

NOTICE

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2016 IL App (4th) 160180-U

NO. 4-16-0180

FILED

November 7, 2016
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.)	Ford County
JOSHUA M. WINKLER,)	No. 15CF14
Defendant-Appellant.)	
)	Honorable
)	Matthew John Fitton,
)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Presiding Justice Knecht and Justice Appleton concurred in the judgment.

ORDER

¶ 1 *Held:* (1) Defendant forfeited the argument that during sentencing, the trial court relied on improper aggravating factors inherent in the offense charged.

(2) The trial court did not abuse its discretion by sentencing defendant to consecutive prison terms of 22 years for predatory criminal sexual assault and 4 years for aggravated criminal sexual abuse.

¶ 2 Following a July 2015 sentencing hearing, the trial court sentenced defendant, Joshua M. Winkler, to consecutive prison terms of 22 years for predatory criminal sexual assault (720 ILCS 5/11.1-1.40(a)(1) (West 2014)) and 4 years for aggravated criminal sexual abuse (720 ILCS 5/11-1.60(f) (West 2014)). Defendant appeals, arguing that the trial court abused its discretion by (1) considering improper aggravating factors inherent in the offense charged and (2) imposing an excessive sentence. We affirm.

¶ 3

I. BACKGROUND

¶ 4 In May 2015, defendant pleaded guilty to (1) predatory criminal sexual assault involving defendant's daughter, who was then 12 years old (count I) and (2) aggravated criminal sexual abuse involving defendant's son, who was then 13 years old (count II).

¶ 5 At defendant's July 2015 sentencing hearing, the State introduced two digital video discs (DVD) containing interviews conducted with both victims as well as their respective victim impact statements. The State, defendant, and the trial court agreed the DVDs would be proffered and considered for the limited purpose of providing background information because the interviews related only to factors necessary to convict defendant of the crimes charged, meaning consideration of the DVDs for sentencing purposes would constitute double enhancement. The State also called the victims' mother, Sarah Webb, who testified about the psychological harm suffered by her children and the impact that this experience has had on her entire family. Defendant offered character statements from family members and spoke in allocution.

¶ 6 The trial court sentenced defendant to consecutive prison sentences of 22 years for predatory criminal sexual assault and 4 years for aggravated criminal sexual assault. The court noted the mitigating factors were defendant's (1) lack of criminal history, (2) guilty plea, (3) cooperation with the investigation, and (4) family support. However, the court noted that the aggravating factors were defendant's position of trust in relation to the victims, the need for deterrence, and the psychological harm suffered by the victims.

¶ 7 Following the sentencing hearing, defendant filed a motion to reconsider the sentence, arguing that his sentence was excessive in light of the mitigating factors. The trial court denied defendant's motion to reconsider, reiterating that the court had considered both the miti-

gating and aggravating factors, specifically noting defendant's lack of a criminal history and his guilty plea, as well as the presentence investigation report.

¶ 8 This appeal followed.

¶ 9 II. ANALYSIS

¶ 10 On appeal, defendant raises the following arguments: (1) the trial court relied on improper aggravating factors inherent in the offense charged, resulting in improper double enhancement, and (2) his sentence is excessive because the court failed to properly consider mitigating factors. The State argues defendant forfeited his argument that the court relied on improper aggravating factors by failing to raise that argument in his posttrial motion to reconsider. Alternatively, the State argues that the court did not rely on improper aggravating factors when sentencing defendant. Additionally, the State maintains that the sentence imposed was not an abuse of the court's discretion.

¶ 11 A. Standard of Review

¶ 12 We review a trial court's sentencing decision for an abuse of discretion. *People v. Blair*, 2015 IL App (4th) 130307, ¶ 33, 44 N.E.3d 1073. The supreme court has further explained, as follows:

"In considering the propriety of a sentence, the reviewing court must proceed with great caution and must not substitute its judgment for that of the trial court merely because it would have weighed the factors differently. [Citations.] 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 dispro-

portionate to the nature of the offense." (Internal citations omitted.) *People v. Fern*, 189 Ill. 2d 48, 53-54, 723 N.E.2d 207, 209-10 (1999).

However, "the question of whether a court relied on an improper factor in imposing a sentence ultimately presents a question of law to be reviewed *de novo*." *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 8, 973 N.E.2d 459.

¶ 13 B. Improper Aggravating Factors

¶ 14 The supreme court has "unequivocally held that for an issue to be preserved for review on appeal, the record must show that (1) a contemporaneous objection to the trial court's error was made, *and* (2) the issue was contained in a written posttrial motion." (Emphasis in original.) *People v. Rathbone*, 345 Ill. App. 3d 305, 308-09, 802 N.E.2d 333, 336 (2003) (citing *People v. Enoch*, 233 Ill. 2d 176, 186, 522 N.E.2d 1124, 1130 (1988) (holding that issues must be raised both at trial and in a posttrial motion to be properly preserved)). Issues not properly preserved are forfeited. *Blair*, 2015 IL App (4th) 130307, ¶ 38, 44 N.E.3d 1073. With respect to assignments of error occurring during a sentencing hearing, Illinois Supreme Court Rule 605(a)(3)(C) (eff. Oct. 1, 2010) provides that "[a]ny issue or claim of error regarding the sentence imposed or any aspect of the sentencing hearing not raised in the written motion [to reconsider the sentence] shall be deemed [forfeited]."

¶ 15 In his posttrial motion to reconsider, defendant argued that his sentence was excessive. However, defendant did not argue that the trial court relied on improper aggravating factors when imposing his sentence, raising that issue for the first time on appeal. Accordingly, defendant did not properly preserve that claim for our review. We conclude defendant has for-

feited this argument and, thus, is barred from asserting it on appeal.

¶ 16 Not only did defendant forfeit this specific sentencing argument, he also failed to request that we review his claim under the plain-error doctrine, resulting in forfeiture of that argument, as well. See *Rathbone*, 345 Ill. App. 3d at 312, 802 N.E.2d at 339 (holding that prior to considering a case for plain error, the defendant must first ask for plain-error review and persuade the court that "(1) the evidence at sentencing was closely balanced or (2) the error deprived him of a fair sentencing hearing").

¶ 17 Notwithstanding these forfeitures, we conclude the trial court did not rely on improper factors when considering its sentencing judgment. " 'As a general rule, the consideration of a factor which is necessarily implicit in an offense cannot be used as an aggravating factor in sentencing.' " *People v. Cohn*, 2014 IL App (3d) 120910, ¶ 29, 20 N.E.3d 1285 (quoting *People v. Burge*, 254 Ill. App. 3d 85, 88, 626 N.E.2d 343, 345 (1993)).

¶ 18 As the State notes, defendant has not identified any specific comments by the trial court indicating reliance on an improper aggravating factor. Defendant maintains generally that the court improperly relied on the young age of the victims and the fact that defendant was in a position of trust as their father. However, the only comment by the court relating to the victims' age occurred in the context of considering the victims' ability to cope with the psychological harm resulting from defendant's crimes. This is not a situation like in *People v. Edwards*, 224 Ill. App. 3d 1017, 1033, 586 N.E.2d 1326, 1337 (1992), where resentencing was warranted because the trial court explicitly stated the victim's young age was an aggravating factor. Thus, while age itself would be an improper aggravating factor because it was an implicit element of the crimes for which defendant was convicted, the record does not reflect that the trial court considered the

victims' age as an aggravating factor.

¶ 19 Defendant also argues that psychological harm is not a proper aggravating factor because the court in *People v. Calva*, 256 Ill. App. 3d 865, 875, 628 N.E.2d 856, 864 (1993), noted that psychological harm is implicit in any aggravated sexual assault of a child. However, defendant misconstrues the following passage he relies on for his purported proposition:

"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. [Citation.] However, no evidence was offered to show any psychological harm to A.G. Therefore, 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.*

¶ 20 Unlike in *Calva*, where psychological harm was not a proper aggravating factor because no evidence of psychological harm was presented to the court (*Id.* at 877, 628 N.E.2d at 865), in this case, the trial court received statements from the victims as well as their mother, which outlined the psychological harm they suffered as a direct result of defendant's acts. Harm caused by defendant's actions is a proper aggravating factor pursuant to 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 2014)) so long as physical or psychological harm is not an element of the crime. Here, physical or psychological harm was not required to convict defendant of either count, thus the court could properly consider the psychological harm suffered by the victims as an aggravating factor.

¶ 21 Finally, we disagree with defendant's argument that the position of trust is a factor

implicit in count II. Defendant was charged with violation of section 11-1.60 of the Criminal Code of 2012, which provides, as follows:

"A person commits aggravated criminal sexual abuse if that person commits an act of sexual conduct with a victim who is at least 13 years of age but under 18 years of age and the person is 17 years of age or over and holds a position of trust, authority, *or* supervision in relation to the victim." (Emphasis added.) 720 ILCS 5/11-1.60(1)(f) (West 2012).

¶ 22 In this case, the State charged defendant with being in a position of authority over the victim. As the State notes, the legislature chose the word "or" rather than "and," meaning that the State need not prove the defendant was in a position of trust in cases where, as here, the defendant was charged with being in a position of authority over the victim. Consequently, the position of trust was not an element of the crime, and the trial court could properly consider the position of trust as an aggravating factor pursuant to section 5-5-3.2(a)(14) of the Unified Code (730 ILCS 5/5-5-3.2(a)(14) (West 2014)). Thus, notwithstanding the fact that defendant forfeited the argument, we conclude the trial court did not rely on any improper aggravating factors inherent in the offense charged when considering defendant's sentence. Accordingly, defendant did not suffer improper double enhancement.

¶ 23 C. Excessive Sentence

¶ 24 A person convicted of predatory criminal sexual assault "shall be sentenced to a term of imprisonment of not less than 6 years and not more than 60 years." 720 ILCS 5/11-1.40(b)(1) (West 2014). A person convicted of aggravated criminal sexual abuse shall be sen-

tenced to a term of imprisonment "not less than 3 years and not more than 7 years." 730 ILCS 5/5-4.5-35(a) (West 2014). "The existence of mitigating factors does not require the trial court to reduce a sentence from the maximum allowed[,] and "[a] defendant's rehabilitative potential and other mitigating factors are not entitled to greater weight than the seriousness of the offense." *People v. Phippen*, 324 Ill. App. 3d 649, 651, 756 N.E.2d 474, 477 (2001). Further, a trial court need not expressly indicate its consideration of mitigating factors and, absent explicit evidence to the contrary, is presumed to have considered all mitigating and aggravating factors in imposing a sentence. *People v. Halerewicz*, 2013 IL App (4th) 120388, ¶ 43, 2 N.E.3d 333.

¶ 25 Defendant concedes his sentence falls within the statutory sentencing range for the crimes of which he has been convicted. Nonetheless, defendant argues that his sentence is excessive because the trial court did not properly consider the mitigating factors, which defendant argues include his lack of criminal history, his guilty plea, his acceptance of responsibility, his "tumultuous" upbringing, the support of his family, his age, and his moderate risk to reoffend. Defendant cites cases holding these are factors that may be considered in mitigation. See *People v. Baker*, 241 Ill. App. 3d 495, 498, 608 N.E.2d 1251, 1253 (1993) (finding defendant's own sexual abuse as a child was a mitigating factor); *People v. Juarez*, 278 Ill. App. 3d 286, 295, 662 N.E.2d 567, 573 (1996) (finding a close familial relationship, defendant's age of 31, and consistent employment were mitigating factors). We do not disagree with defendant's contention that the factors he mentions may be considered in mitigation, but we do disagree with defendant's contention that in this case, the court did not consider or give proper weight to these factors.

¶ 26 At the sentencing hearing, the trial court specifically noted defendant's guilty plea

and lack of prior criminal history. The court also noted that defendant had not fully accepted responsibility for his actions, but he instead blamed others, including the victims. At the posttrial hearing, the court reiterated that it had considered defendant's lack of criminal history and his guilty plea. The court went on to clarify it had also considered the defendant's family support in mitigation as well as the mitigating factors included in the presentence report, which included all the factors that defendant now claims the court did not consider. In sum, the court did consider the mitigating factors noted by defendant, and there is no evidence indicating that this court should abandon the presumption that the trial court properly considered the mitigating factors before it. As previously stated, these mitigating factors are not entitled to any greater weight than the seriousness of defendant's crimes or the aggravating factors present in this case. Further, trial courts are not required to specifically articulate the weight given to each and every factor when considering the proper sentence in a given case.

¶ 27 Defendant states the aggravating factors cited by the trial court, specifically the emotional harm, the position of trust, and the need for deterrence, are factors inherent in any sexual assault or sexual abuse case. Nevertheless, these are proper aggravating factors in sexual assault and abuse cases, and their frequent applicability does not negate the seriousness of these factors or of the crimes for which defendant was convicted. See *Pippen*, 324 Ill. App. 3d. at 351, 756 N.E.2d at 476 (holding that in a predatory criminal sexual assault case, proper aggravating factors include harm to the victim, prior criminal history, the position of trust in relation to the victim, and the need for deterrence). Defendant also appears to argue this case is not as serious as other predatory criminal sexual assault cases because the victim was "less than one year under the age where the statute elevating the severity of the offense would be inapplicable." We deem

defendant's argument in this regard as irrelevant and meritless to his excessive-sentence claim.

¶ 28 Considering the record and the remarks by the trial court at the sentencing hearing and the posttrial hearing, we conclude that the trial court did not abuse its discretion when sentencing defendant. The court stated the breach of trust weighed heavily on its decision, and the victims' psychological harm and the need for deterrence were also aggravating factors present in this case—all of which are proper considerations. Additionally, the court explicitly noted several mitigating factors and stated it considered the mitigating factors contained in the presentence report, which contained all factors noted by defendant on appeal. Defendant's consecutive 22- and 4-year prison sentences for predatory criminal sexual assault and aggravated criminal sexual abuse—sentences totaling less than half of the maximum sentence for which defendant was eligible—are not greatly at variance with the spirit of the law or manifestly disproportionate to the nature of defendant's crimes in light of both the aggravating and mitigating factors. Accordingly, we conclude defendant's sentence was not excessive and that the court did not abuse its discretion.

¶ 29 III. CONCLUSION

¶ 30 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$75 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2014).

¶ 31 Affirmed.