2018 IL App (3d) 170540-U

Order filed December 11, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
	)	Will County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-17-0540
v.	)	Circuit No. 15-CF-2394
	)	
RAUL E. JACOBS,	)	Honorable
	)	Carla Alessio-Policandriotes,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Presiding Justice Carter and Justice Wright concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The circuit court did not consider improper factors when sentencing the defendant. (2) The defendant's sentence did not violate the eighth amendment of the United States Constitution. (3) The defendant's sentence was not excessive.

¶ 2 The defendant, Raul E. Jacobs, appeals his sentence of seven years' imprisonment, arguing (1) the court considered improper aggravating factors, (2) his sentence violated the eighth amendment of the United States Constitution, and (3) his sentence was excessive.

¶ 3 FACTS

¶ 4 On October 16, 2016, the defendant entered a blind plea to one count of theft over $100,000. 720 ILCS 5/16-1(a)(2), (b)(6) (West 2014). The parties agreed that $335,962.91 was the amount of restitution owed to the victim, Judy Delbovo, of which the defendant had already paid $172,000. As a factual basis, the State said that if the case proceeded to trial, they would show that the defendant was working in the financial planning business in December 2013. The defendant went to the church where Delbovo's sister, Norberta, was a member.

> "[Delbovo] had suffered multiple strokes and was unable to manage her own affairs. And so *** [Delbovo] and her representative then sought out and came to an agreement with the defendant in which he would take over her financial planning and would act in her best interests."

Delbovo's sister, Lucy Harper, contacted the Illinois Secretary of State's security department when she became concerned about money missing from Delbovo's accounts. A representative from the Secretary of State's security department was present at Harper's residence when a phone conversation occurred between Harper and the defendant

> "in which the defendant admitted initially to stealing over $80,000 since the time that he became [Delbovo's] planner back in 2013. He had also indicated that he had forged some signatures of [Delbovo] in order to access funds. The concerns had been over some Chase Bank accounts. [The defendant] indicated that he had lied about closing those accounts and that the money was in fact taken out of those accounts for him."

Based on the investigation, Harper agreed to wear an overhear device and met the defendant at a Starbucks in October 2015. The defendant again admitted that he had taken money. He arrived at the Starbucks with $52,000 to give Harper and attempted to formulate a payment agreement.

After the meeting, the defendant proceeded to the police department where he gave a full statement. The State further said that they subpoenaed multiple bank accounts and would be able to show, if the case proceeded to trial, "exactly how the money went from accounts that were for the use and benefit of [Delbovo] and directly ended up being transferred over to accounts that were in the defendant's sole power and control, and that he used them for his own personal use and benefit." The court found a sufficient factual basis to accept the plea. The court further found the plea was freely and voluntarily made.

¶ 5 The matter proceeded to a sentencing hearing on February 8, 2017, six months after the defendant had pled guilty. The parties stated that it was a probational offense or 4 to 15 years' imprisonment in the Illinois Department of Corrections (DOC). The defendant had made no further payments towards the restitution. The court found that $1229 in cash had been confiscated by the police and ordered that it be tendered to Delbovo's power of attorney (POA).

¶ 6 Harper testified for the State that she was Delbovo's sister and became her POA for her "finances and well-being" in 2013 because of the decrease in Delbovo's physical and mental capabilities after having her strokes. She testified that she met with the defendant at a Starbucks while wearing an overhear device, and he admitted to taking around $80,000 from Delbovo. She asked him to "come clean" and "put it all out on the table," but the defendant "swore" that $80,000 was all the money he had taken. However, through the investigation, she learned he had actually taken about $335,000.

¶ 7 Harper read a victim impact statement and said that Delbovo had multiple strokes, the first of which happened when she was 56 years old. "[S]he suffered cognitive impairment from the first stroke and was unable to function in the capacity necessary to perform her high-powered job as a vice president of commercial lending for BMO Harris Bank." Delbovo then retired.

During the time between the first and second strokes, Harper and the rest of Delbovo's family "discovered [Delbovo's] finances were in shambles," and she did not have money to pay her bills. Harper and Norberta were directed by friends to the defendant, who went to the same church as Norberta. The defendant met with Delbovo and her son and assured them "that he would take care of her finances." The defendant suggested that they open a Chase Bank account to keep separate from Delbovo's BMO Harris Bank account and asked that he be made a signer on the Chase account to pay Delbovo's bills. Harper stated that the defendant forged Delbovo's name and cashed in her annuity at a deficit. Harper stated that they considered the defendant a member of their family.

¶ 8 Harper stated that Delbovo's health continued to deteriorate and she recently had her fifth stroke and a heart attack. She was going through heart failure and wore an external defibrillator. Her family was determining whether she should have an internal defibrillator implanted. She lived in an assisted living facility, needed 24-hour care, received intravenous infusions a couple days a week, and was taking around 25 medications per day. Delbovo was 61 years old and the money the defendant stole would go toward her long-term care. After the defendant took the money, the amount remaining in Delbovo's account was approximately $1.1 million.

¶ 9 Michael Aubin testified that he was a special agent with the Illinois Securities Department. He became involved in the defendant's case in October 2015, subpoenaed various financial records, and determined that the defendant took $335,962.91 from Delbovo, which did not include any penalties for closing out any accounts early. Aubin stated the crime was perpetrated through "numerous transactions" between 2013 and 2015. He analyzed several purchases that the defendant made with the money. In October 2014, the defendant used $30,000 of Delbovo's money to buy a BMW and less than six months later, in February 2014, spent

$25,000 of the money at a Porsche dealership. In March 2015, the defendant purchased a watch from Abrams Jewelry for $10,400. Aubin said the financial records also showed the defendant made several ATM withdrawals and used some of the money to repay his personal credit cards. Also around March 2015, the defendant closed Delbovo's annuity of approximately $160,000 to $180,000. Aubin believed the account was closed with a 5% penalty. Aubin met with the defendant during the investigation and the defendant admitted to taking $305,000. The defendant cooperated with Aubin and provided Aubin with his accounting of what he had taken. Aubin stated that, based on the documents that he saw, he did not see any fraudulent activity with any of the defendant's other clients. The State rested.

¶ 10 Grant Vazquez testified for the defense that he was employed at Rob Rose and Associates and had been the defendant's direct supervisor since November 2015. He said that since the defendant had been working for him he had received three promotions and his anticipated salary for 2017 was $100,000 plus bonuses. Vazquez stated that the defendant would remain employed and that they "stand right behind him." Vazquez said he did not know how much money the defendant had stolen or that he had done so "from a person with physical and mental disabilities" until the sentencing hearing, but that did not change his opinion of the defendant.

¶ 11 Jacques Jacobs testified that he was the defendant's brother-in-law[1] and was a pastor. He said that the defendant has responded to the situation "with humility." Jacques stated that the defendant was a good father, had a supportive wife, and was trusted by many. He stated that this was an "isolated situation."

¶ 12 Gene Norlander stated that he met the defendant at church approximately five years prior and he and his daughter had both been clients of the defendant for about a year and a half until

[1]Jacques's wife was the defendant's wife's sister. The fact that Jacques and the defendant have the same last name is a coincidence.

the defendant started working for a different company. Norlander stated that the defendant never showed any type of misappropriation of funds.

¶ 13 Jamie Jacobs testified that she was the defendant's wife of eight years and they had two children together, ages four and nine months. Jamie stated that the defendant should not go to prison because his children relied on him, and he was the only provider in their household. She stated that she was an elementary school teacher, but had been a stay-at-home mom for the past two years. Her teaching certificate was still valid. Jamie stated that the crime was "totally out of [the defendant's] character." She stated that she had a retirement account, but they had to withdraw the money for restitution. The account had $33,000 in it, but after the penalties, they were only able to retrieve approximately $20,000 to $21,000. They purchased their house for $255,000 in December 2013 and the balance owed was over $200,000. She said she did not need fancy vehicles or jewelry to be happy, and she did not tell the defendant to steal the money. She did not know where he had gotten the money to purchase the BMW, but told him that she would not ride in it and that he should trade it in.

¶ 14 Miriam Tabor testified that she was the defendant's mother. Tabor said that she and the defendant's father were missionaries and had raised him in that environment so she was shocked to find out what he had done. She said that she knew how remorseful the defendant was and that he was a good father.

¶ 15 The State asked the court to consider the following factors in aggravation from section 5-5-3.2(a) of the Unified Code of Corrections (Code) (730 ILCS 5/5-5-3.2(a) (West 2016)): (1) the defendant "utilized his professional reputation or position in the community to commit the offense," (2) the sentence was necessary to deter others, (3) the offense was committed against a person with a physical disability, (4) he held a position of trust over the victim, and (5) the

offense was committed against a person who was elderly or infirm. *Id.* § 5-5-3.2(a)(6), (7), (9), (14), (23). The State asked that the court sentence the defendant to a term of imprisonment, not the minimum based on the seriousness of the offense, but not the maximum since the defendant "has made some attempts at trying to make [the victim] whole."

¶ 16 Defense counsel stated that it did not believe that some of the aggravating factors applied because the defendant "was dealing with Lucy Harper and their family" and the factors apply "in situations where you have an individual clearly taking advantage of a person's disabled state of mind." Counsel argued that in mitigation, the court should consider that the defendant (1) was 39 years old without any criminal history, (2) had been a financial adviser for years without any evidence that he had "misguided somebody, misappropriated any funds or whatever," (3) was remorseful, (4) had made substantial restitution, (5) would not commit the offense again since he no longer had a license to be involved in financial matters, (6) had a wife and children who needed him, (7) had a job that would allow him to pay back the remaining restitution, and (8) admitted what he had done and cooperated with the investigation. Defense counsel asked that the defendant be given probation and ordered to pay restitution out of each of his paychecks.

¶ 17 The defendant made a statement in allocution, stating that when he met Delbovo and her family he "knew [he] had to help her." He said he did not go into the business to steal money, but one day he was looking at his own Chase account and noticed that Delbovo's account was linked to his. He first owed $5000 on a credit card and was waiting for a commission check so he transferred the money from Delbovo's account to pay his credit card and when he got his commission check, he did not replace the money in Delbovo's account. He said it just started "rolling from there." When he told Harper the amount he took was $80,000, he knew that it was more, but did not know the exact amount. Once he started checking into it, he realized how much

he owed. The defendant said Delbovo and her family were nice people, and he just wanted to apologize and pay back what he owed them. He asked that he be given probation, stating, "I don't want to create more victims of my kids as well or of my own wife."

¶ 18 The court said:

> "[T]he balance of the restitution is $163,962.91. Everyone already recognizes that is not the actual amount of loss of the victim here, that's just the dollar amount. She's not earned any interest or benefit from that money and probably based on the cashing out of that annuity she had tax consequences of it and no one is making her whole as to that, either.
>
> I have had an opportunity since June of 2001 of being one of the judges here in Will County, and in 2002 taking over a felony court call and most recently taking the assignment of the presiding judge of the felony division. I tell you that not to talk about a resume, but so that you know there's some history that I'm going to give you when I impose this sentence, okay. And the history is this.
>
> Each time that I have had an opportunity, and I truly mean it's an opportunity, it's a gift when someone's mother over the last 17 years, approximately 17 years has come to court and tells me more about their son than I could ever read in a presentence investigation, it's a gift. When I hear from someone's employer that they're a substantial value to their company and that this person is someone that they want to have remain as their employee, it's important to know that. It's important also to know about long-term relationships, spousal relationships, in-law relationships. It's important to know when someone does or does not support their children.

But can you imagine how many times I've heard it that the person standing before me should not go to prison because a mother loves him or a wife needs him or children will be less benefited in his absence. All of those things are true, they are absolutely true, and the people who come and testify are not the one who caused the problems. They're not the reasons why, they're just—it's the crime.

At sentencing we look past just what is contained in a presentence investigation report. The Court must and I have considered everything that's in there. You have to consider everything that's in the statements made before the Court, including victim impact statements. Look to see if there is some consistency here, not just on this case but all cases.

When someone is charged with a Class 1 Felony having stolen over a number of years an amount in excess of $335,000, and each time they dipped into that account it was another felony. Each time it was another felony, each time. We can't list how many felonies that [the defendant] has committed. Because of the manner in which the State has elected to charge this case, it's one felony. So someone can stand before me and say I've got no prior criminal history, Judge. But I've got three years of so many felonies that it adds up to $335,000.

You know what I hear? I hear people who are 18, 20, 22 years old, they go into Meijer and they steal. They go to Walmart and they steal and the State asks me to send them to prison because you see, look it, they took more liquor. And they go because they get charged on each and every offense. Or how about when someone finds someone who is vulnerable in an alley and knocks them upside the

head and steals their wallet and, I don't know, maybe gets a hundred bucks and an ATM card everyone says oh, my God, that's a crime of violence. You have to save us, Judge, send this guy to prison. And you see the headlines, a crime of violence. You know, when there's family relationships, when there's employer/employee relationships, when you're in a position of trust. I got to tell you, I really believe that the family of the victim would rather have been standing in the alley and getting knocked upside the head by a stranger. It wouldn't have hurt as bad. You know, once you call somebody aunt, you can't disregard what goes with that.

And I appreciate that the nature of this charge is course of conduct and that [the defendant] was admonished that this in fact was a probational offense, that he was going to be asking for probation. That there had to be some indication that if I awarded a sentence of probation it would not deprecate the seriousness of the offense. It would not in any way mock what I have to do on all the cases that I have to deal with. [The defendant] used his professional reputation to commit these offenses. He was certainly in a position of trust. That he may not have had very personal day to day contact with [Delbovo] based on her own health and disabilities, but we cannot ignore the fact that the underlying victim here is in fact a disabled adult, and I won't ignore that. I cannot.

I do know that he has, according to the statute, no criminal history. Because he was good at it. He was good at it. He had a victim that was very vulnerable. I do note that he has paid the sum of $172,000 in restitution so far. And I know over the course of this case I have repeatedly wondered why in the

world aren't the companies making this right. If he held a license, he was insured. He was outside the scope of his responsibilities. Somebody should be paying the victim to make her whole in addition to [the defendant], just based on their bonding. Just based on the fact if it's a forgery, they can't accept it. Who is the notary that it was signed in front of and where's that notary and why isn't that notary being held accountable? You have so many people here who are failing to hold up their end of the bargain, and that's when it's hard to forgive, quite honestly.

But I'm not going to do this. I'm not going to give [the defendant] a sentence to probation when he lives in a house that's got to be at least, at least $255,000 when he owes somebody 163. It's a mockery. If he bought the house in Mokena when the market was down in 2013, I'm not an expert but I've lived in this community all my life and I know that house is worth thousands of dollars more than it was at the time that he bought it. And to suggest that he can be on probation when he owns a house like that, it is then putting me in a position to make an absolute finding that it does not match the other consistency that we have regarding how we deal with felony crimes in our community.

In addition, I am very glad that he has a job, that he's making substantial money. But a man who doesn't want to go to prison doesn't live in a house like that, doesn't own two cars in probably a two and a half car garage, doesn't make every potential payment possible before today's date. And I'll be honest with you, and doesn't have the luxury of having—if in fact Mrs. Jacobs and him had a commitment at some point that she was going to be a stay-at-home mom, I

commend them in that. But people can be stay-at-home moms when they can afford one spouse to work and the other one to stay home. They can't afford that. They simply cannot. Not for him to stay out of prison. That's why we have child care and that's why women and men work together in raising their children. If they choose not to do that, that's their choice. But I'm not going to have a stay-at-home mom and a guy working living in that kind of house with the two cars in the garage and give somebody probation when they owe someone $163,000. It doesn't make sense to me.

The sentence I'm imposing is ten years in the [DOC], and I'm going to stay that mittimus for six months. And I have a feeling that in six months there's no longer going to be owed $163,000, because I can assure everybody here on your motion that you're going to file, counsel, for me to reconsider, it's going to substantially address the issues I have. People who want probation because they have the support of their community, they have the support of a boss, they have the support of their family, then they don't then live in a manner that stolen money got for them. It's not possible. If they choose to do that, then they live in the [DOC]."

The court then stated:

"I have considered everything regarding the factors that are contained in this Indictment, what [the defendant] pled to, the lack of criminal history; the factors in each of them, the factors in mitigation and aggravation. The ten-year sentence is appropriate with such an outstanding balance of restitution. Should he choose to satisfy that balance or bring something in a motion to reconsider that shows me

otherwise, then I will reconsider his sentence. But he's never going to live in a house that he's living in now without the victim being made more substantially at whole."

¶ 19 A hearing on the defendant's motion to reconsider sentence was heard on August 17, 2017. The defendant presented two restitution checks to the court totaling $50,225.26. The defendant also stated that his house was in foreclosure. The defendant stated that the current market value of his house was $265,000, the balance of the mortgage was approximately $236,000, and he was behind on payments by about $18,000. The court stated the defendant probably had around $25,000 in equity in the house after the costs of the sale that he could put toward restitution. The State said there was a comparative market analysis that showed a suggested list price of $259,000, which then listed $12,500 in real estate commission, $3250 in title and attorney fees, $2800 in property tax credits, and $450 for a survey. With all the sale costs, the State said the net to the seller would be $240,000 and the defendant's mortgage was about $237,000. Defense counsel argued that the defendant has been doing his part to make Delbovo whole. Counsel asked that the court hold the motion for another 45 days in abeyance to see what other restitution the defendant could pay. The defendant's family had also formulated a payment plan. The State asked that the mittimus be executed and stated that Delbovo's family agreed with that recommendation.

¶ 20 The court said:

"[A]t our sentencing hearing in February this year, this being August 17, 2017, I made specific findings including that what was before the Court was a Class 1 felony, that you were a probationable offense, but you were looking at four to 15 years in the [DOC], that I found substantial aggravating factors to affect why I

thought this should not be a probation case, that I thought it did not reflect the serious nature of the charge, the nature of the disability of your victim, and how long of a period of time that you committed your fraud upon her. And that, to me, were all substantial reasons why ten years in the [DOC] was the appropriate sentence.

I did consider at that time factors in mitigation, the fact that you had a lack of criminal history, that you are a married man with two small children, that you had family support, and you had the ability to make substantial changes in your lifestyle in order to attempt to make your victim whole.

Today, what is being presented is the $50,225.26. ***

* * *

There remains a substantial obligation in excess of $100,000. Every day the State appears before me on cases on a Class 4 or Class 3, Class 2 where someone steals Red Bulls from Walmart and asks me to put people in prison. And it happens. And they are married, and they have children, and we send people to prison whether they are married and have children or whatever because at some point the State says enough is enough. And what occurred here is that the State now has victims. They are in court and they have a right to be heard that have said enough is enough. They don't want more time for you to make things right. They don't want to have to be in this building again. They are willing, it appears to me, to give up me fighting for the other balance of $100,000 for them, and if that is their position, they have a right to be heard.

I do, however, believe it's important that I recognize that there has been a substantial additional payment and I previously imposed a sentence of ten years. You have made a substantial payment against the 163 with what I'm calculating.

Your motion to reconsider the sentence is granted. I now impose seven years in the [DOC] giving you credit for the additional amount that you have now paid against the 163. So the mittimus issues."

¶ 21 ANALYSIS

¶ 22 On appeal, the defendant raises a myriad of arguments challenging his sentence. First, the defendant argues that the court considered improper factors when sentencing the defendant. Specifically, the defendant argues the court: (1) considered Delbovo's disability as an aggravating factor, (2) considered the trust relationship as an aggravating factor, (3) punished the defendant for a crime of violence, (4) punished the defendant for multiple felonies it believed he had committed, (5) punished the defendant for his wife's conduct, and (6) considered the theft itself as an aggravating factor. Second, the defendant argues that his sentence violated the eighth amendment of the United States Constitution because it was disproportionate to the seriousness of the offense (U.S. Const., amend. VIII). Lastly, the defendant argues that his sentence was excessive. We will consider each of these arguments in turn.

¶ 23 I. Improper Factors

¶ 24 The circuit court has broad discretion in imposing a defendant's sentence. *People v. Jones*, 168 Ill. 2d 367, 373 (1995). There is a strong presumption that the circuit court based its sentencing determination on proper legal reasoning, and we review the circuit court's sentencing decision with great deference. *People v. Dowding*, 388 Ill. App. 3d 936, 942-43 (2009). However, we cannot affirm a sentence based on an improper factor, unless we "determine 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." *People v. Heider*, 231 Ill. 2d 1, 21 (2008). We presume the court's sentence is valid so long as it neither ignores relevant factors in mitigation nor considers improper factors in aggravation. *People v. Watt*, 2013 IL App (2d) 120183, ¶ 49. The issue of whether a court relied on an improper factor in imposing a sentence presents a question of law that we review *de novo*. *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 8.

¶ 25 1. Disability

¶ 26 The defendant states that the circuit court should not have considered two aggravating factors related to Delbovo's disability: (1) "the defendant committed the offense against a person who has a physical disability or such person's property" (730 ILCS 5/5-5-3.2(a)(9) (West 2014)), and (2) "the defendant committed the offense against a person who was elderly or infirm or who was a person with a disability by taking advantage of a family or fiduciary relationship with the elderly or infirm person or person with a disability" (*id.* § 5-5-3.2(a)(23)). Specifically, the defendant argues that (1) there was no medical evidence submitted at sentencing, but instead, only a layperson (Harper) testified regarding Delbovo's disability, and (2) Delbovo's disability should not have been considered because the defendant primarily communicated with Harper, who was acting as Delbovo's POA. Moreover, the defendant argues that the consideration of both factors based on her disability resulted in an impermissible double enhancement of his sentence.

¶ 27 At the outset, we note that the defendant does not argue that Delbovo's maladies disqualify her as the type of victim discussed in the above-mentioned aggravating factors. *Supra* ¶ 26. Stated another way, the defendant does not argue that Delbovo is not "a person who has a

physical disability" or "a person who was elderly or infirm or who was a person with a disability." 730 ILCS 5/5-5-3.2(a)(9), (23) (West 2016)). "Points not argued are forfeited." Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018). Therefore, we will assume that Delbovo is the type of victim contemplated by both aggravating factors. Moreover, we note that the court did not explicitly state that it considered either of these aggravating factors when sentencing the defendant.

¶ 28 "It is well settled that the evidentiary standards used in sentencing are much less rigid than those used in the guilt-innocence phase of trial." *People v. Rose*, 384 Ill. App. 3d 937, 940 (2008) (citing *People v. Jackson*, 149 Ill. 2d 540, 547 (1992)). "The source and type of information that the sentencing court may consider is virtually without bounds. *People v. La Pointe*, 88 Ill. 2d 482, 496 (1981). For evidence to be admissible in a sentencing hearing, it is required only to be reliable and relevant, a determination that is within the trial court's discretion." *Rose*, 384 Ill. App. 3d at 941.

¶ 29 Here, Harper testified at sentencing about Delbovo's medical issues and need for care in both her victim impact statement and through direct examination by the State. The defendant had the opportunity to cross-examine her regarding her testimony, though he did not ask any questions regarding Delbovo's medical issues. It was within the court's discretion to determine whether Harper's testimony was reliable and relevant. As Harper was Delbovo's POA and had personal knowledge of Delbovo's health issues, it was not an abuse of discretion for the court to consider her reliable and to consider the nature of Delbovo's disability.

¶ 30 In coming to this conclusion, we reject the defendant's reliance on *People v. Bailey*, 409 Ill. App. 3d 574, 576 (2011), for the proposition that expert medical testimony or records is

required to consider the nature of a disability at sentencing. While in *Bailey* a doctor did testify regarding the victim's medical conditions, it is not required.

¶ 31 Moreover, the fact that the defendant primarily communicated with Harper during the period in which he stole the money from Delbovo is of no consequence. The defendant cites no case law for this proposition. He still took the money from Delbovo knowing that she was disabled through meeting her and by the very fact that she had a POA.

¶ 32 We further reject the defendant's contention that the application of both aggravating factors resulted in a double enhancement of his sentence. First, we note that the defendant cites no law for the proposition that this amounts to a double enhancement. Second, this did not amount to a double enhancement. "A double enhancement occurs when either (1) a single factor is used both as an element of an offense and as a basis for imposing a harsher sentence than might otherwise have been imposed, or (2) the same factor is used twice to elevate the severity of the offense itself." *People v. Guevara*, 216 Ill. 2d 533, 545 (2005). Here, the disability was not an element of the offense of theft (720 ILCS 5/16-1(a)(2), (b)(6) (West 2014)) nor was it used to actually elevate the severity of the offense. Third, it is clear that the legislature intended for both factors to be considered where they applied. See *Guevara*, 216 Ill. 2d at 545-46 (there is no prohibition against double enhancement where the legislature clearly intends for such). Section 5-5-3.2(a) of the Code specifically states, "The following factors *shall* be accorded weight in favor of imposing a term of imprisonment or may be considered by the court as reasons to impose a more severe sentence ***." (Emphasis added.) 730 ILCS 5/5-5-3.2(a) (West 2014). Thus, when the court decided whether to sentence the defendant to probation or a term of imprisonment, it was required to give weight to both factors.

¶ 33 2. Trust

¶ 34 The defendant next contends that the court considered three factors based on the defendant's violation of a trust relationship with Delbovo: (1) "the defendant utilized his professional reputation or position in the community to commit the offense, or to afford him an easier means of committing it" (*id.* § 5-5-3.2(a)(6)), (2) "the sentence is necessary to deter others from committing the same crime" (*id.* § 5-5-3.2(a)(7)), and (3) that the defendant held a position of trust or supervision in relation to a victim under 18 years of age (*id.* § 5-5-3.2(a)(14)). The defendant contends that the court should not have considered any of these factors and that consideration of all three resulted in an impermissible triple enhancement of the defendant's sentence.

¶ 35 First, the defendant contends that the court should not have considered that "the defendant utilized his professional reputation or position in the community to commit the offense, or to afford him an easier means of committing it" (*id.* § 5-5-3.2(a)(6)). Specifically, the defendant states that he "did not use his reputation to get hired by Harper intending to steal; but stole only after the bank mistakenly linked Delbovo's account to [the defendant's] credit card account, and he did not resist the temptation to steal." This is a distinction without a difference. Whether the defendant intended to steal when he was hired, he still used his professional relationship as Delbovo's financial planner to commit the theft. Therefore, the aggravating factor applied.

¶ 36 Second, the defendant contends that the court should not have considered that the sentence was necessary as deterrence. Specifically, the defendant says that the State argued for this factor "on the basis that the trust relationship was violated between [the defendant] and Delbovo; that [the defendant] may not have paid taxes for Delbovo; that Delbovo may have lost interest on the stolen money; that Delbovo endured pain and suffering from years of strokes, and

that time and resources were expended by the POA as a result of the crime." This argument is without merit. It does not matter why the State argued that this factor applied. It is certainly proper for the circuit court to find that the sentence was necessary to deter others from committing the same crime. *People v. Williams*, 223 Ill. App. 3d 692, 701 (1992).

¶ 37 Third, the defendant contends that the court should not have considered

> "the 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, teacher, scout leader, baby sitter, or day care worker, in relation to a victim under 18 years of age, and the defendant committed an offense in violation of Section 11-1.20, 11-1.30, 11-1.40, 11-1.50, 11-1.60, 11-6, 11-11, 11-14.4 except for an offense that involves keeping a place of juvenile prostitution, 11-15.1, 11-19.1, 11-19.2, 11-20.1, 11-20.1B, 11-20.3, 12-13, 12-14, 12-14.1, 12-15 or 12-16 of the Criminal Code of 1961 or the Criminal Code of 2012 against that victim" (730 ILCS 5/5-5-3.2(a)(14) (West 2014)).

We agree that this factor did not apply to the defendant's case as Delbovo was not under 18 years of age and theft was not one of the offenses listed. However, though the State argued that this factor applied, there is no indication in the record that the court actually considered this as a factor in aggravation. Nowhere in the record does the court mention such a factor. Moreover, "[T]he trial court is presumed to know the law and apply it properly." *People v. Howery*, 178 Ill. 2d 1, 32 (1997). Such presumption is only rebutted "when the record contains strong affirmative evidence to the contrary." *Id.* Here, such a presumption is not rebutted by the record.

¶ 38 In coming to this conclusion, we reject the defendant's reliance on *Abdelhadi*, 2012 IL App (2d) 111053, ¶ 11, as it is factually distinguishable. In *Abdelhadi*, the court recited the same improper factor that the State had argued. *Id.* Here, the court made no mention of the factor.

¶ 39 Fourth, the defendant's contention that the court's consideration of multiple factors based on the trust relationship resulted in an impermissible triple enhancement of the defendant's sentence is without merit. Of the three previously enumerated factors (*supra* ¶ 34) only the first was actually considered on the basis of the trust relationship. *Supra* ¶ 35. Moreover, as we stated above when the defendant made the same argument regarding Delbovo's disability, it was not an enhancement as the trust relationship was not an element of the offense of theft (720 ILCS 5/16-1(a)(2), (b)(6) (West 2014)) nor was it used to actually elevate the severity of the offense and it is clear that the legislature intended for both the professional relationship and deterrence factors to be considered where they applied. See *supra* ¶ 32.

¶ 40 3. Crime of Violence

¶ 41 The defendant argues that "[t]he trial court reasoned that [the defendant's] conduct was more harmful to the victim than had he stolen a lesser amount of money but committed violence in doing so; and therefore, it should impose a penalty as if he had actually committed a crime of violence." After reading the record we disagree with the defendant's assessment. The court did not "impose a penalty as if he had actually committed a crime of violence," but instead commented on the seriousness of the offense. "[T]he seriousness of an offense is considered the most important factor in determining a sentence." *People v. Jackson*, 2014 IL App (1st) 123258, ¶ 53. Here, the court simply noted that stealing this large amount of money from a disabled victim, whom they trusted was more serious of a crime than "when someone finds someone who

is vulnerable in an alley and knocks them upside the head and steals their wallet and *** maybe gets a hundred bucks and an ATM card."

¶ 42 In coming to this conclusion, we reject the defendant's reliance on *People v. Sharpe*, 216 Ill. 2d 481 (2005). *Sharpe* stands for the proposition that we may not compare the sentences for offenses with different elements when determining whether a sentence is constitutional under the proportionate penalties clause. *Id.* at 521. That is not what the court was doing here as it was neither comparing the sentences nor considering the constitutionality of the sentence under the proportionate penalties clause.

¶ 43 4. Punished for Multiple Felonies

¶ 44 The defendant next asserts that "[t]he trial court admitted it was sentencing [him] for multiple felonies." The court did not admit anything of the sort. Instead, the court stated:

> "When someone is charged with a Class 1 Felony having stolen over a number of years an amount in excess of $335,000, and each time they dipped into that account it was another felony. Each time it was another felony, each time. We can't list how many felonies that [the defendant] has committed. Because of the manner in which the State has elected to charge this case, it's one felony. So someone can stand before me and say I've got no prior criminal history, Judge. But I've got three years of so many felonies that it adds up to $335,000."

The court was stating that while the defendant pled guilty to only one offense, he had in fact committed multiple acts over a large period of time, thus committing multiple offenses for which he was not charged. At sentencing, the court may consider "criminal conduct not resulting in prosecution or conviction." *People v. Harris*, 375 Ill. App. 3d 398, 409 (2007). The record is clear that the court was not sentencing the defendant for multiple felonies, but instead noting the

little weight it gave the defendant's lack of criminal history as a mitigating factor based on the multiple individual acts, though not charged separately by the State, the record showed that the defendant had committed over a period of years.[2]

¶ 45 In coming to this conclusion, we reject the defendant's contention that the court considered as an aggravating factor "its belief that [the defendant] had committed other crimes against other clients." This is not supported by the record. The court made no statements regarding other clients, but instead stated that the defendant did not have a criminal record because he was able to go a long period of time taking money from Delbovo without being caught.

¶ 46 5. Punished for Wife's Conduct

¶ 47 Next, the defendant contends that the court punished him for his wife's conduct. Specifically, the defendant states that (1) the court treated as an aggravating factor that the defendant and his wife did not sell their marital home for restitution, which they owned as tenants by the entirety, and (2) punished the defendant because his wife was a stay-at-home mom.

¶ 48 First, any impropriety with the court's comments regarding the sale of the house was cured at the hearing on the motion to reconsider. At the sentencing hearing, the court noted that the marital house was worth $255,000, and that they could have sold it and paid some of the restitution with the equity. However, at the motion to reconsider sentence the defendant showed that the house was in foreclosure and the parties spent some time discussing the fact that there

[2]We note that the defendant points out that the circuit court "wrongly calculated" the duration of time the theft occurred, stating that the period of time from December 2013 to October 2015 was only 22 months, not 3 years as the court stated. We do not believe this to be a material distinction. Moreover, we note that the court could have meant that the offenses took place during three separate calendar years-2013, 2014, and 2015.

was no equity in the house. When the court mentioned that there could still be some equity in the house, the State showed the comparative market analysis, did some math, and stated that there was no equity in the house. The court accepted this. When the court discussed the new sentence, it did not mention the sale of the house.

¶ 49 Second, the record does not show that the court punished the defendant because his wife was a stay-at-home mom. Instead, the record reflects that the court considered the financial hardship that prison would have on the defendant's family (730 ILCS 5/5-5-3.1(a)(11) (West 2016)), noting that, though the defendant's wife had been a stay-at-home mom, she could return to work.

¶ 50 6. Theft Itself

¶ 51 The defendant further contends that the court considered the theft itself as an aggravating factor when it said, "[p]eople who want probation *** don't then live in a manner that stolen money got for them. *** If they choose to do that, then they live in the [DOC]." We disagree. The court was not considering a factor inherent in the offense when making such a statement, but instead was commenting on the large amount of restitution the defendant still owed.

¶ 52 II. Proportionate Penalties

¶ 53 The defendant next appears to raise an as-applied constitutional challenge. Specifically, the defendant contends that his seven-year sentence violated the eighth amendment of the United States Constitution because it was not proportionate. U.S. Const., amend. VIII.

¶ 54 At the outset we note that the defendant has forfeited this issue by failing to raise it in the circuit court. *People v. Thompson*, 2015 IL 118151, ¶ 36 ("[A]n as-applied challenge requires a showing that the statute violates the constitution as it applies to the facts and circumstances of the challenging party."). "[A] defendant must present an as-applied constitutional challenge to

the trial court in order to create a sufficiently developed record." *People v. Holman*, 2017 IL 120655, ¶ 32; see also *People v. Rizzo*, 2016 IL 118599, ¶¶ 24, 26. The defendant provides no reasons for why we should excuse this forfeiture.

¶ 55 Even if we were to excuse the defendant's forfeiture, he would not prevail. "[T]he Eighth Amendment contains a narrow proportionality principle, that does not require strict proportionality between crime and sentence but rather forbids only extreme sentences that are grossly disproportionate to the crime." (Internal quotation marks omitted.) *Graham v. Florida*, 560 U.S. 48, 59-60 (2010) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 997, 1000-1001 (1991) (Kennedy, J., concurring in part and concurring in judgment)). " ' "[O]utside the context of capital punishment, successful challenges to the proportionality of particular sentences [are] exceedingly rare." ' " *Harmelin*, 501 U.S. at 1001 (Kennedy, J.) (quoting *Solem v. Helm*, 463 U.S. 277, 289-90 (1983), quoting *Rummel v. Estelle*, 445 U.S. 263, 272 (1980)). When considering a "gross proportionality challenge to a particular defendant's sentence" (*Graham*, 560 U.S. at 61).

> "[a] court must begin by comparing the gravity of the offense and the severity of the sentence. [Citation.] '[I]n the rare case in which [this] threshold comparison…leads to an inference of gross disproportionality' the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions. [Citation.] If this comparative analysis 'validate[s] an initial judgment that [the] sentence is grossly disproportionate,' the sentence is cruel and unusual." *Id.* at 60 (quoting *Harmelin*, 501 U.S. at 1005 (Kennedy, J.)).

Stated another way, we must first compare the gravity of the offense with the severity of the sentence. If, based on such a comparison, we surmise that the sentence is grossly disproportionate to the crime, we then compare the sentence with other similar sentences. However, if we infer that the sentence is not grossly disproportionate to the crime, then the sentence is not unconstitutional under the eighth amendment, and we need not take any further steps.

¶ 56 Here, the defendant was convicted of theft, a Class 1 felony, for taking $335,962.91 from Delbovo, who was disabled, while he was acting as her financial planner. He was sentenced to seven years' imprisonment. The sentence he received was not an extreme sentence nor can we say that it was grossly disproportionate to the crime. See *id.* at 59-60 (citing *Harmelin*, 501 U.S. at 1000-1001 (Kennedy, J)). We find support for this result in a plethora of Supreme Court cases. See *Rummel*, 445 U.S. at 265, 285 (finding that Rummel's life sentence after fraudulently using a credit card for $80, passing a forged check for $28.36, and obtaining $120.75 by false pretenses did not violate the eighth amendment); *Hutto v. Davis*, 454 U.S. 370, 370, 374 (1982) (upholding Davis's 40-year sentence for possessing and distributing nine ounces of marijuana); *Harmelin*, 501 U.S. at 961 (upholding Harmelin's sentence of life imprisonment for possessing 672 grams of cocaine under the eighth amendment); *Solem*, 463 U.S. at 296, 303 (finding that Helm's sentence of life imprisonment for writing a "no account" check for $100 was disproportionate under the eighth amendment). Because this initial inquiry did not lead to an inference that the sentence was grossly disproportionate, we find that the sentence is not unconstitutional under the eighth amendment, and we need not compare the sentence with other similar sentences.

¶ 57 III. Excessive Sentence

¶ 58 Lastly, we consider the defendant's argument that his sentence is excessive because the court improperly weighed the factors in mitigation and aggravation. On review, a circuit court's sentencing decisions are given great deference and will not be altered absent an abuse of discretion. *People v. Jackson*, 375 Ill. App. 3d 796, 801 (2007). The court has this deference because it is in a better position to determine the appropriate facts since it has the opportunity to weigh factors like "the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age." *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). It is not the duty of the appellate court to reweigh the factors involved in the circuit court's sentencing decision. *People v. Alexander*, 239 Ill. 2d 205, 214-15 (2010). It is presumed that the court considered any mitigating evidence absent some indication, other than the sentence itself, to the contrary. *People v. Thompson*, 222 Ill. 2d 1, 37 (2006). When a sentence falls within the statutory range, it does not constitute an abuse of discretion unless it is manifestly disproportionate to the nature of the offense or greatly at variance with the spirit and purpose of the law. *Alexander*, 239 Ill. 2d at 215.

¶ 59 We construe the defendant's argument as an invitation for this court to reweigh the sentencing factors, which we refuse to do. *Id.* at 214-15. There is no indication in the record that the court failed to consider any of the factors in mitigation and aggravation or any of the evidence presented at sentencing. Though the defendant may believe that the mitigation evidence and his potential for rehabilitation merited a lesser sentence, the court was not required to agree. We emphasize that a defendant's potential for rehabilitation is not entitled to greater weight than the seriousness of the offense. *People v. Coleman*, 166 Ill. 2d 247, 261 (1995). Moreover, the 7-year sentence the defendant received was well within the range of 4 to 15 years' imprisonment. 730 ILCS 5/5-4.5-30(a) (West 2016). We cannot say the sentence was "greatly at variance with

the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *Stacey*, 193 Ill. 2d at 210. Though probation was an option, the court did not abuse its discretion in finding that probation would deprecate the seriousness of the offense and be inconsistent with the ends of justice. See 730 ILCS 5/5-6-1(a)(2) (West 2016).

¶ 60 In coming to this conclusion, we reject the defendant's reliance on the sentences received in other cases for the proposition that he should have received a lesser sentence or probation. Sentencing is based on the particular circumstances of the individual case, and "[t]he fact that a lesser sentence was imposed in another case has no bearing on whether the sentence in the case at hand is excessive *on the facts of that case*." (Emphasis in original.) *People v. Fern*, 189 Ill. 2d 48, 56 (1999).

¶ 61 CONCLUSION

¶ 62 The judgment of the circuit court of Will County is affirmed.

¶ 63 Affirmed.