2017 IL App (4th) 4140516-U

NO. 4-14-0516

FILED
March 31, 2017
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.	)	DeWitt County
DUANE T. THACKREY,	)	No. 12CF95
Defendant-Appellant.	)	
	)	Honorable
	)	William Hugh Finson,
	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Turner and Justice Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not commit plain error in sentencing defendant to 85 years in prison.

¶ 2 A jury found defendant, Duane T. Thackrey, guilty of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2012)) and aggravated criminal sexual abuse (720 ILCS 5/11-1.60(b) (West 2012)). The trial court sentenced him to 85 years in prison. Defendant appeals, challenging the sentence as excessive. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In September 2012, the State charged defendant with five counts of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2012)) (counts I to V). Defendant was also charged with aggravated criminal sexual abuse (720 ILCS 5/11-1.60(b)

(West 2012)) (count VI).

¶ 5 Defendant was charged with sexually abusing his stepdaughter, D.D., during 2011 and 2012. The following testimony was elicited at trial. D.D. testified that the abuse began in 2006, shortly after defendant moved into her home. At the time, D.D. was approximately four years old. She testified that defendant, whom she often referred to as "dad," sexually abused her during the day when her mother was at work. After asking D.D.'s siblings to play outside, defendant would bring D.D. into his bedroom and lock the door. D.D. testified that defendant would touch her vagina and anus, perform oral sex on her, and would have sexual intercourse with her. When asked how often the sexual encounters involved intercourse, D.D. responded that it occurred "every time." D.D. testified that the sexual abuse lasted until she was approximately 10 years old.

¶ 6 In July 2012, D.D.'s mother discovered defendant kissing another child, A.B., who was temporarily residing in their home. A.B. testified that as she leaned in to hug and kiss defendant good night, defendant started "making out" with her and "his finger was inside [her] underwear." A.B. testified that she was "afraid that if she didn't do what [defendant] wanted," she "would have to live back with [her] dad." Defendant moved out of the house shortly after he was caught with A.B.

¶ 7 On September 11, 2012, D.D. revealed that defendant had inappropriately touched her. D.D. testified that she chose to disclose this information to her mother when she "knew [defendant] was out" of the house. D.D.'s mother testified that she was having a discussion about "healthy relationships and safe sex" with her children. She noticed that D.D. "started shaking" and "stopped talking." The mother sent her other children downstairs so that she could speak

privately with D.D. The mother said, "something's happened to you," and "I want to know who's touched you, what happened." After some prodding, D.D. disclosed that defendant touched her too many times to count.

¶ 8 Defendant's mother, sister, and several other family members testified for defendant. Defendant's mother testified that she babysat "every other weekend" and she "never noticed anything any different" with respect to D.D.'s behavior. Defendant's sister corroborated this testimony, explaining that she never observed any unusual behavior when she lived temporarily with defendant and D.D. Defendant's sister testified that defendant occasionally locked his bedroom door to take naps during the day while she "stayed upstairs" with all of the children. She also testified that she never noticed D.D. in defendant's bedroom during his naps.

¶ 9 On February 27, 2014, the third day of trial, defendant failed to appear in court. A warrant was issued for his arrest, and it was later discovered that defendant had fled the jurisdiction. The trial recommenced in defendant's absence on March 3, 2014.

¶ 10 The jury found defendant guilty on all counts.

¶ 11 On June 10, 2014, the trial court held a sentencing hearing. The State recommended consecutive prison terms of 15 years for each count of predatory criminal sexual assault of a child (counts I to V), in addition to 10 years for aggravated criminal sexual abuse (count VI), for a total of 85 years. In support of this recommendation, the State emphasized the duration of the sexual abuse, defendant's position of trust, defendant's threats to punish D.D. if she told anyone about the abuse, and defendant's flight during trial.

¶ 12 Defense counsel requested consecutive 6-year terms for each count of predatory criminal sexual assault of a child and 10 years for aggravated criminal sexual abuse, for a total of

40 years. To support this lower sentence, defense counsel pointed to defendant's age and minimal criminal history.

¶ 13 The court sentenced defendant to consecutive terms of 15 years for each count of predatory criminal sexual assault of a child and 10 years for aggravated criminal sexual abuse, for a total of 85 years.

¶ 14 This appeal followed.

¶ 15 II. ANALYSIS

¶ 16 Defendant argues on appeal that his 85-year sentence was excessive. He further argues that the court (1) failed to give adequate consideration to his youth, prior abuse by an uncle, and limited criminal history; and (2) considered a factor in aggravation that was an element of the underlying offense and applied an inapplicable statutory factor in aggravation. We disagree.

¶ 17 Here, defendant was convicted of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2012)) and aggravated criminal sexual abuse (720 ILCS 5/11-1.60(b) (West 2012)). Each count of predatory criminal sexual assault, a Class X felony, carried with it a possible sentence of 6 to 60 years (720 ILCS 5/11-1.40(b)(1) (West 2012)) (counts I to V). The sentencing range for aggravated criminal sexual abuse, a Class 2 felony (720 ILCS 5/11-1.60(b), (g) (West 2012)), carried with it a sentence of 3 to 7 years with a possible extended-term of 7 to 14 years (730 ILCS 5/5-4.5-35(a) (West 2012)). Each count was mandatorily consecutive, and the parties agree the resulting sentencing range was 33 to 314 years' imprisonment in the aggregate.

¶ 18 A. Forfeiture

¶ 19 Ordinarily, we review a defendant's claim that his sentence was excessive for an abuse of discretion. *People v. Thrasher*, 383 Ill. App. 3d 363, 371, 890 N.E.2d 715, 722 (2008). A sentence will be deemed an abuse of discretion where the sentence is "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) (citing *People v. Fern*, 189 Ill. 2d 48, 54, 723 N.E.2d 207, 210 (1999)). However, defendant concedes that he neither objected to the sentence at the sentencing hearing nor raised any such claim in a motion to reconsider. It is well settled that a defendant forfeits any sentencing issue when he fails to object at the sentencing hearing or file a postsentencing motion to reconsider. *People v. Hillier*, 237 Ill. 2d 539, 544, 931 N.E.2d 1184, 1187 (2010). " 'This principle encourages a defendant to raise issues before the court, thereby allowing the court to correct its errors *** and consequently precluding a defendant from obtaining a reversal through inaction.' " *In re M.W.*, 232 Ill. 2d 408, 430, 905 N.E.2d 757, 772 (2009) (citing *People v. Piatkowski*, 225 Ill. 2d 551, 564, 870 N.E.2d 403, 409 (2007)). Thus, any sentencing issue is forfeited unless defendant can demonstrate plain error. *Hillier*, 237 Ill. 2d at 544, 931 N.E.2d at 1187.

¶ 20 B. Plain-Error Doctrine

¶ 21 The plain-error doctrine is a limited and narrow exception to the forfeiture rule. *Id.* at 545, 931 N.E.2d at 1187. According to Illinois Supreme Court Rule 615(a) (eff. Jan. 1, 1967), "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." To obtain relief under this rule, "a defendant must

first show that a clear or obvious error occurred." *Hillier*, 237 Ill. 2d at 545, 931 N.E.2d at 1187. "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." *Id.* The defendant has the burden of persuasion under both prongs of the plain-error analysis. *Id.* Prior to determining whether plain error occurred, however, we first determine whether error occurred at all. *People v. Sargent*, 239 Ill. 2d 166, 189, 940 N.E.2d 1045, 1059 (2010). If clear or obvious error did not occur, no plain-error analysis is necessary. *People v. Walker*, 232 Ill. 2d 113, 124, 902 N.E.2d 691, 697 (2009).

¶ 22 C. Sentencing Factors

¶ 23 Defendant argues the court erred in failing to consider his youth, prior abuse by an uncle, and limited criminal history as factors in mitigation. He further argues that the court erroneously applied a factor in aggravation that is also an element of the underlying offense and applied an inapplicable factor in aggravation.

¶ 24 1. *Factors in Mitigation*

¶ 25 The court discussed three statutory mitigating factors at defendant's sentencing hearing. See 730 ILCS 5/5-5-3.1(a) (West 2012)). First, the court considered section 5-5-3.1(a)(7) of the Unified Code of Corrections (Code) (730 ILCS 5/5-5-3.1(a)(7) (West 2012)), which applies when a "defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present crime." Contrary to defendant's assertions, the record reflects the court did consider and give weight to this factor, finding defendant "successfully completed" supervision for a minor crime and stating that is "certainly not a bad record."

¶ 26 The trial court next considered section 5-5-3.1(a)(8) of the Code (730 ILCS 5/5-5-3.1(a)(8) (West 2012)), which applies when "defendant's criminal conduct was the result of circumstances unlikely to recur." Here, the court found that this factor did not weigh in favor of defendant "given the length of time" defendant abused D.D. and given the testimony regarding defendant's sexual abuse of another child. For the same reasons, the court found that section 5-5-3.1(a)(9) of the Code (730 ILCS 5/5-5-3.1(a)(9) (West 2012))—whether "the character and attitudes of the defendant indicate that he is unlikely to commit another crime"—weighed against defendant.

¶ 27 2. *Common Law Factors*

¶ 28 Defendant asserts that the court failed to consider his youth when sentencing him to a *de facto* life sentence. The court must consider the "nature and circumstances of the crime, the defendant's conduct in the commission of the crime, and the defendant's personal history, including his age, demeanor, habits, mentality, credibility, criminal history, general moral character, social environment, and education." *People v. Maldonado*, 240 Ill. App. 3d 470, 485-86, 608 N.E.2d 499, 509 (1992); *People v. Fern*, 189 Ill. 2d 48, 53, 723 N.E.2d 207, 209 (1999). However, a court "has no obligation to recite and assign value to each factor presented at a sentencing hearing." *People v. Hill*, 408 Ill. App. 3d 23, 30, 945 N.E.2d 1246, 1253 (2011). "We presume the sentencing court considers mitigating evidence." *People v. Burton*, 2015 IL App (1st) 131600, ¶ 38, 38 N.E.3d 182. We find nothing in the record to suggest that the court did not consider defendant's age in determining an appropriate sentence.

¶ 29 Defendant cites *Miller v. Alabama*, 567 U.S. 460, __, 132 S. Ct. 2455, 2467-75 (2012), and *Graham v. Florida*, 560 U.S. 48, 70 (2010), for the proposition that a defendant's

young age militates against the imposition of natural life imprisonment. Unlike the juvenile defendants in *Miller* and *Graham*, who were 14 and 16 years old respectively, the defendant in the case at bar was a 21-year-old man with parental authority over his victim. The unique sentencing considerations for a juvenile delinquent, as set forth in *Miller* and *Graham*, simply do not apply here. Further, as mentioned above, nothing leads us to conclude—in the absence of evidence to the contrary—that the court failed to consider defendant's youth.

¶ 30 Defendant also argues the court failed to consider that defendant's uncle molested him as a child. *People v. Baker*, 241 Ill. App. 3d 495, 498, 608 N.E.2d 1251, 1253 (1993) (discussing the "likelihood a person who has been abused as a child may develop into a perpetrator of the same type of abuse"). Although the court in this case never specifically mentioned the abuse defendant suffered as a child, the court indicated that it had considered everything in the presentence investigation report, which included information regarding the sexual abuse defendant endured at the age of five. Thus, it appears the court took defendant's prior abuse into account during sentencing.

¶ 31 3. *Factors in Aggravation*

¶ 32 Factors in aggravation "may be considered by the court as reasons to impose a more severe sentence." 730 ILCS 5/5-5-3.2(a) (West 2012). To that end, the court here considered whether "the sentence [was] necessary to deter others from committing the same crime." 730 ILCS 5/5-5-3.2(a)(7) (West 2012). The court found that this factor in aggravation was "certainly present." The court explained that "no one should have to go through what [D.D.] did as a small child, and the message has to go out that that's not [going to] be tolerated."

¶ 33 Next, the trial court considered whether "the defendant, by the duties of his office

or by his *position*, was obliged to prevent the particular offense committed or to bring the offenders committing it to justice." (Emphasis added.) 730 ILCS 5/5-5-3.2(a)(4) (West 2012). The court reasoned that this factor applied because, as D.D.'s stepfather, defendant "had an affirmative duty to protect [D.D.] from the kind of conduct he engaged in." Defendant argues this factor should not have been applied because the term "position" refers to employment positions, such as a police officer, and not a position as a stepparent.

¶ 34 Defendant fails to cite any case law limiting the term used in section 5-5-3.2(a)(4)—"position"—to employment positions. Nonetheless, even if defendant is correct in his assertion, we find defendant was not prejudiced in light of the other aggravating factors that weighed against him. *People v. Gilliam*, 172 Ill. 2d 484, 521, 670 N.E.2d 606, 623 (1996) (citing *People v. White*, 114 Ill. 2d 61, 67, 499 N.E.2d 467, 469 (1986) ("[W]here it can be determined from the record that the weight placed on the improperly considered aggravating factor was so insignificant that it did not lead to a greater sentence, remandment is not required.").

¶ 35 Further, the trial court properly considered whether "defendant held a *position of trust or supervision such as, but not limited to, family member* as defined in Section 11-0.1 of the Criminal Code of 2012***" (Emphasis added.) 730 ILCS 5/5-5-3.2(a)(14) (West 2012)). The court explained that "the other factor is very similar" to this one, and it "certainly applies here because, as I said, he's [D.D.'s] stepfather, responsible for taking care of her while her mother is at work. He's *in loco parentis* to [D.D. and he] took advantage of that." Defendant complains that, in addressing this statutory factor in aggravation, the court overemphasized and improperly considered a factor inherent in the underlying offense. *Gilliam*, 172 Ill. 2d at 521, 670 N.E.2d at 623 ("It is settled that an element that is inherent to the criminal offense of which a defendant has

been convicted cannot be used also to extend the prison sentence on the conviction."). The underlying offense, aggravated criminal sexual abuse (count VI), required the State to prove (1) defendant committed an act of sexual conduct; (2) with a victim who is under 18 years of age; and (3) the person is a *family member*. (Emphasis added.) 720 ILCS 5/11-1.60(b) (West 2012). Defendant argues that the court used an element inherent in the underlying offense—defendant's status as a family member—to impermissibly enhance its sentence. We disagree.

¶ 36 Contrary to defendant's assertion, defendant's "position of trust or supervision"—a factor in aggravation as set forth in section 3.2(a)(14)—is not an element of the underlying crime. 730 ILCS 5/5-5-3.2(a)(14) (West 2012). Just because a person is a "family member" does not necessarily mean he holds a "position of trust or supervision." In light of the trial court's comments, we find that, rather than relying on the mere fact of defendant's familial relationship to the victim, the court appropriately considered the nature and degree of defendant's position of authority as a factor in aggravation.

¶ 37 In *People v. Burke*, 226 Ill. App. 3d 798, 799-800, 589 N.E.2d 996, 997-98 (1992), this court found that the trial court properly considered the nature and degree of defendant's status as a stepfather where defendant resided "as a family unit" with the victim of the sexual abuse and "had been acquainted with [the victim] since she was two years old." See also *People v. Madura*, 257 Ill. App. 3d 735, 739, 629 N.E.2d 224, 227 (1994) ("It is, therefore, appropriate to consider the nature and degree of a defendant's position of trust or supervision regarding a child/victim, even when the criminal sexual assault charge requires proof of a familial relationship as an element of the crime."). Similarly, defendant in this case resided with D.D. as a family unit, defendant had been acquainted with D.D. since she was three years old,

and defendant frequently supervised her when her mother was at work. Accordingly, the court properly considered defendant's "position of authority and supervision" as a factor in aggravation.

¶ 38 At the sentencing hearing, the trial court stated the following regarding defendant's conduct in the commission of the crime, his demeanor, character, and personal history:

> "Besides the statutory factors in aggravation, there are also some others that I think also apply. *** As I recall the trial testimony, the acts [D.D.] testified about went on for about five years. And, as I recall her testimony, it occurred approximately weekly. This is not a one-time act and then it never happened again. The defendant's conduct was part of a course of conduct that lasted for about half a decade.
>
> In addition, [defendant] hasn't taken any responsibility for his conduct. There's no remorse, no regret, no apologies other than for not sticking around until the end of the trial. That's not good because it indicates he doesn't realize he did anything wrong. And if he doesn't realize he did anything wrong, that in turn means it could happen again.
>
> And, of course, we all recall that [defendant] fled the jurisdiction of the [c]ourt about midway through the trial during the defense case. He was apprehended, it's my understanding, in the state of Indiana. So he not only fled the jurisdiction of this [c]ourt, he also fled Illinois. That is a factor the [c]ourt has to consider. It's as if he's thumbing his nose at the

> [c]ourt and the judicial system and reinforces what I said a few minutes ago about his lack of remorse."

¶ 39 Based on the above, we find the court did not err in sentencing defendant. Accordingly, we find no plain error in the court's 85-year sentence, a sentence which fell well within the permissible 33 to 314 year sentencing range.

¶ 40 III. CONCLUSION

¶ 41 For the reasons stated, we affirm defendant's sentence. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 42 Affirmed.