employment history. The noted risk factors were: "[a]dmits he had deviant sexual fantasies in the past and knew his actions were wrong before he committed them and still decided to sexually abuse a three[-]year[-]old child."

¶ 9 The sex-offender evaluation conducted by Dr. Howard Levine reflected as follows:

> "[Defendant] sexually abused a three[-]year[-]old girl within hours of having his first opportunity to do so. He sexually abused this child across many hours. His sexual abuse included digital penetration of the child's vagina, rubbing his erect penis on the child's vagina, masturbating while fondling the child, and masturbating and ejaculating on the child's body.
>
> In addition to sexually abusing this child at his earliest opportunity, he reports that he became sexually aroused and began to have sexual fantasies of the child within a month of knowing this child, that he had deviant sexual fantasies while engaging in sexual contact with the child's mother, and that he deceived the mother into having unsupervised contact with this child with the expressed intent to sexually abuse this child.

> In addition to the sexual abuse of this child, he presents with a ten[-]year history of seeking out and masturbating to ejaculation to images of sexual abuse of children found in child pornography. He reports that he has looked at [50] or more of these images across the years. He reports that his use of child pornography is about one[-]third of his total pornographic use.
>
> He reported that he noticed his sexual arousal to children when he himself was 14-15 years old. He reports he seldom, if ever, had the opportunity to sexually abuse children in the past.
>
> It is clear that [defendant] is [a] [s]ex [o]ffender. It is also appropriate to use the phrase 'predatory sex offender'. His deviant sexual arousal to children, while not exclusive, is deeply entrenched. [Defendant] has gone to great lengths to strengthen and express his deviant sexual arousal fantasies to children through long[-]term history of child pornography."

¶ 10 Defendant further reported to Dr. Levine he began to look for opportunities to have this child alone. He volunteered to babysit while the mother went off to work. He reportedly volunteered to babysit with the intent to sexually abuse or to test himself to see if he could resist sexually abusing this child. He denied any history of masturbating to fantasies of this victim; however, leading up to the sexual abuse of this child, he did masturbate to ejaculation while looking at child pornography. Prior to sexually abusing this child, he had deviate sexual fantasies of her while engaging in sex with the child's mother.

¶ 11 Defendant further reported to Dr. Levine:

"[H]e was alone with this child for approximately nine to ten hours before the mother returned. He reports that within three to four hours he began to sexually abuse this child. He reports that around that time 'my logical thought processes went out the window'. He reports that he began sexual abuse of this child by first putting his hand on the child's bare leg. He reports that he moved his hand and began to fondle the child's genitals over her clothes. He later engaged the child in what he calls 'mommy and daddy games'. He reports that he maneuvered the child onto the child's mother's bed. There he reports that he again began to fondle this child's genitals over her clothes. He reports that he kissed the child on the mouth, and then stripped her clothes off below the waist. He reports that he 'sniffed and kissed' her genitals. He reports that he then began to fondle the child's bare genitals trying to touch where he thought her clitoris might be. He says that he quickly became erect at this time and stripped himself naked below the waist. He reports that he propped this child up on the pillows and spread her legs. He reports that he rubbed his erect penis on her vagina. He then fondled this child's genitals with penetration while masturbating himself. Before he ejaculated on this child's belly, he instructed this child to spread her vaginal lips

and also had this child touch his penis with her bare hands.

After he ejaculated on this child's belly, he reports that his 'logical thoughts returned'. He cleaned the child up and began to instruct her not to tell anyone because 'we could both get into trouble'."

¶ 12 Per Dr. Levine's report, some days later, X.S.'s mother noticed X.S. was "displaying sexual behavior; 'shaking her booty' and masturbating with her mother's hairbrush." Defendant continued to visit the home "while the child was beginning to decompensate." Defendant reportedly was concerned " 'any minute I'm going to jail.' " During this time, defendant continued to sleep over at the victim's house and have sex with her mother. During this time, defendant also stopped looking at child pornography and scrubbed his laptop computer clean, but he left his desktop computer intact. Eventually, defendant was confronted by X.S.'s mother and he confessed to her. Soon thereafter, he was arrested.

¶ 13 Dr. Levine's report reflected defendant's admission he began to look at and masturbate to child pornography as a 19-year-old man. (Defendant was 28 years old at the time of sentencing.) Half of the child-pornography images were of pubescent and postpubescent children and half were of clearly prepubescent children. He reportedly looked at and masturbated to ejaculation to images of these children in various sexually explicit poses, including being sexually abused by adults, being sexually exploited with other children, masturbating images, images of bondage, and one image of a child being sexually abused by a large dog. Defendant reportedly recognized these children were uncomfortable, frightened, and often in pain, but he overcame those distracting images to successfully masturbate.

¶ 14 Dr. Levine administered several assessment instruments to defendant. The Static 99 Actuarial Risk Assessment Instrument revealed two individual factors, placing defendant in the "moderate/low risk to reoffend," meaning a 9 to 16% likelihood of being rearrested for sexual crimes in 5 to 15 years. The Multiphasic Sex Inventory results suggested defendant is relatively truthful regarding his sexual obsessions but dishonest about his interest in sexual deviance. Dr. Levine found, "[Defendant] makes considerable efforts to justify his sexual deviance and sexual[ly] deviant behavior and show[s] cognitive distortions and immaturity." He noted defendant is "highly motivated for treatment."

¶ 15 At the August 10, 2011, sentencing hearing, defendant offered into evidence several letters written in his support. The State called Detective Sam Gaines with the Mattoon police department. Gaines testified he interviewed X.S.'s mother, who advised him in January 2011 she had witnessed her daughter sitting on the couch with her pants down, her vagina exposed, and her daughter was placing her fingers inside her vagina. She asked her daughter why she was doing this and X.S. told her defendant showed her how to do this. X.S. also told her mother defendant had touched her vagina with his fingers. X.S.'s mother told Gaines she confronted defendant and he eventually admitted abusing X.S.

¶ 16 Gaines also interviewed X.S. Gaines found X.S. expressed herself well for a three-year-old. Using drawings of boys and girls without clothing, Gaines established X.S. called her private area "pee-pee," her vaginal area "pee-pee," and the male's penis "pee-pee." They also went over good touches and bad touches. X.S. told Gaines one night while she was alone with defendant they were playing mommy and daddy (later explained to Gaines by defendant). She told Gaines defendant touched her vagina with his fingers as well as with his

penis, he inserted his fingers and penis in her vagina, and he "peed" on her. X.S. indicated this occurred in her mother's bedroom.

¶ 17 Gaines interviewed defendant the next day. Defendant told Gaines while in the living room of the house, he and X.S. started off playing mommy and daddy, which he described as pretending they were husband and wife, pretending they were driving to the grocery store and they were grocery shopping. X.S. became bored and began playing video games. Defendant sat down next to X.S. and placed his hand on her vaginal area over her clothing. X.S. did not say anything so he continued until she became bored and started playing video games again. They moved to the bedroom and started playing mommy and daddy again, where they pretended to go to sleep for the night. They kissed good night and X.S. shut off the light; they repeated this scenario again. Eventually X.S. became bored and began to play video games in bed. Defendant again placed his hand on her vagina. X.S. did not say anything, so defendant took off her pants, exposing her vagina. Defendant continued to touch her vagina, placing his finger in the fold of her vagina. While doing so, defendant exposed his penis and began masturbating. At one point, he allowed X.S. to touch his penis. Defendant stated he did place his penis in the fold of X.S.'s vagina and eventually he ejaculated on X.S.'s leg, stomach, and on the bed. X.S. got mad at him, thinking he had peed on her. He explained it was not pee, it was semen, and he cleaned it up with a tissue.

¶ 18 Gaines testified defendant said he was addicted to pornography, some of which was child pornography. He actively searched out child-pornography sites. He claimed he only looked. He denied ever saving any of it on his computer. Defendant gave Gaines written consent to search his apartment for any computers. The police recovered a desktop computer, a

laptop computer, a removable hard drive, and several discs.

¶ 19 Gaines testified defendant was cooperative and rather straightforward. Defendant accepted responsibility for his actions, not blaming intoxication or the victim.

¶ 20 The State also called Detective Jeremy Clark of the Mattoon police department. Clark examined the computer equipment collected from defendant's apartment. On the hard drive of the desktop computer, Clark located approximately 4,789 images and 5 videos of either child pornography or child erotica. The majority of the 4,789 images were found in unallocated space, which is basically the deleted space on the hard drive that is inactive.

¶ 21 The videos were on the computer's hard drive in active allocated space. Four of the five were segments of the same video. The fifth video was a stand-alone. Each video depicted sexual conduct and sexual acts performed on minors, either stand-alone or with adults. One video was labeled "PTHC, Jenny, nine-year-old, M-Peg." It was approximately two minutes long. It featured a six- to nine-year-old prepubescent female bound with ropes and blindfolded. A dog is performing oral sex on the child and then later a male subject forces oral sex on the girl while the dog is performing oral sex on her. PTHC stands for pre-teen, hard-core.

¶ 22 On the laptop computer, Clark found approximately 162 images, some in active space and some in inactive space. These images depicted child erotica and child pornography similar to those found on the desktop computer. In Clark's estimation, over a thousand different children were depicted in the various images and videos on defendant's computers. Clark testified the images on both computers appeared to have been collected over a period of time, dating back to 2009. Nothing suggested defendant was engaged in distributing child pornography. Rather, defendant appeared to be an avid viewer.

¶ 23 Clark testified he had participated in the interview of defendant. He described defendant as cooperative.

¶ 24 Tina Wiggington, defendant's mother, testified she had visited her son every week since his arrest. In her opinion from her discussions with defendant, he was remorseful and would benefit from treatment. Defendant was a good son who had contributed financially to the family from the time he was in high school.

¶ 25 Defendant addressed the court, stating:

> "I know that what I did was wrong. I regretted it ever since. I take full responsibility for my actions, and I intend to fully comply with whatever is required of me by this [c]ourt, including treatment.
>
> This is my first offense of any nature, and I believe that by benefiting from treatment, it will be my last.
>
> Basically, I just want a chance to piece my life back together and do the right thing, and I thank you for giving me that chance."

¶ 26 The State recommended a sentence of 45 years in prison. Defendant argued for a sentence of 8 to 10 years.

¶ 27 The trial court noted it had reviewed the PSI and evaluation report, the evidence presented by both witnesses and the exhibits admitted at sentencing (pornographic images and video), the financial-impact statement filed by the Department of Corrections (DOC), the various letters submitted in support of defendant, defendant's statement in allocution, and the arguments

of counsel and the State.

¶ 28 In considering the statutory factors in mitigation, the trial court found only one factor may have been relevant, *i.e.*, defendant had no prior criminal history. However, the court noted the statute specifies no history of criminal "activity" and found this mitigating factor was not applicable because defendant had not lived a completely law-abiding life. He had been viewing child pornography, which was a criminal activity.

¶ 29 In considering the statutory factors in aggravation, the trial court found the following applied: (1) defendant's conduct had caused or threatened serious harm, the extent of which remained to be seen, but which had already manifested itself by sexualized conduct observed by the victim's mother; (2) defendant had engaged in criminal activity by viewing child pornography; (3) the need to deter others from committing the same crime, which the court recognized was tempered by the fact defendant did, after being confronted by the victim's mother, admit his conduct, pleaded guilty, and spared the victim and her family the ordeal of a trial; (4) as the victim's babysitter, defendant held a position of supervision over a victim under the age of 18 years when he committed the offense; and (5) defendant, although not convicted, had committed the offense of child pornography by possessing more than 100 images of child pornography, some of which depicted children engaging in acts of sexual penetration and/or being bound. The court recognized, while the victim and defendant were not depicted in any of the images he possessed and no evidence pointed to defendant distributing child pornography, he was a viewer and the victimization of children by the pornography industry would be greatly reduced if there were no viewers of it. The court further observed this appeared to be defendant's first opportunity since realizing he had deviant sexual fantasies to be alone with a young

innocent minor, at which time he victimized her within a couple of hours. The court also noted defendant's conduct was not the product of a spur-of-the-moment impulse, since Dr. Levine's report indicated defendant had had fantasies about X.S. specifically, plotted the offense, and maneuvered his way into babysitting for her so he could be alone with her.

¶ 30 The trial court sentenced defendant to 21 years in DOC, followed by MSR of 9 years. The court recommended sex-offender-specific treatment.

¶ 31 On September 8, 2011, defense counsel filed a motion to reconsider sentence, arguing the trial court did not give adequate consideration to the cost of incarceration, defendant's lack of criminal history, his potential to benefit from counseling, and his potential for rehabilitation. Counsel further argued the sentence imposed was so excessive it would deter others from assuming responsibility for their actions. At a hearing on the motion, defense counsel advised the court defendant had been making progress in sex-offender treatment and had recently become a group facilitator and was assisting new members with their transition into the program. Counsel again stressed defendant's lack of criminal record, noted defendant had enrolled in vocational courses, and was working to obtain an associate degree. The court denied the motion.

¶ 32 After this court remanded for counsel to file a Rule 604(d) certificate compliant with the requirements of the rule (*People v. Phillips*, 2013 IL App (4th) 120909-U (unpublished order of January 7, 2013) (citing Ill. S. Ct. R. 604(d) (eff. July 1, 2006))), defense counsel renewed his previous arguments at the subsequent reconsideration hearing. The trial court denied the motion. This appeal followed.

¶ 33 II. ANALYSIS

¶ 34 A. The Trial Court Did Not Err at Sentencing

¶ 35 Defendant first argues the trial court erred at sentencing when it (1) improperly considered the psychological harm to X.S., which defendant maintains is implicit in the offense of predatory criminal sexual assault of a child; and (2) repeatedly considered defendant's possession of child pornography. Defendant acknowledges he has forfeited these arguments due to his failure to raise them in his motion to reconsider sentence. However, he asks this court to address the issues as matters of plain error or ineffective assistance of counsel.

> "The plain-error doctrine is a narrow and limited exception. [Citation.] To obtain relief under this rule, a defendant must first show that a clear or obvious error occurred. [Citation.] In the sentencing context, a defendant must then show either that (1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing. [Citation.] Under both prongs of the plain-error doctrine, the defendant has the burden of persuasion. [Citations.] If the defendant fails to meet his burden, the procedural default will be honored." *People v. Hillier*, 237 Ill. 2d 539, 545, 931 N.E.2d 1184, 1187-88 (2010).

¶ 36 In determining whether plain error occurred, we determine first whether the trial court committed any error. *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 411 (2007).

¶ 37 A defendant's claim of ineffective assistance of counsel is analyzed under the

two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on such a claim, "a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant." *People v. Petrenko*, 237 Ill. 2d 490, 496, 931 N.E.2d 1198, 1203 (2010). To establish deficient performance, the defendant must show his attorney's performance fell below an objective standard of reasonableness. *People v. Evans*, 209 Ill. 2d 194, 219-20, 808 N.E.2d 939, 953 (2004) (citing *Strickland*, 466 U.S. at 688). Prejudice is established when a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* (citing *Strickland*, 466 U.S. at 694). A defendant must satisfy both prongs of the *Strickland* standard, and the failure to satisfy either prong precludes a finding of ineffective assistance of counsel. *People v. Clendenin*, 238 Ill. 2d 302, 317-18, 939 N.E.2d 310, 319 (2010).

¶ 38 1. *Psychological Harm to the Victim*

¶ 39 We begin by reviewing the issue under the plain-error doctrine. Our supreme court has found, in a general sense, "a factor implicit in the offense for which a defendant has been convicted cannot be used as an aggravating factor in sentencing for that offense, absent a clear legislative intent to allow such use of the factor." *People v. Milka*, 211 Ill. 2d 150, 184, 810 N.E.2d 33, 52 (2004).

> "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 otherwise have been imposed.' [Citation.] Such dual use of a single factor is often referred to as a 'double enhancement.' [Citation.] The prohibition against double

> enhancements is based on the assumption that, in designating the appropriate range of punishment for a criminal offense, the legislature necessarily considered the factors inherent in the offense." *People v. Phelps*, 211 Ill. 2d 1, 11-12, 809 N.E.2d 1214, 1220 (2004).

¶ 40 In the case *sub judice*, the State charged defendant with one count of predatory criminal sexual assault of a child under section 12-14.1(a)(1) of the Criminal Code of 1961 (Code) (720 ILCS 5/14.1(a)(1) (West 2010)), which sets forth the elements of the offense as follows: "The accused commits predatory criminal sexual assault of a child if: *** the accused was 17 years of age or over and commits an act of sexual penetration with a victim who was under 13 years of age when the act was committed." Harm is not an element of the offense. See *People v. Kerwin*, 241 Ill. App. 3d 632, 636, 610 N.E.2d 181, 185 (1993) (harm was not an element of the offense where the statute under which the defendant was convicted (aggravated criminal sexual assault) required the victim was under 13 years of age, the defendant was more than 17 years old, and an act of sexual penetration occurred).

¶ 41 Relying on *People v. Calva*, 256 Ill. App. 3d 865, 628 N.E.2d 856 (1993), defendant argues psychological harm to a child is implicit in sex offenses and cannot be considered as a factor in aggravation. In *Calva*, sexual acts were committed against A.G., a six-year-old girl. *Id.* at 867, 628 N.E.2d at 858. At sentencing, the trial court remarked defendant had "psychologically injured and scarred A.G. for life." *Id.* at 869, 628 N.E.2d at 860. The reviewing court observed, "As for psychological harm, cases have held that it can be inferred that a child who is the victim of sexual assault has sustained psychological damage." *Id.* at 875, 628

N.E.2d at 864. Because no evidence was offered to show any psychological harm to A.G., the court stated, "it would seem that the degree of any psychological harm used in aggravation would be minimal, as it would be limited to the degree of harm inherent in any aggravated sexual assault of a child." *Id.* The court stated, "it would seem that psychological harm *** cannot be considered in aggravation" without evidence the victim suffered beyond what is implicit in "any" sexual assault against a child. *Id.* at 877, 628 N.E.2d at 865.

¶ 42 We reject the reasoning in *Calva*. We find it is appropriate under the aggravating factors contained in section 5-5-3.2(a)(1) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-5-3.2(a)(1) (West 2010)) for a trial court to consider the defendant's conduct caused or threatened serious harm. Indeed, *Calva* seems to be an outlier. The vast majority of cases addressing this issue have found the psychological harm inflicted on a young sexual-assault victim is a proper consideration in sentencing. See, *e.g.*, *People v. Ulmer*, 158 Ill. App. 3d 148, 149-51, 510 N.E.2d 1296, 1297-98 (1987) (trial court finding " 'this offense *** could very well leave a permanent scar on this young lady' " was a proper consideration in aggravation); *People v. Nevitt*, 228 Ill. App. 3d 888, 892, 593 N.E.2d 797, 799 (1992) (the psychological harm to the three-year-old victim was a proper sentencing consideration); *Kerwin*, 241 Ill. App. 3d at 636, 610 N.E.2d at 185 (not improper for the trial court to consider the emotional harm to the nine-year-old victim as an aggravating factor); *People v. Burton*, 102 Ill. App. 3d 148, 150, 153-54, 429 N.E.2d 543, 545, 547 (1981) (the trial court finding " 'obviously [defendant's conduct] injected severe psychological trauma on the [eight- and nine-year-old] victims, a serious psychological trauma which may well be carried with them throughout their lives' " was properly considered in aggravation at sentencing); and *People v. Lloyd*, 92 Ill. App.

3d 990, 991, 995-96, 416 N.E.2d 371, 372, 376 (1981) (the trial court's consideration of the emotional injury to the three-year-old victim was appropriate in aggravation). (See also *People v. Huddleston*, 212 Ill. 2d 107, 816 N.E.2d 322 (2004), where our supreme court, at great length, discusses the psychological trauma suffered by young victims of criminal sexual assault.)

¶ 43 Contrary to defendant's assertion, there need not be direct evidence in the record establishing psychological harm; the trial court may infer harm. Regardless, here the court had evidence of psychological harm to X.S. because X.S.'s mother reported her sexualized behavior. Therefore, it was not error for the court to consider such harm to X.S.

¶ 44 If there is no error, there can be no plain error. As the trial court committed no error, defendant's forfeiture must be honored. Moreover, we find the result of the proceeding would not have been different had defense counsel raised the issue in the motion to reconsider, and defendant's claim of ineffective assistance of counsel also fails. See *Evans*, 209 Ill. 2d at 219-20, 808 N.E.2d at 953 (citing *Strickland*, 466 U.S. at 694).

¶ 45 2. *Possession of Child Pornography*

¶ 46 We begin again by reviewing this issue under the plain-error doctrine. Defendant argues the trial court repeatedly considered his possession of child pornography and thereby placed too much emphasis on an otherwise proper aggravating factor. Defendant asserts this overemphasis was an abuse of discretion and likely increased the sentence imposed.

¶ 47 The factors in aggravation relevant to the consideration of pornography are as follows: "[T]he defendant has a history of prior delinquency or criminal activity" (730 ILCS 5/5-5-3.2(a)(3) (West 2010)); "the defendant committed any offense under [s]ection 11-20.1 of the [Code (child pornography)] and possessed 100 or more images" (730 ILCS 5/5-5-3.2(a)(24)

(West 2010)); and "the defendant committed the offense of child pornography or aggravated child pornography *** where a child [is] engaged in, solicited for, depicted in, or posed in any act of sexual penetration or bound, fettered, or subject to sadistic, masochistic, or sadomasochistic abuse in a sexual context" (730 ILCS 5/5-5-3.2(a)(26) (West 2010)). Defendant complains the trial court abused its discretion in considering the same pornography as three separate factors in aggravation. His argument is with the legislature, not this court. His child-pornography conduct was evidence of criminal activity, exceeded 100 images (a total of 4,951 images were found on his two computers), and some of the pornography depicted sexual penetration and bondage. Each factor in aggravation applied and the court was correct to consider each aggravating factor.

¶ 48 In this case, defendant was convicted of a nonprobationable offense with a sentencing range of 6 to 60 years in prison. 720 ILCS 5/12-14.1(a)(1), (b)(1) (West 2010). Section 5-5-3.1 of the Unified Code (730 ILCS 5/5-5-3.1) (West 2010)) states 13 factors are to be accorded weight in withholding or minimizing a sentence of imprisonment, *i.e.*, as mitigation. In reviewing these statutory factors, the trial court found:

> "[T]he only one that I think could be present would be the factor [seven] regarding the lack of history of prior delinquency or criminal activity, and I'll note that there is no record of juvenile delinquency adjudications or any criminal convictions, but [the assistant State's Attorney] is correct that the statute doesn't talk about offenses or convictions. It says criminal activity, and I cannot find that the defendant has led a law-abiding life for a

> substantial period of time before the commission of the present crime because he's been viewing the pornography, and that is criminal activity, so I really do not find any factors in mitigation to be present."

¶ 49 Section 5-5-3.2 of the Unified Code (730 ILCS 5/5-5-3.2) (West 2010)) provides 27 factors in aggravation to be "accorded weight in favor of imposing a term of imprisonment or may be considered by the court as reasons to impose a more severe sentence." Of the factors in aggravation, the trial court found (1) defendant's conduct caused or threatened serious harm (730 ILCS 5/5-5-3.2(a)(1) (West 2010)); (2) defendant had a history of criminal activity (730 ILCS 5/5-5-3.2(a)(3) (West 2010)); (3) the sentence was necessary to deter others from committing the same crime (730 ILCS 5/5-5-3.2(a)(7) (West 2010)); (4) defendant held a position of trust or supervision, as a babysitter, when he committed the offense of predatory criminal sexual assault of a child (730 ILCS 5/5-5-3.2(a)(14) (West 2010)); (5) defendant committed the offense of child pornography and possessed more than 100 images (730 ILCS 5/5-5-3.2(a)(24) (West 2010)); and (6) the child-pornography images included children being sexually penetrated and/or bound (730 ILCS 5/5-5-3.2(a)(26) (West 2010)). Regarding subsections (a)(3), (24), and (26), the court stated:

> "Another factor the [c]ourt is to consider in aggravation would be the one regarding the defendant's prior history of criminal activity or delinquency. I've already explained that. There are no criminal convictions or delinquency adjudications, but because of the child pornography, he has engaged in criminal

activity, so that factor exists as well.

* * *

The State also recommended that I consider factors 24 and 26 regarding child pornography. Because of the evidence of child pornography, those factors do exist that he committed the child pornography offense and possessed 100 or more images and also some of those offenses involved—or some of those depictions involved children engaging in acts of sexual penetration or being bound.

I will consider those factors, but recognize the fact that this defendant is not convicted of child pornography. There is evidence of the child pornography, and I will not ignore it. Although the defendant and the victim are not depicted in the images that have been testified about or submitted to the [c]ourt, they are not depicted in those images and there's no evidence that this defendant distributed child pornography, it's quite clear that he was a viewer, and the victimization of children by the porn industry would be reduced if we didn't have viewers such as the defendant. If you could eliminate the viewers, you could eliminate that considerably, so it is something that this [c]ourt considers in determining the sentence."

¶ 50 In correlating the factors in mitigation and aggravation, the aggravating factor of

defendant's history of criminal activity for possession of child pornography naturally excluded the mitigating factor of no history of criminal activity. Therefore, the trial court did not err when it found no statutory factors in mitigation applied to defendant.

¶ 51 Further, defendant's suggestion the trial court should have limited its consideration of his possession of child pornography to only one factor is unpersuasive.

> "The Illinois Constitution requires that penalties be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. [Citations.] This constitutional mandate calls for the balancing of the retributive and rehabilitative purposes of punishment. [Citation.] This balancing process requires careful consideration of *all* factors in aggravation and mitigation, including, *inter alia*, the defendant's age, demeanor, habits, mentality, credibility, criminal history, general moral character, social environment, and education, as well as the nature and circumstances of the crime and of defendant's conduct in the commission of it. [Citation.]" (Emphasis added.) *People v. Quintana*, 332 Ill. App. 3d 96, 109, 772 N.E.2d 833, 845 (2002).

¶ 52 Trial courts must consider *all* of the enumerated factors in mitigation and aggravation when fashioning a sentence. Two factors in aggravation applied to the number and type of child pornography defendant possessed, *i.e.*, (1) his computer contained thousands of images, well over the 100 set forth in subsection 5-5-3.2(a)(24); and (2) those images depicted

children being sexually penetrated and/or bound as set forth in subsection 5-5-3.2(a)(26). Consideration of these factors was not an overemphasis or abuse of discretion; it reflected the reality of defendant's habits, mentality, general moral character, the nature and circumstances of the crime, and the conduct leading to the commission of this offense.

¶ 53 It was not error for the trial court to find defendant's possession of child pornography applied to more than one factor in aggravation. As stated above, if there is no error, there can be no plain error. Therefore, defendant has forfeited this issue on appeal. Further, the result of the proceeding would not have been different had defense counsel raised the issue in the motion to reconsider, and defendant's claim of ineffective assistance of counsel also fails.

¶ 54 B. The Trial Court Did Not Abuse Its Discretion at Sentencing

¶ 55 Next, defendant argues the trial court abused its discretion when it sentenced him to 21 years in DOC. We disagree.

¶ 56 "A sentence imposed by the trial court is presumed to be proper" (*People v. Butler*, 2013 IL App (1st) 120923, ¶ 31, 994 N.E.2d 89), and where a sentence falls within the statutory guidelines, it will not be disturbed on review absent an abuse of discretion (*People v. Halerewicz*, 2013 IL App (4th) 120388, ¶ 40, 2 N.E.3d 333). We must afford great deference to the trial court's judgment regarding a sentence because the court, having observed the defendant and the proceedings, is in a far better position to consider such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, and habits than a reviewing court, which must rely on a cold record. *Id.* ¶ 41, 2 N.E.3d 333. A sentence within statutory limits will not be deemed excessive unless it is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense. *Id.* "The spirit

and purpose of the law are promoted when a sentence reflects the seriousness of the offense and gives adequate consideration to the rehabilitative potential of the defendant." (Internal quotation marks omitted.) *Butler*, 2013 IL App (1st) 120923, ¶ 31, 994 N.E.2d 89.

¶ 57 Defendant pleaded guilty to one count of predatory criminal sexual assault of a child, a Class X felony with a sentencing range between 6 and 60 years' imprisonment. 720 ILCS 5/12-14.1(a)(1), (b) (West 2010). The trial court sentenced defendant to 21 years in prison. Thus, defendant's prison sentence was within the statutory range and will not be disturbed absent an abuse of discretion. *People v. Perruquet*, 68 Ill. 2d 149, 153, 368 N.E.2d 882, 883 (1977).

¶ 58 Defendant argues again the trial court erred when it considered the psychological harm he caused X.S. and it overemphasized his possession of child pornography. We have already found no error occurred in the court's consideration of these statutory aggravating factors.

¶ 59 Defendant further argues the trial court failed to give proper weight to evidence in mitigation, most notably the results of the sex-offender-specific evaluation in which the Static 99 showed him to be in the "moderate/low risk" to reoffend and the Multiphasic Sex Inventory showed him to be in the "normal range" of sexual desires and interests compared to other sex offenders. Defendant also argues the court failed to give adequate consideration to his (1) employment history, (2) strong family ties, (3) cooperation with the investigation, and (4) acceptance of responsibility for his conduct.

¶ 60 " 'The trial court has no obligation to recite and assign value to each factor presented at a sentencing hearing.' " *People v. Brazziel*, 406 Ill. App. 3d 412, 434, 939 N.E.2d 989, 1009 (2010) (quoting *People v. Hill*, 402 Ill. App. 3d 920, 928, 932 N.E.2d 173, 181

(2010)). Rather, "it is presumed that the trial court properly considered all mitigating factors and rehabilitative potential before it; and the burden is on the defendant to affirmatively show the contrary." *People v. Garcia*, 296 Ill. App. 3d 769, 781, 695 N.E.2d 1292, 1300 (1998). Defendant has failed to demonstrate the trial court abused its discretion.

¶ 61 In the case *sub judice*, the trial court had before it the results of the sex-offender-specific evaluation performed by Dr. Levine. While it is true the Static 99 showed defendant to be in the "moderate/low risk" to reoffend, the report reflected further findings of Dr. Levine. "It is clear that [defendant] is [a] [s]ex [o]ffender. It is also appropriate to use the phrase 'predatory sex offender'. His deviant sexual arousal to children, while not exclusive, is deeply entrenched. [Defendant] has gone to great lengths to strengthen and express his deviant sexual arousal fantasies to children through long[-]term history of child pornography." Regarding the Multiphasic Sex Inventory, Dr. Levine also noted:

> "[Defendant] makes considerable efforts to justify his sexual deviance and sexual[ly] deviant behavior and show[s] cognitive distortions and immaturity. However, he is highly motivated for treatment.
>
> [Defendant] appears to be relatively truthful regard[ing] his sexually deviant behavior. However, he is somewhat cagey regard[ing] his sexual[ly] deviant desires."

¶ 62 Clearly, the assessment report before the trial court reflecting the "moderate/low risk" to reoffend was contradicted by defendant's deeply entrenched sexual deviance, which was strengthened by a long history of viewing child pornography while masturbating to ejaculation.

Defendant knew he was sexually aroused by X.S., he had been having sexual fantasies about X.S. while having sex with her mother, and he went to great lengths to gain unsupervised contact with X.S. with the expressed intent of sexually abusing her.

¶ 63 In addition to the sex-offender evaluation, the trial court stated it reviewed the PSI, which reflected defendant's cooperation and acceptance of responsibility, strong family support, high school graduation, and good employment history. The court also noted consideration of the evidence presented through witnesses and exhibits, the financial impact statement by DOC, the various letters submitted in support of defendant, defendant's statement in allocution, and the arguments of counsel. Further, the court considered the statutory factors in aggravation and mitigation. In fashioning its sentence, the court recognized defendant had come forward and admitted his crime, but he did so only after X.S.'s mother confronted him about X.S.'s unusual sexualized behavior. The court also noted defendant's conduct was not a spur-of-the-moment impulse. Rather, defendant had fantasies about this specific child, plotted the offense, and maneuvered his way into babysitting the victim so he could be alone with her.

> "The trial judge is not required to detail precisely for the record the exact process by which she determined the penalty nor is she required to articulate her consideration of mitigating factors nor is she required to make an express finding that defendant lacked rehabilitative potential. [Citation.] The seriousness of the crime is the most important factor in determining an appropriate sentence, not the presence of mitigating factors such as the lack of a prior record, and the statute does not mandate that the absence of

aggravating factors requires the minimum sentence be imposed. [Citation.]" *Quintana*, 332 Ill. App. 3d at 109, 772 N.E.2d at 845-46.

¶ 64 The trial court delineated its considerations in fashioning the sentence. We see no indication the court relied on an improper aggravating factor, placed undue emphasis on or afforded more weight to defendant's possession of child pornography, or failed to give proper weight to the mitigating factors presented. Weighing the aggravating factors against the mitigating factors, the court was well within its discretion to sentence defendant to 21 years in prison for his predatory criminal sexual assault of X.S. Defendant's sentence, which was in the lower third of the statutory range, was nowhere close to being "greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *People v. Stacey*, 193 Ill. 2d 203, 210, 737 N.E.2d 626, 629 (2000).

¶ 65 C. The Mittimus

¶ 66 Section 5-8-1(d)(4) of the Unified Code provides the term of MSR for certain sex offenders, including predatory criminal sexual assault of a child, "shall range from a minimum of [three] years to a maximum of the natural life of the defendant." 730 ILCS 5/5-8-1(d)(4) (West 2010). When the trial court imposed its sentence in August 2011, it included a determinate term of nine years' MSR. In January 2012, our supreme court found, unlike other offenses, under the provisions of section 5-8-1(d)(4) of the Unified Code, the legislature intended there be an "indeterminate" MSR term in sexual assault cases. *People v. Rinehart*, 2012 IL 111719, ¶¶ 23-30, 962 N.E.2d 444. Although neither party raised this issue on appeal, pursuant to our authority under Illinois Supreme Court Rule 615(b) (eff. Jan. 1, 1967), we amend defendant's mittimus to

reflect an indeterminate MSR term of three years to natural life. See *People v. Jackson*, 2012 IL App (1st) 092833, ¶ 52, 974 N.E.2d 855.

¶ 67 III. CONCLUSION

¶ 68 For the reasons stated, we affirm defendant's conviction and sentence but modify the mittimus to reflect an indeterminate MSR term of three years to natural life. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 69 Affirmed as modified.