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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Lake County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 11-CF-80
)	
BENJAMIN PABELLO,)	Honorable
)	Christopher R. Stride,
Defendant-Appellant.)	Judge, Presiding.

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

ORDER

¶ 1 *Held:* (1) The trial court did not clearly err in denying defendant's *Batson* claim: although the State used half of its peremptory challenges to strike Hispanic venire members, the State offered explanations that the court was entitled to accept as race-neutral and nonpretextual; (2) the State proved defendant guilty beyond a reasonable doubt of two counts of predatory criminal sexual assault of a child, as the victim's testimony and defendant's statement to the police were sufficient to establish that defendant committed the offense more than once; (3) the trial court did not abuse its discretion in sentencing defendant to 15 years' imprisonment on each count of predatory criminal sexual assault of a child: despite the mitigating factors, which the court presumably considered, the sentences (which were still in the lower half of the applicable range) were justified by the seriousness of the offenses.

¶ 2 Defendant, Benjamin Pabello, appeals the judgment of the circuit court of Lake County convicting him after a jury trial of two counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2010)) and sentencing him to consecutive 15-year prison terms. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was indicted on three counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2010)), each count being based on a “separate and distinct occasion” in which defendant allegedly committed an act of sexual penetration against the victim. His case proceeded to a jury trial.

¶ 5 During jury selection, the State used three of its six peremptory challenges to remove Hispanic venirepersons. Defendant, who is Hispanic, challenged the use of the peremptory challenges. See *Batson v. Kentucky*, 476 U.S. 79 (1986). The trial court found that a *prima facie* case of discrimination existed because of the State’s use of half of its peremptory challenges to remove members of a “protected class of which [defendant] is a member.”

¶ 6 The State offered the following race-neutral reasons for its exercise of the peremptory challenges against the Hispanic potential jurors. As to Juan Rios, the State pointed to his being a 25-year-old high school drop-out who had made no apparent effort to obtain his high school diploma or equivalent. It elaborated that it was concerned that Rios, who apparently did not like being told what to do by someone in authority, might not like being told by the State to find defendant guilty.

¶ 7 The State explained that it challenged Gerardo Sajuan because he had been charged with possessing liquor as a minor in 2006 and driving while under the influence of alcohol (DUI) and having liquor in his vehicle in 2010. The State’s concern with Sajuan was that his apparent

misuse of alcohol might affect his ability to “sit in judgment [of] someone who also by his own admission had an issue with alcohol around the time that the crime was committed.”

¶ 8 As for Pablo Servin, the State, relying on his having had several traffic offenses, including driving with a revoked driver’s license, speeding over 20 miles per hour, and speeding over 30 miles per hour, argued that he might “have a disrespect not only for the law, but [for] the safety and health and well-being of the community.” The State noted that Servin said that he might have difficulty expressing his opinion in a group. The State pointed to Servin’s having taken business management courses but having continued to perform manual labor, having a pierced eyebrow, and having regularly cared for numerous nieces and nephews as additional race-neutral reasons for striking him. The State described these various concerns as an “amalgam of reasons [that were] all race neutral as to Servin.”

¶ 9 The trial court found the State’s explanations credible as to all three Hispanic venirepersons. The court found them to be “in context plausible reasons for why somebody should be excused” and that they were race-neutral and nonpretextual. Therefore, the court denied defendant’s *Batson* challenge.

¶ 10 The following evidence is from the trial. In May 2003, defendant married Noemi Gomez. Noemi had a six-year-old daughter, Jessica P. Defendant babysat Jessica during the day while Noemi worked.

¶ 11 According to Jessica, who was 15 years old at trial, defendant would play a game with her that he called “squishy,” in which he would tackle or hug her and “put his body weight over [her].” She described it as an innocent game that defendant would play in front of her mother.

¶ 12 One morning in June 2003, defendant called Jessica into his bedroom where he was lying on the bed. Jessica was naked, but she could not recall how her clothes had been removed.

Defendant, who was wearing only briefs, asked Jessica to lie on top of him. He then touched her vagina with his fingers.

¶ 13 Jessica described his touching as “kind of like a stroke” or a “picking,” but it was not “deep enough for it to hurt.” After touching her vagina, defendant licked his fingers. Jessica testified that that was the “first time the squishy game changed.”

¶ 14 When asked if that was the last time that defendant “played the squishy game in that fashion,” Jessica answered, “That I recall, no.” When asked if she could remember another time when something “like what you described for us” happened, she described another incident where she was naked on defendant’s bed and he told her to get dressed quickly to answer the telephone. When asked if she was playing the squishy game at that time, Jessica answered that “there was nothing else that [she] could have been doing” and that “the last time that [she] played that, [she] was naked on the bed again.” She added that she could not remember whether her vagina was “stroked, picked, or touched in any way” that time.

¶ 15 Jessica described another occasion that was “like [those she had] described [to the jury] already.” She could not recall if she was dressed or not, but her mother pulled into the driveway and defendant peeked outside. Jessica asked if she could tell her mother that they “were playing [the] game,” and defendant said no, because her mother would be mad.

¶ 16 Sergeant Scott Warren of the Lake Zurich police department interviewed defendant in January 2011 regarding Jessica’s accusations that defendant touched her sexually when she was six years old. According to Sergeant Warren, defendant told him that he and Jessica “used to play but not in a bad way” and that it was “just innocent play.” Defendant said that one time he might have played with her “in a bad way.” Defendant admitted that he touched Jessica sexually but only with his fingers. When Sergeant Warren asked him how many times, defendant

responded that it was “only about one or two times.” Defendant stated that he touched Jessica “around the outside” of her vagina. He described the second time as “being about the same as the first time.”

¶ 17 Defendant testified that he never touched Jessica in an inappropriate way. He explained that his admission to Sergeant Warren that he had touched her inappropriately was based on his understanding that he was being questioned about using too much force when he touched or played with her, as opposed to touching her sexually. He considered Jessica’s accusations to be a reaction to his disliking her boyfriend and disciplining her for leaving the house late at night without permission. Defendant described an incident in which he told Jessica that she could end up in a correctional facility and she responded by saying, “Let’s see who ends up out of the house first, you or [me].”

¶ 18 The jury found defendant guilty of two of the charges and not guilty of the third. The trial court denied defendant’s motion for a new trial.

¶ 19 At sentencing, Jessica read her victim impact statement. She stated, in pertinent part, that she had no anger toward defendant but “[o]nly fear.” It was a fear that did not “just haunt [her] during the day, but also at night in her dreams.” She could not “live in peace in [her] dreams.” She feared that defendant “[would] come back to get revenge” and that he “[would] come back to get [her].” She worried that “one day [defendant] [would] get out of prison and come back and that all [of her] nightmares [would] come true.” She added that she had a difficult time trusting others and did not feel safe doing so. Her childhood was not what it should have been, and defendant brought “lots of hurt and pain into [her] family’s life.” She was relieved that defendant was going to be far away from her in prison, and she hoped that he would be there for a very long time.

¶ 20 The presentence investigation report (PSR) showed that defendant had no prior felony convictions and several traffic offenses. Other than the PSR and Jessica's impact statement, the State offered no aggravating evidence. Defendant submitted no additional mitigating evidence.

¶ 21 The trial court, in imposing sentence, stated that it considered the trial evidence, the PSR, Jessica's impact statement, defendant's rehabilitative potential, the financial impact of incarceration, and defendant's allocution. The court sentenced defendant to 15 years' imprisonment on each conviction. Pursuant to statute, the court imposed consecutive sentences. See 730 ILCS 5/5-8-4(d)(2) (West 2010). Following the denial of his motion to reconsider his sentences, defendant filed a timely notice of appeal.

¶ 22 II. ANALYSIS

¶ 23 On appeal, defendant raises three issues. First, he contends that the trial court's finding regarding the State's use of its peremptory challenges against the three Hispanic venirepersons was clearly erroneous, because the State's reasons were not race-neutral and were pretextual. Second, he maintains that the State's evidence was insufficient to prove him guilty beyond a reasonable doubt of having committed, on more than one occasion, the offense of predatory criminal sexual assault of a child. Third, he contends that the trial court abused its discretion in sentencing him to 15 years in prison for each conviction and that this court should reduce his sentence as to each conviction.

¶ 24 A. *Batson* Challenge

¶ 25 A *Batson* challenge is a claim that addresses the fairness of the jury-selection process, and its purpose is to ensure that no improper bias affected the process. *People ex rel. City of Chicago v. Hollins*, 368 Ill. App. 3d 934, 943 (2006). The exclusion of only one prospective juror because of discriminatory animus is unconstitutional. *People v. Davis*, 231 Ill. 2d 349, 360

(2008).

¶ 26 There is a three-step process for evaluating whether the State's use of a peremptory challenge resulted in the removal of a venireperson based on race. *Davis*, 231 Ill. 2d at 360. First, the defendant must make a *prima facie* showing that the prosecutor exercised a peremptory challenge based on race. *Id.* Second, if the defendant makes a *prima facie* showing, the burden shifts to the State to provide a race-neutral explanation for each prospective juror in question. *Id.* A race-neutral basis means something other than the race of the prospective juror. *Id.* at 363. It need not be persuasive or even plausible, but need be only a reason that does not deny equal protection. *People v. Easley*, 192 Ill. 2d 307, 324 (2000). Defense counsel may then rebut the explanation as pretextual. *Davis*, 238 Ill. 2d at 363. Finally, at the third stage, the trial court must determine whether the defendant, who carries the ultimate burden of persuasion, has shown purposeful discrimination in light of the parties' submissions. *Id.* Because the ultimate determination requires the court to observe the prospective juror's demeanor and assess the credibility of the State's explanation, a reviewing court defers to the trial court's judgment and will disturb its *Batson* ruling only if it is clearly erroneous. *Id.* at 364.

¶ 27 We begin by noting that there is no issue as to whether defendant made out a *prima facie* case. Therefore, we turn to whether the trial court clearly erred in finding that the State's explanations for excluding the three Hispanic venire persons were race-neutral and were not a pretext for discrimination.

¶ 28 In that regard, the record reflects that the trial court found that the State was credible in offering its explanations. Our review of the record reveals nothing that would undercut that finding.

¶ 29 As for Rios, the State expressed concern that, because he had dropped out of high school,

he might not “appreciate being told what to do” by an authority figure and that, in a criminal case such as this one, he might be biased against the State if it told him to find defendant guilty. That reasoning was entirely race-neutral and made perfect sense under the circumstances. See *People v. Fair*, 159 Ill. 2d 51 (1994) (finding that a juror who had completed only two years of a high school education was a legitimate race-neutral reason).

¶ 30 In regard to Sajuan, the State’s concern was that his prior misuse of alcohol might affect his ability to fairly consider any alcohol-related issues as to defendant. That too was race-neutral and a legitimate reason to remove Sajuan. The fact that Sajuan discontinued his alcohol use at some point does not alter that conclusion. See *People v. Pecor*, 286 Ill. App. 3d 71 (finding that a juror’s prior exposure to drug intoxication, which was the defendant’s anticipated defense, was trial related and a race-neutral reason).

¶ 31 Lastly, as to Servin, the State’s concerns included his apparent disrespect for the law and community safety as demonstrated by his history of serious traffic offenses. Additionally, Servin expressed doubt about his ability to express an opinion in a group. Both of those explanations were race-neutral and understandable reasons to have excluded Servin. See, e.g., *People v. Banks*, 243 Ill. App. 3d 525 (1993); *People v. Woods*, 184 Ill. App. 3d 688 (1989) (finding that a juror’s potential bias against police officers was a legitimate race-neutral reason).

¶ 32 There was no hint of racial animus in the State’s explanations. Rather, they were based on legitimate, nondiscriminatory reasons. Thus, the trial court did not clearly err in finding that the State’s reasons were race-neutral and nonpretextual. See *People v. Mack*, 128 Ill. 2d 231 (1989) (affirming denial of *Batson* claim where State justified use of 13 of 16 peremptory challenges against African Americans).

¶ 33 In an effort to show pretext, defendant focuses on the State’s failure to use a peremptory

challenge against a white prospective juror (Beck) who, like one of the challenged Hispanic venirepersons (Sajuan), had been convicted of DUI. However, our supreme court has stated that, if a prosecutor rejects a minority venireperson for possessing certain traits, but does not do so for a white venireperson with the same characteristics, that does not itself show that the prosecutor's explanations were pretextual. *People v. Harris*, 129 Ill. 2d 123, 179 (1989). Although the prosecutor's explanations might have been applicable to a white venireperson who was not challenged, the white venireperson might have exhibited another trait that the prosecutor reasonably believed would have made him more desirable as a juror. *Id.* at 179-80. On the other hand, although it is not conclusive, evidence that a stricken minority possessed the same characteristics as a nonminority selected by the State should certainly be given great weight by the trial court in assessing the State's explanations. *Id.* at 180.

¶ 34 Defendant argues that Beck was the same as Sajuan, because they shared the common characteristic of having had a DUI. Having one shared trait, however, did not make the two venirepersons the same in terms of their overall characteristics. Indeed, Sajuan had additional alcohol-related offenses, which differentiated him from Beck. Even if Sajuan had the same characteristic in terms of alcohol use, as the supreme court noted in *Harris*, Beck might have had a trait that the prosecutor reasonably believed made him a better juror in this case. 129 Ill. 2d at 179-80.

¶ 35 Defendant points to Beck's conviction of marijuana possession, which none of the excluded Hispanic venirepersons had. However, marijuana possession or use was not related to the proffered reason for excluding Sajuan, the potential issue of alcohol use by defendant. Therefore, the failure to exclude Beck because of his marijuana possession or use did not show that the State's race-neutral reasons for excluding the three Hispanic venirepersons were

pretextual.

¶ 36

B. Sufficiency of the Evidence

¶ 37 When we consider a sufficiency-of-the-evidence challenge to a conviction, we do not retry the defendant. *People v. Smith*, 185 Ill. 2d 532, 541 (1999). Rather, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Bishop*, 218 Ill. 2d 232, 249 (2006). Testimony may be found insufficient under that standard, but only where the evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). The testimony of a single witness, if positive and credible, is sufficient to convict. *Smith*, 185 Ill. 2d at 541. We will reverse a conviction only if the evidence is so unreasonable, improbable, or unsatisfactory as to create a reasonable doubt of the defendant's guilt. *Id* at 542.

¶ 38 In this case, Jessica testified that on one occasion defendant touched her vagina with his fingers while she was naked. More important, when asked if that was the last time that defendant "played the squishy game in that fashion," Jessica answered, "That I recall, no." When asked if she could recall another time when something like that happened, she described another incident when she was on the bed naked with defendant and defendant told her to get dressed and answer the phone. She added that there was nothing that she could have been doing at that time other than playing the squishy game, just like the last time she played it with defendant in his bedroom. Jessica also described another occasion that was "like [those she had] described [to the jury] already." In that situation, she asked if she could tell her mother what they were doing, and defendant told her not to because her mother would get mad. Jessica's testimony alone established that defendant had sexually assaulted her on at least two occasions.

When the foregoing evidence is viewed in the light most favorable to the State, it was sufficient for the jury to find that defendant engaged in inappropriate sexual contact with Jessica on more than one occasion.

¶ 39 Additionally, according to Sergeant Warren, defendant admitted that he had touched Jessica's vagina "about one or two times." Defendant described the second time as "being about the same as the first time." Defendant attempts to undermine the significance of his statement by arguing that the reference to his having touched Jessica's vagina more than once was not corroborated by Jessica's testimony. That argument fails, because, as we have discussed, Jessica's testimony clearly showed that defendant touched her vagina on at least two different occasions. Thus, defendant's statement provided further evidence that he committed predatory criminal sexual assault of a child on two occasions.

¶ 40 C. Excessive Sentence

¶ 41 A trial court's sentence is given great deference, because that court was in a better position than a reviewing court to assess the circumstances of the case and weigh the aggravating and mitigating factors. *People v. Streit*, 142 Ill. 2d 13, 18-20 (1991). Trial courts have broad discretion in sentencing, and a sentence within the applicable statutory range may not be disturbed on appeal absent an abuse of discretion. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). Such an abuse of discretion occurs when the sentence greatly varies with the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. *Id.*

¶ 42 In this case, defendant's sentence for each conviction fell within the lower half of the applicable statutory range. See 720 ILCS 5/12-14.1(b)(1) (West 2010). Therefore, we give the trial court's sentencing decision great deference and consider only whether it was an abuse of discretion. See *People v. Null*, 2013 IL App (2d) 110189, ¶ 55.

¶ 43 All sentences should reflect the seriousness of the crime and the objective of returning the defendant to useful citizenship. *Null*, 2013 IL App (2d) 110189, ¶ 56. Careful consideration must be given to all mitigating and aggravating factors, along with the need for deterrence and the potential for rehabilitation. *Id.* Even though a reviewing court might weigh the sentencing factors differently than the trial court, that does not warrant altering the sentence. *Id.*

¶ 44 Where the record shows that the trial court acknowledged the PSR, there is a presumption that it considered both the mitigation evidence contained therein and the rehabilitative potential of the defendant. *People v. Colbert*, 2013 IL App (1st) 112935, ¶ 25. Similarly, where mitigating evidence was before the trial court, it is presumed that the trial court considered it, absent some indication to the contrary, other than the sentence itself. *People v. Benford*, 349 Ill. App. 3d 721, 735 (2004). Moreover, there is generally a rebuttable presumption that a sentence was proper, and a defendant has the burden to affirmatively demonstrate that an error occurred. *People v. Burdine*, 362 Ill. App. 3d 19, 26 (2005).

¶ 45 Defendant, admitting that “the offense here is serious,” contends that his conduct of “very briefly rub[bing] his finger near the outside of the complainant’s vagina” did not warrant such lengthy sentences. That contention fails, however, as defendant, who was entrusted with six-year-old Jessica’s care at the time, took advantage of the situation to assault her. Contrary to defendant’s argument, that conduct was egregious, regardless of the extent to which he touched Jessica’s vagina.

¶ 46 Additionally, Jessica’s impact statement detailed the anguish and suffering that defendant’s conduct imposed upon her and her family. She described her ongoing fear of defendant. She also talked about her difficulty in trusting others. There is no doubt that defendant wreaked emotional havoc on Jessica and her family that will haunt them for a very

long time. Considering that the seriousness of the offense is the most important of the sentencing factors (see *People v. McGowen*, 2013 IL App (2d) 111083, ¶ 11), the circumstances of defendant's crimes alone supported significant sentences.

¶ 47 Defendant's minimal criminal history, acknowledged by the trial court, did not compel lower sentences. It was but one mitigating factor for the court to have considered. We will not reweigh that factor. See *Null*, 2013 IL App (2d) 110189, ¶ 56.

¶ 48 Finally, defendant argues that he should have received lower sentences because the offenses were eight years ago and because he never touched Jessica inappropriately after she turned seven. This contention lacks merit. The reason the offenses were "dated" was that Jessica did not report them until she was older. Even if defendant stopped his criminal behavior shortly after it began, that does not detract from the seriousness of what he did and the impact it caused.

¶ 49 Defendant has not shown that his sentences greatly varied with the spirit and purpose of the law or were manifestly disproportionate to the nature of his offenses. See *Alexander*, 239 Ill. 2d at 212. Therefore, the trial court did not abuse its discretion in sentencing defendant to 15 years' imprisonment on each conviction.

¶ 50 III. CONCLUSION

¶ 51 For the reasons stated, we affirm the judgment of the circuit court of Lake County finding defendant guilty of two counts of predatory criminal sexual assault of a child and sentencing him to 15 years in prison on each conviction.

¶ 52 Affirmed.