NOTICE
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2017 IL App (4th) 140981-U

NO. 4-14-0981

FILED
May 5, 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.	)	Champaign County
JAMES L. KIMBLE,	)	No. 14CF76
Defendant-Appellant.	)	
	)	Honorable
	)	Heidi N. Ladd,
	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Holder White and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defendant's 15-year prison sentence was not excessive.

(2) Defendant failed to identify the fines he claims were improperly imposed by the circuit clerk.

(3) The State's request to vacate defendant's sentencing credit is denied.

¶ 2 The trial court sentenced defendant, James L. Kimble, to 15 years' imprisonment after he pleaded guilty to criminal sexual assault (720 ILCS 5/11-1.20(a)(3) (West 2012)). Defendant appeals, arguing (1) his sentence was excessive; and (2) fines improperly imposed by the circuit clerk should be vacated. The State argues defendant is not entitled to any *per diem* sentencing credit. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In January 2014, the State charged defendant with three counts of criminal sexual assault. 720 ILCS 5/11-1.20(a)(3) (West 2012). Defendant entered an open guilty plea to count I. Counts II and III were dismissed as part of a plea agreement.

¶ 5 At the plea hearing in February 2014, the State provided the following factual basis. Defendant began sexually assaulting his stepdaughter, E.C., when she was 16 years old. The abuse took place over a one-year period. According to a statement by E.C., the sexual assaults occurred "like every day" in the family residence and in defendant's van. During an interview with several officers, defendant admitted he had sexual intercourse with E.C. on two occasions. He justified the assaults by claiming that E.C. was trading sexual favors in exchange for him paying off her financial debt.

¶ 6 Prior to accepting defendant's guilty plea, the trial court admonished defendant of his rights and informed him that the offense of criminal sexual assault carried with it a possible prison sentence of 4 to 15 years. 720 ILCS 5/11-1.20(b)(1) (West 2012); 730 ILCS 5/5-4.5-30(a) (West 2012).

¶ 7 In June 2014, the trial court held a sentencing hearing. Defense counsel recommended a prison sentence of four or five years. In support of this recommendation, counsel emphasized defendant was 58 years old at the time of sentencing, had successfully completed treatment for substance abuse, and was in poor health.

¶ 8 The State recommended a 15-year prison sentence. The State noted defendant's extensive criminal record dating back to 1978, which included prior convictions for burglary, domestic assault, disorderly conduct, and possession of drug paraphernalia. Additionally, the State presented the testimony of Boonville, Missouri, police officer Eric Moss, who arrested

defendant in 2008 for sexually assaulting his then 25-year-old biological daughter, C.W, in Missouri. Although criminal charges were filed, they were later dropped because C.W. was concerned that defendant would commit suicide. Moss explained the circumstances surrounding the alleged assault, stating that defendant begged C.W. to have sex with him, she refused, and defendant began choking her, saying, "I'm going to kill you." Moss confirmed C.W. had a "mark on her neck that would have been consistent with some type of struggle." Moss described C.W. as "despondent" when he spoke with her. He explained that she "went down to the river to try to drown herself, but her uncle had stopped her." Defendant admitted to Moss that he had sexual intercourse with C.W. on multiple occasions.

¶ 9 The trial court sentenced defendant to 15 years' imprisonment. The court explained it had considered the presentence investigation report; the nature and circumstances of the offense; the evidence and applicable factors in aggravation and mitigation; the testimony of Officer Moss; the recommendations of counsel; and defendant's character, history, and rehabilitative potential. In imposing defendant's sentence, the court stated, in part, as follows:

> "This is a 58-year-old, twice-convicted felon, who justifies his acts in what amounts to having his 17-year-old stepdaughter prostitute herself and service him so that she can pay off a loan. And in his own mind that's justification.
>
> * * *
>
> [Defendant] blamed the victim *** for why he was even facing the sentenc[e].

This reflects a complete lack of any insight, or even more strikingly, any sense of remorse. He's shifting the responsibility once again to the victim, and I would note that he reflects a sense of sexual entitlement, as if he's entitled to assault [C.W.] and [E.C.] because that is his right. And that's an attitude that makes him especially dangerous. It makes him dangerous of being a recidivist, of repeating his behavior. It certainly makes deterrence for this individual a compelling factor, and the protection of the public has to be the most compelling factor dictating a sentence here."

¶ 10 At the conclusion of the June 2, 2014, sentencing hearing, the trial court imposed a $200 sexual assault fine, a $250 deoxyribonucleic acid fee, and a Violent Crimes Victims Assistance Act fine, and it ordered a sentence credit of $695 toward any fines based on 139 days' incarceration previously served. In a written supplemental sentencing order, the court ordered additional fines and fees.

¶ 11 On July 2, 2014, defendant *pro se* mailed a "motion for reduction of sentence." On July 9, 2014 the trial court appointed counsel and allowed leave to file an amended motion. In October 2014, defendant's attorney filed a "motion to withdraw guilty plea or reconsider sentence." In the motion, counsel alleged various sentencing errors, including the trial court's undue emphasis on defendant's prior burglary and domestic violence convictions, as well as its failure to take into account his "advanced age." Additionally, defendant claimed that his guilty plea was not knowing, intelligent, or voluntary due to a hearing impairment. In November 2014, the court denied defendant's motion.

¶ 12 This appeal followed.

¶ 13 II. ANALYSIS

¶ 14 Defendant argues on appeal that (1) his sentence was excessive; and (2) fines improperly imposed by the circuit clerk should be vacated. The State argues defendant is not entitled to any *per diem* sentencing credit.

¶ 15 A. Sentencing

¶ 16 Defendant was sentenced to 15 years' imprisonment for one count of criminal sexual assault. 720 ILCS 5/11-1.20(a)(3) (West 2012). The offense, a Class 1 felony, carried with it a possible sentence of 4 to 15 years. 720 ILCS 5/11-1.20(b)(1) (West 2012); 730 ILCS 5/5-4.5-30(a) (West 2012). Defendant argues that the trial court discounted applicable mitigating factors, and as to some of them, "used them as aggravating factors." Specifically, defendant claims the court placed too little weight on his physical infirmities and "advanced age," and it considered his receipt of disability benefits and substance abuse as evidence in aggravation. Defendant also argues that the court placed too much emphasis on the dismissed charges in the instant case, the alleged sexual assault of his biological daughter, and his "lifestyle choices" that included having "four children with three different women."

¶ 17 The State contends, and defendant appears to concede, that he forfeited most of his issues on appeal by failing to raise them in a motion to reconsider. Indeed, we find the only issue properly preserved is the issue that the trial court failed to give sufficient weight to defendant's age. Defendant claims, however, that we may consider the other sentencing issues under the plain-error doctrine. A reviewing court may consider an unpreserved error if the alleged error was clear or obvious and (1) the evidence was closely balanced or (2) the error was so serious defendant was denied a fair hearing. Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967); *People v. Hillier*, 237 Ill. 2d 539, 545, 931 N.E.2d 1184, 1187 (2010). Defendant bears the burden of

persuasion under both prongs of the plain-error analysis. *Id.* In this case, defendant has failed to establish the trial court committed any sentencing error.

¶ 18 Defendant's first contention is the trial court failed to properly consider his "advanced age" and physical infirmities as factors in mitigation. See 730 ILCS 5/5-5-3.1(a)(12) (West 2012) ("The imprisonment of the defendant would endanger his or her medical condition."). We need not dwell on his first contention as 58 years is certainly not an "advanced age." Regarding defendant's claim the trial court gave short shrift to his physical infirmities, which included arthritis and diabetes, we agree with the State that the court specifically considered and rejected them as significant mitigating evidence. During the sentencing hearing, the trial court stated:

> "In reviewing his physical disabilities I'm compelled to note that none of [his] physical infirmities prevented him from having sex with his teen-age [step]daughter in this case, or *** his [biological] daughter. In fact he repeatedly molested [E.C.], not only in the bedroom and the kitchen, but a van.
>
> So I would say that certainly whatever physical limitations he has, they are not such that they in any way stop[ped] him from the athletics and the physical dexterity that would be required to molest his teen-age stepdaughter in a van. So I give them less weight."

¶ 19 On appeal, it is not our duty to reweigh sentencing factors. *People v. Alexander*, 239 Ill. 2d 205, 214, 940 N.E.2d 1062, 1067 (2010). We find that the trial court in this case properly considered defendant's age and physical infirmities.

¶ 20 Defendant next argues that the trial court did not consider his substance abuse as a factor in mitigation. At the sentencing hearing, the court stated that defendant "is an individual

who describes using cannabis off and on for 40 years, and using cocaine, or engaging in cocaine use daily, despite several interventions and opportunities for both outpatient and residential treatment." Defendant fails to explain why his past substance abuse and failed treatment should be considered as mitigating evidence. Moreover, in light of the above quote, it appears the trial court did consider defendant's substance abuse. We find no error in the court's comments.

¶ 21 Defendant further argues that the trial court placed too much weight on his years of unemployment and his "lifestyle" choices, which included having "four children with three different women." The comments defendant complains about were made during the court's review of the presentence investigation report during the sentencing hearing. The court commented as follows: "[A]nd in reviewing his history, he has four children with three different women. All the children are adults. He was ordered to pay child support. He, himself has been unemployed since 1989 or '90. He's been on disability since 2000. There was no reason he supplied for why he has not worked over that ten-year period." Contrary to defendant's assertions, it appears the court was simply noting these facts in passing as it read from the report, and nothing reflects it considered them as evidence in aggravation. Thus, we find defendant's claim of error is without merit.

¶ 22 We also find no merit in defendant's claim the trial court erred in considering defendant's alleged sexual assault of his biological daughter, C.W., or the dismissed charges relating to E.C. A sentencing court may consider a defendant's past crimes, including crimes for which the defendant has not been prosecuted. *People v. Jackson*, 149 Ill. 2d 540, 548, 599 N.E.2d 926, 930 (1992). The underlying facts of the previous crime may be considered during a sentencing hearing where the burden of proof is lower. *Jackson*, 149 Ill. 2d at 550, 599 N.E.2d at 930.

¶ 23 The entirety of the trial court's commentary relating to defendant's other alleged sexual assaults is as follows:

> "One critical focus for this court is the type of *** offense and the danger to the community, and that has to be a compelling factor here. Certainly I've measured all of the factors in mitigation—I find very few—and [as for] the factors in aggravation, *** I look to the nature of the underlying offense he's being sentenced for and his attitude. The factual basis was that he admitted to engaging in sexual intercourse with a 17-year-old stepdaughter on two occasions. She [made] report[s] on multiple occasions. He admitted to the two in his van and explained that he was letting her work off a court fine he had paid for her.
>
> This is a 58-year-old, twice convicted felon, who justifies his acts in what amounts to having his 17-year-old stepdaughter prostitute herself and service him so that she can pay off a loan. And in his own mind[,] that's justification.
>
> When you then put that against the evidence I've heard from *** [Officer] Moss *** today, *** we see a frightening similarity to the acts he engaged in March 2008 with another child. This was his biological daughter who is now [*sic*] 25 years of age. She reported that he had forcibly choked her and attempted to rape her, and it's apparent from his own explanation, by his own statement to *** Moss, he saw this as regular sexual intercourse with his adult daughter that was completely justified. He made that statement without any regret. It was almost defiant. Why would I need to rape her, in essence, because I had her every day at my command? He views that incest as his right.
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> That is a frightening specter of an individual who should not be walking

> around in our community. As if that twisted mindset wasn't disturbing enough, during the preparation of this presentence report[,] he then makes volunteered statements to Officer Jessup, who [was] preparing the report, with some umbrage that he's been *** sentenced for this because now he didn't feel he was responsible for anything. He blamed the victim, and blamed it as her responsibility for why he was even facing the sentencing.
>
> This reflects a complete lack of any insight, or even more strikingly, any sense of remorse. He's shifting the responsibility once again to the victim, and I would note that he reflects a sense of sexual entitlement, as if he's entitled to assault his daughter and his stepdaughter because that is his right. And that's an attitude that makes him especially dangerous. It makes him dangerous of being a recidivist, of repeating his behavior. It certainly makes deterrence for this individual a compelling factor, and the protection of the public has to be the most compelling factor dictating a sentence here."

¶ 24 We find no error in the trial court's comments. They fairly characterize defendant's reported conduct, as well as his lack of remorse or rehabilitative potential. The trial court made clear it had determined the maximum sentence was necessary for the protection of the public given defendant's recidivism and attitude towards his victims, as well as for the sake of deterrence. The trial court's explanation for handing down the maximum allowable sentence of 15 years was cogent and amply supported by the record. We do not find the sentence was excessive. The trial court did not commit error, let alone plain error.

¶ 25 In the alternative, defendant argues he received ineffective assistance of counsel in light of counsel's failure to raise the above-identified sentencing issues in a postsentencing

motion. *Strickland v. Washington*, 466 U.S. 668, 685-86, (1984); *People v. Evans*, 186 Ill. 2d 83, 93, 708 N.E.2d 1158, 1163 (1999) (To establish ineffective assistance of counsel, defendant must establish that his attorney's performance fell below an objective standard of reasonableness and, but for that deficient performance, the result of the proceeding would have been different.). As discussed above, we find the trial court committed no sentencing error. Accordingly, any claim that counsel was ineffective for failing to raise meritless sentencing issues is, itself, without merit.

¶ 26 B. Fines, Fees, and Costs

¶ 27 Defendant argues any fines improperly imposed by the circuit clerk should be vacated. However, in his brief on appeal, defendant fails to specifically identify the assessments he claims are fines improperly imposed by the circuit clerk. Pursuant to supreme court rules, an appellant's brief must contain an argument section with "the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008). A reviewing court "is not a repository into which an appellant may foist the burden of argument and research; it is neither the function nor the obligation of this court to act as an advocate or search the record for error." *Obert v. Saville*, 253 Ill. App. 3d 677, 682, 624 N.E.2d 928, 931 (1993). The failure to comply with relevant supreme court rules results in forfeiture of an argument on appeal. *People v. Snow*, 2012 IL App (4th) 110415, ¶ 11, 964 N.E.2d 1139.

¶ 28 Here, defendant asserts that "all of the fines listed on the print-out from the clerk's computer that were not imposed by the judge were improperly imposed by the clerk and should be vacated." Although defendant identifies fines that were "*not* the subject of this argument" (emphasis added), he fails to specifically identify the fines that he believes should be

vacated on appeal. Without such specificity, we are left to wonder *which* of the assessments contained in the circuit clerk's computer print-out, if any, are in fact fines that were improperly imposed by the circuit clerk and not the trial court. This leaves us unable to address defendant's argument.

¶ 29 C. Sentencing Credit

¶ 30 Finally, the State argues defendant was not entitled to any *per diem* sentencing credit because section 110-14(b) of the Code of Criminal Procedure of 1963 provides that the *per diem* credit "does not apply to a person incarcerated for sexual assault." 725 ILCS 5/110-14(b) (West 2012). See also 725 ILCS 5/110-14(a) (West 2012) ("Any person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of $5 for each day so incarcerated upon application of the defendant.").

¶ 31 The trial court, in its oral pronouncement of the sentence, found defendant was entitled to credit for 139 days previously served in custody. Also, at the sentencing hearing, the State and defense counsel stipulated to a $695 credit against creditable fines and fees, which the court then ordered. The State now asks us to direct that a modified sentencing judgment be entered to remove the sentencing credit because credit does not apply to a person, such as defendant, who is incarcerated for sexual assault. 725 ILCS 5/110-14(b) (West 2012). This we cannot do. Given that the State did not file a cross-appeal, it may not now attack the judgment below with a view either to enlarge its own rights or to lessen the rights of defendant. See *People v. Castleberry*, 2015 IL 116916, ¶22-26, 43 N.E.3d 932 ("Although the appellate court may not, under our rules, address a request by the State to increase a criminal sentence which is illegally low, the State may, in appropriate circumstances, seek relief from this court via the writ of

mandamus.”).

¶ 32 III. CONCLUSION

¶ 33 For the reasons stated, we affirm the judgment of the trial court. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 34 Affirmed.