

No. 1-12-3252

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 11 CR 4775
)	
JOSEPH VERRE,)	Honorable
)	Jorge Luis Alonso,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Rochford and Justice Hall concurred in the judgment.

ORDER

¶ 1 *Held:* We affirm defendant's convictions for criminal sexual assault and criminal sexual abuse over his contentions that the evidence was insufficient to convict him and that his sentence was excessive.

¶ 2 Following a bench trial, defendant Joseph Verre was convicted of two counts of criminal sexual assault and two counts of criminal sexual abuse. He was sentenced to consecutive five-year terms of imprisonment for each count of criminal sexual assault, and one-year terms of imprisonment for each count of criminal sexual abuse, which were to be served concurrent to

each other and concurrent to the criminal sexual assault counts. On appeal, defendant contests the sufficiency of the evidence, and maintains that his sentence was excessive. We affirm.

¶ 3 Defendant, then 69 years old, was charged in an 18 count indictment stemming from an incident on February 10, 2011, where he allegedly committed various sex crimes against Denise Hacke, a mentally disabled 33-year-old woman. In particular, defendant was charged with two counts of criminal sexual assault in that he inserted his penis (Count 7) and fingers (Count 8) in Hacke's vagina knowing she was unable to understand the nature of the acts. Defendant was also charged with two counts of criminal sexual abuse in that there was contact between his lips (Count 16) and hands (Count 17) and Hacke's breasts for the purpose of his sexual gratification or arousal, knowing Hacke was unable to understand the nature of the acts.

¶ 4 At trial, Denise Hacke testified that she grew up in Park Ridge and graduated from Maine South High School where she was in special education classes "[p]art of the time." After graduation, she worked at supermarkets, and had been working at a Jewel in Niles for 10 years. At different times during Hacke's employment, her parents, who moved to Antioch, drove her to work, and she also rode the public bus. Although Hacke had a check book and wrote checks, her father kept track of the balance. Hacke lived at Avenues to Independence in Park Ridge where she had two roommates. According to Hacke, she cooked for her roommates, but did not shop when she cooked because it was too difficult for her. Hacke walked to the library where she borrowed music CDs. She sent e-mails to her friends, surfed the internet, completed word puzzles, and read the newspaper. Hacke also had a cell phone that she used to call family.

¶ 5 Hacke testified that on February 10, 2011, the day of the incidents in question, defendant picked up Hacke from work. Hacke knew defendant her entire life and participated in activities such as shopping and sports with him and his son, Frank, who, according to the testimony of

defendant's wife, Leah Verre, was mentally disabled. Defendant told her that he needed to fix the heater at 7151 West Belmont Avenue, waved Hacke inside, and locked the door. Despite Hacke's statements to stop, defendant took her to the furnace room, and pulled down her pants and underwear. Defendant touched her vagina with his hand, "rubbing it up and down," and then lifted up her shirt and bra. He fondled and licked her breasts. Defendant placed his penis in her vagina and "was rubbing it up and down." Defendant told her not to tell anybody, and then took Hacke to K-Mart to buy toys. She went into the store alone and spent \$92 on toys using her own check. On February 11, 2011, Hacke told her mother what happened because she was "shook up" and did not know what to do. Hacke went to the hospital where she was examined by a doctor and discussed the incident. She subsequently spoke to a detective about the incident, and that detective ordered someone to come to the scene to swab her breasts. Hacke also testified that the incident on February 10 was not the first, and that defendant similarly assaulted her "five times or more in the furnace room and five times or more in the bathroom" of 7151 West Belmont Avenue.

¶ 6 Detective Ronald Schmuck testified that on February 11, 2011, he spoke to Hacke regarding the incident in question and became aware that there was a possibility of biological evidence. He ordered a female evidence technician to administer swabs of Hacke's breast, which she completed. On February 15, 2011, Schmuck executed a search warrant at 7151 West Belmont Avenue and found a vacant unit with very little furnishings inside, a small furnace room, and a small bathroom. A stain on the bathroom floor was recovered and inventoried. Katrina Gomez, a forensic scientist, testified that both the floor sample and the breast swab testified positive for defendant's DNA.

¶ 7 Dr. Michael Ostrowski, who was 78 years old, testified that he was a clinical psychologist and was employed at Avenues to Independence, the purpose of which was to transition individuals from a sheltered home environment to a more independent living arrangement. Ostrowski examined Hacke in December of 2003, and found that her full scale IQ was 65, placing her in the lower one to two percentile, *i.e.*, mild mental retardation. Hacke had a mental age of about 8 years and 2 months, and a social age of about 11 years and 9 months. Ostrowski expressed doubts about Hacke's ability to comprehend the newspaper, doubted that she could read anything but the most basic library books, but thought she could understand e-mail. In Ostrowski's professional opinion, Hacke did not have the ability to give knowing consent to sexual contact, and was susceptible to being manipulated by adults. Ostrowski further testified that his 2003 examination remained valid on the day of trial because Hacke's condition cannot change positively.

¶ 8 On cross-examination, Dr. Ostrowski testified that he read an interview of Hacke conducted by Dr. Black in 2008. Black characterized Hacke as "borderline intellectual functioning," which, according to Ostrowski, is a category "almost interchangeable" with the term "mild mental retardation." Ostrowski also testified that "technically" borderline intellectual functioning is a category which shows a higher ability than mild mental retardation. Ostrowski further noted that the scores generated by Black in evaluating Hacke agreed with his own evaluation of her in 2003.

¶ 9 Following closing arguments, the trial court found defendant guilty of two counts of criminal sexual assault of someone unable to understand the nature of the acts, and two counts of criminal sexual abuse of someone unable to understand the nature of the acts. In doing so, the court relied on the testimony of Hacke, who testified clearly and credibly, and on the expert

testimony of Ostrowski. The court further relied on both the physical and circumstantial evidence in finding defendant guilty of the four counts, and specifically indicated that "Hacke was unable to understand the nature of the acts that were performed upon her."

¶ 10 At sentencing, the State emphasized in aggravation that defendant was in a position of trust because he knew Hacke her entire life and often chaperoned her and his similarly disabled son. The State also noted the frequency of the assaults and their planned nature. A victim impact statement, which was read by Hacke's brother, indicated that Hacke was no longer able to take public transportation, could not play in her old basketball league for fear of seeing defendant's son, and had regressed to playing with Barbie dolls like when she was a child. In mitigation, defense counsel emphasized defendant's long and productive life that was free of trouble with the police, and noted that his incarceration has put a great deal of stress on defendant's wife, who must now care for her mentally disabled son alone. Defense counsel noted that, given defendant's age and physical ailments, even the minimum sentence is the equivalent of a life sentence. In allocution, defendant apologized to the court, noted that he had never been in trouble, and requested probation. After considering the arguments of counsel in aggravation and mitigation, the court sentenced defendant to consecutive five-year terms on each criminal sexual assault count, and one-year terms for each criminal sexual abuse count, which were to be served concurrently to each other, as well as concurrent to the criminal sexual assault counts.

¶ 11 On appeal, defendant contends that he was not proven guilty beyond a reasonable doubt of the offenses of criminal sexual assault and criminal sexual abuse.

¶ 12 When presented with a challenge to the sufficiency of the evidence, this court must determine 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. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011). The credibility of the witnesses, the weight to be given their testimony, and the resolution of any conflicts in the evidence are within the province of the trier of fact, and a reviewing court will not substitute its judgment for that of the trier of fact on these matters. *People v. Brooks*, 187 Ill. 2d 91, 132 (1999). Reversal is justified only where the evidence is "so unsatisfactory, improbable or implausible" that it raises a reasonable doubt as to the defendant's guilt. *People v. Slim*, 127 Ill. 2d 302, 307 (1989).

¶ 13 Defendant was convicted of two counts of criminal sexual assault and two counts of criminal sexual abuse. Section 12-13(a)(2) of the Criminal Code of 1961 (Code) provides that the accused commits criminal sexual assault if he commits an act of sexual penetration and knows the victim is either: (1) unable to understand the nature of the act or (2) unable to give knowing consent. 720 ILCS 5/12-13(a)(2) (West 2010), now codified as 720 ILCS 5/11-1.20(a)(2) (West 2012). Section 12-15(a)(2) of the Code provides that the accused commits criminal sexual abuse if he engages in sexual conduct and knows the victim is either: (1) unable to understand the nature of the act or (2) unable to give knowing consent. 720 ILCS 5/12-15(a)(2) (West 2010), now codified as 720 ILCS 5/11-1.50(a)(2) (West 2012). The four relevant counts in this case charged that defendant knew Hacke was "unable to understand the nature of the act[s]."

¶ 14 Defendant does not contest that the sexual acts at issue occurred. Defendant does contend, however, that insufficient evidence was presented that Hacke was unable to give *knowing consent*. He specifically maintains that Hacke was capable of consent where she was an adult with significant life skills, and where the only expert evidence as to her alleged incapacity came from a retired, 78-year-old psychologist who had not treated or spoken to Hacke in over eight years.

¶ 15 Defendant is mistaken that he was convicted on the basis of Hacke's inability to give knowing consent to the sexual acts in question. As stated above, the charging instrument specifically states that Hacke was "unable to understand the nature of the act[s]." Furthermore, in announcing its findings, the court specifically stated twice that the State proved that Hacke "was unable to understand the nature of the acts that were performed on her." This court has made clear that "there are two different ways to commit the crime [of criminal sexual assault]; the first *** is to knowingly have sexual relations with someone who is unable to understand the nature of the act, while the second method is to knowingly have sexual relations with someone who, for any reason, is unable to give knowing consent." *People v. Beasley*, 314 Ill. App. 3d 840, 845 (2000), quoting *People v. Whitten*, 269 Ill. App. 3d 1037, 1042 (1995). Because defendant was convicted of criminal sexual assault and criminal sexual abuse based on Hacke's inability to understand the nature of the acts, we evaluate defendant's sufficiency of the evidence claim under that theory. In doing so, we note that "[i]n regard to the theory of liability of 'unable to understand the nature of the acts,' this court has said that merely demonstrating 'the victim understood the physical nature of sexual relations is not sufficient to establish that the victim comprehended the social and personal costs involved.'" *People v. Vaughn*, 2011 IL App (1st) 092834, ¶ 38, quoting *People v. Blake*, 287 Ill. App. 3d 487, 493 (1997).

¶ 16 Viewing the evidence in the light most favorable to the State, as we must, the evidence clearly established both that Hacke did not understand the nature of the subject acts, and that defendant knew of Hacke's inability to comprehend them. Hacke, a 33-year-old former special education student who had difficulty accomplishing daily chores such as shopping, was living at Avenues to Independence in Park Ridge, the purpose of which was to transition individuals from a sheltered home environment to a more independent living arrangement. Dr. Ostrowski found

that Hacke's full scale IQ was 65, and that she had "mild mental retardation." Specifically, Ostrowski found that Hacke had a mental age of about 8 years and a social age of about 11 years. According to Ostrowski, Hacke did not have the ability to give knowing consent to sexual contact, and was susceptible to being manipulated by adults. Defendant was aware of Hacke's condition as he had known Hacke for her entire life and would include her in activities with his similarly disabled son.

¶ 17 Nevertheless, defendant contends, albeit in the context of whether Hacke had the ability to give knowing consent to the sexual conduct, that Hacke's age, education, living arrangement, and employment history showed that she had "significant life skills." In particular, defendant points out that Hacke graduated from Maine South High School and that not all of her classes were of a special education nature, she was gainfully employed at a supermarket for over 10 years, used public transportation, wrote checks, used a computer, went to the library, read the newspaper, shopped, and used a cell phone. Defendant further maintains that, other than Hacke's "below average IQ," the only evidence presented by the State to "establish her inability to consent" was Dr. Ostrowski's testimony. Defendant asserts that Ostrowski was not credible where he was 78 years old, semi-retired, his only exam of Hacke was in 2003, and Dr. Black evaluated Hacke as being borderline intellectual functioning. In arguing that Hacke's life skills showed that she had the ability to consent or understand the nature of sexual conduct, and attempting to discredit Ostrowski, defendant is essentially asking this court to retry him. We decline to do so where this court does not substitute its judgment for that of the trier of fact as to the issues of witness credibility and the weight to be given each witness's testimony. See *People v. Ross*, 229 Ill. 2d 255, 272 (2008). Here, we see no reason to upset the trial court's determination that Ostrowski and Hacke testified credibly, and that defendant knew Hacke did

not have the ability to understand the nature of the subject sexual acts.

¶ 18 In reaching this conclusion, we find *People v. Blunt*, 65 Ill. App. 2d 268 (1965), relied on by defendant, distinguishable from the case at bar. In *Blunt*, the court reversed the conviction of a defendant who had intercourse with a mentally disabled woman on the ground that "[m]ere mental derangement or mental deficiency is not enough. Its thrust must be of sufficient magnitude to throttle effective consent." *Id.* at 273. We noted in *Beasley*, 314 Ill. App. 3d at 844, however, that *Blunt* arose under the former rape statute, which the legislature repealed in 1984. In addition, because the old statute, unlike the current one, did not require proof that the accused knew the victim was unable to understand the nature of the sex acts, the former statute could not distinguish between the *Blunt* defendant, who had met the victim only hours before the incident (*Blunt*, 65 Ill. App. 2d at 269), from our defendant who knew Hacke for her entire life.

¶ 19 In the alternative, defendant contends that his sentence was excessive. In particular, defendant requests that his sentence be reduced from 10 to 8 years' imprisonment in recognition of his age, health, and lack of any criminal record.

¶ 20 As defendant correctly acknowledges, criminal sexual assault is a Class 1 felony with a sentencing range of not less than 4 and not more than 15 years' imprisonment. 720 ILCS 5/12-13(a)(2) (West 2010); 730 ILCS 5/5-4.5-30 (West 2010). Defendant is also correct that he was subject to mandatory consecutive sentences. See 730 ILCS 5/5-8-4(d)(2) (West 2010) (consecutive sentences are mandatory where the defendant was convicted of criminal sexual assault). Therefore, defendant was subject to a minimum sentence of 8 years, and a maximum sentence of 30 years.

¶ 21 A trial court has broad discretion to determine an appropriate sentence, and a reviewing court may reverse only where the trial court has abused that discretion. *People v. Patterson*, 217

Ill. 2d 407, 448 (2005). The reviewing court should not substitute its judgment for that of the trial court simply because it would have balanced the appropriate sentencing factors differently. *People v. Alexander*, 239 Ill. 2d 205, 214-15 (2010). A sentence within the statutory range does not constitute an abuse of discretion unless it varies greatly from the purpose of the law or is manifestly disproportionate to the nature of the offense. *People v. Henderson*, 354 Ill. App. 3d 8, 19 (2004). Where mitigating evidence is presented to the trial court, it is presumed, absent some indication to the contrary, other than the sentence itself, that the court considered it. *People v. Benford*, 349 Ill. App. 3d 721, 735 (2004).

¶ 22 The trial court clearly stated that it had considered appropriate factors in mitigation and aggravation. In delivering its sentence, the trial court stated that it considered the presentence investigation report, the financial impact of incarceration, the arguments of counsel, and defendant's statement in allocution. The court noted that a major aggravating factor was that defendant held a position of trust with Hacke. On the other hand, mitigating factors included defendant's age, and his complete lack of a criminal history. The court acknowledged that these mitigating factors play "very strongly in favor of [defendant]." The court noted that the minimum sentences for these offenses were harsh, and despite the terrible nature of the crimes that defendant committed, it was clear from the statement of the family that Hacke and the family would "be okay." The court then sentenced defendant to an aggregate term of 10 years' imprisonment, which was only 2 years above the minimum and 20 years below the maximum. From the statements above and the court's decision to sentence defendant to just two years above the minimum, it is clear that the court thoughtfully weighed the appropriate mitigating and aggravating factors and sentenced defendant to a term within the permissible sentencing range. We thus cannot find that the trial court abused its discretion.

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¶ 23 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 24 Affirmed.