2019 IL App (1st) 173037-U

FIRST DIVISION
February 25, 2019

No. 1-17-3037

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 17 MC1 203018
	)	
ANGEL GARCIA,	)	Honorable
	)	Joanne F. Rosado,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE MIKVA delivered the judgment of the court.
Justices Pierce and Walker concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for battery is affirmed. The evidence was sufficient to show that the defendant knowingly made physical contact of an insulting or provoking nature and the trial court did not improperly limit defendant's cross-examination of a State's witness. Defendant failed to show that his sentence of two years' probation was an abuse of the trial court's discretion.

¶ 2 Following a bench trial, defendant Angel Garcia was found guilty of battery (720 ILCS 5/12-3(a)(West 2016)), and sentenced to 24 months of probation. On appeal, Mr. Garcia argues that he was not proven guilty of battery beyond a reasonable doubt because the State failed to establish that he knowingly made physical contact of an insulting or provoking nature with the

victim. He asks us to find that the trial court abused its discretion when it limited defense counsel's ability to cross-examine a State's witness. Mr. Garcia also argues that his sentence was excessive in light of the "non violent nature of the incident." We affirm.

¶ 3 I. BACKGROUND

¶ 4 At trial, the victim Michelle Eslinger testified that on February 25, 2017, she missed a flight between Chicago and Seattle and had to spend the night at the airport. She was upset because her 16-year-old son was at home alone and she "needed to get home that night." Between 10:15 and 10:30 p.m., Ms. Eslinger was approached by the defendant, Angel Garcia. Mr. Garcia indicated that he worked for the airline, and after Ms. Eslinger indicated that she needed to get home, Mr. Garcia stated that he would help her and that he was her "angel." Ms. Eslinger was crying, and Mr. Garcia told her that she had to calm down before he could help her. Mr. Garcia then led her up the stairs to the rotunda, a garden area. As they walked, Mr. Garcia told her that as soon as she calmed down, he could get her on "a flight out." Ms. Eslinger and Mr. Garcia sat down, but she continued to cry. Mr. Garcia then suggested that they go the "yoga room."

¶ 5 When they arrived at the yoga room, Ms. Eslinger needed to use the restroom and Mr. Garcia showed her where it was located. When she returned to the yoga room, Mr. Garcia told her that he was going to help her and that she had to calm down. Mr. Garcia then placed his hand on her lower back and kissed her on the mouth. Mr. Garcia kissed her four times. Ms. Eslinger did not reciprocate; rather, she "kind of" pushed away. When Mr. Garcia asked her why she would not kiss him back, she stated that his breath smelled like cigarettes. Mr. Garcia responded that he would go and brush his teeth and left the room. Mr. Garcia left his jacket behind.

¶ 6 As soon as Mr. Garcia left, Ms. Eslinger gathered her belongings and left the room. She

found a woman that had been on her earlier flight and sat with this person until that person's flight departed. She then stayed in an area where cots and security officers were located for the rest of the night. The next morning she went to a family restroom and locked herself inside because the airline counters were not yet open. Once the counters were open, Ms. Eslinger went to a ticket counter and "asked to leave on any flight out of O'Hare." She explained that she had to file a complaint but did not feel safe at the airport. Although she was told to go to "AA dot com," she said no, that she needed to file an official report. The police were notified and she spoke to officers.

¶ 7 Ms. Eslinger identified photographs of Mr. Garcia, including a photograph of Mr. Garcia leaving the yoga room. These photographs are not included in the record on appeal. The State also entered two videos into evidence that are not included in the record on appeal. The videos showed Ms. Eslinger and Mr. Garcia going into and out of the yoga room. Ms. Eslinger testified that she did not tell Mr. Garcia that he could kiss her and Mr. Garcia never asked if he could kiss her. When Mr. Garcia kissed her, she felt scared and "[k]ind of violated." She did not immediately contact the police because she was shocked and had a "hard time processing what happened."

¶ 8 During cross-examination, Ms. Eslinger testified that she believed Mr. Garcia took her to the yoga room to calm her down because she was too upset to get on a plane. Although Mr. Garcia stated that he worked for the airline and could get her home, he did not state that he could book her on a flight. Prior to Mr. Garcia kissing her, Mr. Garcia was "handsy" but she "just thought he was being nice." Ms. Eslinger agreed that Mr. Garcia did not do anything "offensive or provocative" prior to kissing her, and gave no indication that he planned to kiss her.

¶ 9 Chicago police officer Martin McNaughton testified that he and a partner met with Ms.

Eslinger, and he completed a report after speaking with her. He later reviewed certain surveillance footage, and met with a supervisor from American Airlines and learned that Mr. Garcia was employed by an American Airlines subcontractor. Officer McNaughton testified that the yoga room is open to the public during the day but usually closed during the "night hours."

¶ 10 During cross-examination, Officer McNaughton testified that he wrote a supplementary case report that summarized what Ms. Eslinger told him. Defense counsel then engaged in a lengthy exchange in which he attempted to bring out inconsistencies between what Ms. Eslinger told Officer McNaughton and what she had testified to, specifically that in her report of the police she said that Mr. Garcia "attempted" to kiss her. Toward the end of that exchange, the following questions were asked:

"[DEFENSE COUNSEL] Q. So did the—if Ms. Eslinger said that the defendant actually kissed her would you have included that in your report?

[OFFICER McNAUGHTON] A. If she actually said. ***

Q. Okay.

Did Ms. Eslinger tell you that the defendant actually kissed her or just that he attempted to kiss her?

A. My best recollection—

[THE STATE]: I would object again. Asked and answered.

THE COURT: Sustained.

[DEFENSE COUNSEL]: I don't believe I asked this question. I also believe this is a very critical point.

THE COURT: Compound question, Counsel. Sustained. Move on.

* * *

Q. You don't recall that happening, Ms. Eslinger, telling you the defendant kissed her?

[THE STATE]: Objection.

THE COURT: Sustained. The officer already testified he does not recall whether or not the complaining witness said that the defendant kissed her.

[DEFENSE COUNSEL]: Okay. Thank you.

BY [DEFENSE COUNSEL]:

Q. Would your supplementary report refresh your recollection as to what the complaining witness may have told you on that subject?

THE COURT: Sustained. Officer said—officer did not say his recollection needed to be refreshed. He indicated he does not remember."

¶ 11 At this point, defense counsel requested to make an offer of proof for the record. Defense counsel explained that he wanted to refresh the officer's recollection of what Ms. Eslinger said to him by showing the officer the supplemental report he had written. The State then objected based on improper impeachment. Defense counsel denied that he was impeaching the officer and argued about making an offer of proof:

"[DEFENSE COUNSEL]: Can I make an offer of proof, your Honor.

THE COURT: Offer of proof of what Counsel?

[DEFENSE COUNSEL]: Of what his testimony would be if I got to ask that question. I have to protect my record for appeal.

THE COURT: Sustained. They already stipulated that the reports say attempt and that there's nothing indicating number of times that she was kissed. Other than—

[DEFENSE COUNSEL]: Or even if it was once or kissed once.

THE COURT: They have already stipulated to all of that.

* * *

[DEFENSE COUNSEL:] I just want to make sure I can't make an offer of proof on a question here. There's two questions. Whether the *** complaining witness told the officer that the defendant actually kissed her. He said, I don't recall. Got that. The second question is would there be anything that might help you refresh your recollection.

That's where I got cut off. Now, if the officer said, yes[,m]y supplementary report. I would like to give him the supplementary report and if he said my recollection is refreshed. I would like to reask the question.

Do you know if the complaining witness told you that the defendant actually kissed her. Maybe he would have an answer.

THE COURT: He already said that he doesn't recall.

[DEFENSE COUNSEL]: Okay. That's it."

¶ 12 At the close of the State's case, Mr. Garcia made a motion for a directed verdict arguing that nothing Ms. Eslinger testified to would suggest that Mr. Garcia kissed her with the knowledge that she would be provoked or insulted by his kisses; rather, Mr. Garcia kissed her with the thought that his kisses were welcome or "at least not uninvited." The trial court denied the motion.

¶ 13 Mr. Garcia testified that he was working a double-shift, including the overnight shift of 10 p.m. to 4 a.m. at "gate No. 1" when he saw Ms. Eslinger crying. He approached to ask if he could help. She said that she was upset, did not understand what kind of "service" was available and whether Mr. Garcia could help her. He responded that he could "absolutely" help her as that was his job. Although Mr. Garcia began to walk Ms. Eslinger to a "specific place for people who

miss flights," she indicated that she needed space to sit down, so Mr. Garcia "invited" her to go the rotunda. Although he did not say anything to Ms. Eslinger about being an angel, Ms. Eslinger commented that Mr. Garcia's name was Angel and that he was her angel. Mr. Garcia testified that the yoga room was open 24 hours a day.

¶ 14 Once in the yoga room, Ms. Eslinger introduced herself and told Mr. Garcia about her son. Mr. Garcia told her about his family and they discussed his job. Mr. Garcia explained that he left his coat in the yoga room because Ms. Eslinger was "really cold." He denied kissing Ms. Eslinger; rather, she hugged him and thanked him for his help and he returned the hug. Ms. Eslinger then told him that he smelled like cigarette smoke and he indicated that he had smoked 10 minutes prior. Ms. Eslinger then asked Mr. Garcia if she could sleep in the yoga room. Mr. Garcia thought it was "no problem" and went to get a cot. Mr. Garcia explained that his job was to help the passengers, "like passenger service to help them." During cross-examination, Mr. Garcia testified that he gave Ms. Eslinger his coat but that she did not wear it; rather, she put it on a bench.

¶ 15 In finding Mr. Garcia guilty of battery, the court stated that Mr. Garcia's testimony was just incredible, that is, it was "self serving" and used "to benefit himself." After the trial court announced its verdict, the matter proceeded immediately to sentencing. The defense argued that Mr. Garcia did not have a criminal background and asked that Mr. Garcia be granted supervision. The trial court then asked Mr. Garcia whether he wanted to say anything. Mr. Garcia told the court that he was a "good guy," with a family. Mr. Garcia stated that he wanted "to apologize for people at that moment [who] feel like I did something wrong because I didn't." He further stated that it was "unfair now because somebody approached to me or kiss me or touch me," and he was the person in trouble. The trial court sentenced Mr. Garcia to 24 months of probation, and

ordered a sex offender evaluation.

¶ 16 Mr. Garcia then filed a motion in arrest of judgment or in the alternative for a new trial and for reduction of sentence. The motion argued that the trial court abused its discretion when it sustained the State's objections to defense counsel's attempts to cross-examine Officer McNaughton regarding the police report, and that the trial court erred when it sentenced Mr. Garcia to 24 months of probation and ordered a "sex offender evaluation." The trial court denied the motion on November 14, 2017.

¶ 17 II. JURISDICTION

¶ 18 Mr. Garcia timely filed his notice of appeal on December 8, 2017. This court has jurisdiction pursuant to article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, § 6) and Illinois Supreme Court Rules 603 and 606, governing appeals from final judgments of conviction in criminal cases (Ill. S. Ct. Rs. 603 (eff. Feb. 6, 2013), 606 (eff. July 1, 2017)), and Rule 604(b), governing appeals challenging the conditions of a sentence of probation (Ill. S. Ct. R. 604(b) eff. July 1, 2017).

¶ 19 III. ANALYSIS

¶ 20 A. Sufficiency of the Evidence

¶ 21 On appeal, Mr. Garcia first contends that he was not proven guilty of battery beyond a reasonable doubt when the State failed to prove that he knowingly made physical contact of an insulting or provoking nature with Ms. Eslinger.

¶ 22 When this court reviews a challenge to the sufficiency of the evidence, we look at the evidence in the light most favorable to the State, and we sustain the verdict if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48. It is the responsibility of the trier of fact to resolve conflicts in the

testimony, weigh the evidence, and draw reasonable inferences from the facts. *People v. Bradford*, 2016 IL 118674, ¶ 12.

¶ 23 A person commits battery when he, knowingly without legal justification by any means, causes bodily harm to an individual or makes physical contact of an insulting or provoking nature with an individual. 720 ILCS 5/12-3(a) (West 2016). A particular contact may be deemed insulting or provoking depending upon the factual context in which it occurs and no injury is required. *People v. DeRosario*, 397 Ill. App. 3d 332, 333-34 (2009). A trier of fact may infer from the victim's contemporaneous reaction to the contact that it was insulting or provoking. *People v. Wrencher*, 2011 IL App (4th) 080619, ¶ 55.

¶ 24 When we look at the evidence in this case, and the context in which Mr. Garcia's conduct occurred, there clearly was sufficient evidence that Mr. Garcia made contact of an insulting or provoking nature with Ms. Eslinger. Ms. Eslinger was upset because she had to spend the night at the Chicago airport while her 16-year old son was home alone. She was crying and upset when Mr. Garcia approached her, stated he would help and led to her another part of the airport. When Ms. Eslinger was still upset, Mr. Garcia suggested that they go the yoga room so that she could calm down. Mr. Garcia ultimately put his hand on her back and then kissed her four times. Ms. Eslinger testified that she did not reciprocate Mr. Garcia's kisses, and that she "kind of" pushed away. Ms. Eslinger further testified that when Mr. Garcia asked her why she did not kiss him back, she stated that he smelled like cigarettes, and that once Mr. Garcia left the yoga room she gathered her belongings, left the room, and sat with another passenger until that passenger left the airport. Ms. Eslinger testified that she did not tell Mr. Garcia that he could kiss her, that Mr. Garcia never asked to kiss her, and that she felt scared and "[k]ind of violated" by Mr. Garcia's kisses. Ms. Eslinger further testified that after the encounter with Mr. Garcia she stayed in view

of security guards, locked herself in a bathroom, and wanted to leave the airport because she did not feel safe. The evidence presented at trial, and the reasonable inferences from that evidence, support the finding that Mr. Garcia's kisses were physical contact of an insulting or provoking nature. Accordingly, the evidence was not so unreasonable, improbable, or unsatisfactory that there remains a reasonable doubt of Mr. Garcia's guilt. *Bradford*, 2016 IL 118674, ¶ 12.

¶ 25 Mr. Garcia is correct that there is nothing about a kiss that is "*per se*" insulting or provoking. He is also correct that Ms. Eslinger did not testify that she objected to the kisses. But in the context of Ms. Eslinger's testimony of what occurred, which the trial court clearly credited, there was certainly a basis for finding that these kisses were insulting or provoking. Ms. Eslinger did not reciprocate, she kind of pushed Mr. Garcia away, and as soon as Mr. Garcia left the yoga room, she gathered her belongings and left. See *Wrencher*, 2011 IL App (4th) 080619, ¶ 55 (a trier of fact may infer from the victim's contemporaneous reaction to the contact that it was insulting or provoking). It was for the trial court, as the trier of fact, to weigh the evidence, and draw reasonable inferences from the facts presented at trial. *Bradford*, 2016 IL 118674, ¶ 12. Accordingly, we affirm Mr. Garcia's conviction.

¶ 26 B. Limitation on Cross-Examination

¶ 27 Mr. Garcia's second argument is that the trial court improperly denied him the opportunity to cross-examine Officer McNaughton regarding what Ms. Eslinger said and to refresh his recollection with a police report.

¶ 28 The confrontation clause of the sixth amendment of the United States Constitution (U.S. Const., amend. VI), guarantees a defendant the right to cross-examine a witness against him for the purpose of showing the witness' bias, interest or motive to testify falsely. *People v. Harris*, 123 Ill. 2d 113, 144 (1988). "[A] trial judge retains wide latitude insofar as the confrontation

clause is concerned to impose reasonable limits on such cross-examination based on concerns about harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or of little relevance." *Id.* And "a reviewing court will not interfere unless there has been a clear abuse of discretion resulting in manifest prejudice to the defendant." *People v. Kirchner*, 194 Ill. 2d 502, 536 (2000). An abuse of discretion will be found where the trial court's ruling is fanciful, arbitrary, unreasonable or where no reasonable person would take the view adopted by the trial court. *People v. Donoho*, 204 Ill. 2d 159, 182 (2003).

¶ 29 As the State points out, defense counsel here was apparently trying to impeach Ms. Eslinger's testimony that Mr. Garcia *actually* kissed her with the information that she reported to Officer McNaughton that Mr. Garcia had *attempted* to kiss her. However, "before prior inconsistent statements may be admitted for impeachment, a proper foundation must be laid on cross-examination." *People v. Lopez*, 2012 IL App (1st) 101395, ¶ 79. Such a foundation "typically directs the attention of the witness to the time, the place, the person or persons to whom the statement was made," and perhaps most importantly, "the substance of the inconsistent statement." *Id.* As the State notes in its brief, "[t]he witness must be given an opportunity to explain the statement that the witness is being confronted with on cross-examination." See *id.*

¶ 30 Defense counsel here was attempting to impeach Ms. Eslinger, not Officer McNaughton. But counsel never confronted Ms. Eslinger with the substance of her inconsistent statement; he did not question her about whether she told the officers that Mr. Garcia only attempted to kiss her, and not that Mr. Garcia actually kissed her. In fact, defense counsel did not question Ms. Eslinger at all about what she said to the officers who questioned her. Defense counsel failed to lay any foundation with respect to Ms. Eslinger's statements to the officers. Notwithstanding this

failure, the trial court gave counsel a lot of latitude in questioning Officer McNaughton about what Ms. Eslinger told him and only began to sustain objections when the questioning became repetitive. Accordingly, the trial court did not abuse its discretion either by limiting counsel's cross-examination of Officer McNaughton about the statements Ms. Eslinger made to him, or by denying counsel more opportunity to refresh Officer McNaughton's recollection with his report.

¶ 31 C. The Sentence Imposed

¶ 32 Mr. Garcia's third argument is that his sentence is excessive. He argues that the trial court abused its discretion when it sentenced him to 24 months of probation and ordered a sex offender evaluation, and asks that this court reduce his sentence to supervision and vacate the trial court's order that he undergo a sex offender evaluation. He claims that the trial court failed to consider that this was a nonviolent offense and that he has no criminal record.

¶ 33 A reviewing court will not alter a defendant's sentence absent an abuse of discretion by the trial court. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). This broad discretion means that we cannot substitute our judgment simply because we may weigh the sentencing factors differently. *Id*. at 212-13. A trial court abuses its discretion in determining a sentence where the sentence is greatly at variance with the spirit and purpose of the law or if it is manifestly disproportionate to the nature of the offense. *Id.* at 212.

¶ 34 When balancing the retributive and rehabilitative aspects of a sentence, a court must consider all factors in aggravation and mitigation including a defendant's age, criminal history, character, education, and environment, as well as the nature and circumstances of the crime and the defendant's actions in the commission of that crime. *People v. Raymond*, 404 Ill. App. 3d 1028, 1069 (2010). The court does not need to expressly outline its reasoning when crafting a sentence, and we presume that the court considered all mitigating factors absent some affirmative

indication to the contrary other than the sentence itself. *People v. Jones*, 2014 IL App (1st) 120927, ¶ 55. Because the most important sentencing factor is the seriousness of the offense, the court is not required to give greater weight to mitigating factors than to the severity of the offense, nor does the presence of mitigating factors either require a minimum sentence or preclude a maximum sentence. *Id.*

¶ 35 Here, Mr. Garcia was found guilty a Class A misdemeanor (720 ILCS 5/12-3(b) (West 2016)), which allows, as a maximum period of probation, the 24 months that Mr. Garcia received. (730 ILCS 5/5-4.5-55(d) (West 2016)). But the trial court could have also sentenced Mr. Garcia to a term of imprisonment of anything less than one year, which it did not do. 730 ILCS 5/5-4.5-55(a) (West 2016).

¶ 36 A trial court is not required to explain the value it assigned to each factor in mitigation and aggravation; rather, it is presumed that the court properly considered the mitigating factors presented and it is the defendant's burden to show otherwise. *People v. Brazziel*, 406 Ill. App. 3d 412, 434 (2010). Here, Mr. Garcia cannot meet that burden, as he points to nothing in the record, other than his sentence, to indicate that the trial court did not consider the evidence in mitigation presented at sentencing. See *Jones*, 2014 IL App (1st) 120927, ¶ 55 (a reviewing court presumes that the trial court considered all mitigating factors absent some affirmative indication to the contrary other than the sentence itself).

¶ 37 We also reject Mr. Garcia's argument that the trial court abused its discretion when it ordered that he undergo a sex offender evaluation as a condition of probation. No presentence investigation was provided and at the end of the sentencing the court said, "The sentence of the Court 24 months probation and I am also ordering a sex offender evaluation." No further explanation was provided.

¶ 38 A condition of probation is reasonable so long as it is not overly broad when viewed in light of the desired goal or the means to that end. *In re J.G.*, 295 Ill. App. 3d 840, 843 (1998). We have held that "a probation condition (whether explicitly statutory or not) is reasonable if (1) the trial court believes the condition would be a good idea, and (2) the record contains no indication that the court's imposition of the condition is clearly unreasonable." *People v. Ferrell*, 277 Ill. App. 3d 74, 79 (1995)). Our supreme court has made clear, however, that "while the trial court has discretion to impose probation conditions which will foster rehabilitation and protect the public, the exercise of this discretion is not without limitation." *People v. Meyer*, 176 Ill. 2d 372, 378 (1997)

¶ 39 Section 5-6-3(b)(4) of the Unified Code of Corrections provides that a court "may in addition to other reasonable conditions relating to the nature of the offense or the rehabilitation of the defendant as determined for each defendant in the proper discretion of the [c]ourt require that the person: *** undergo medical, psychological or psychiatric treatment." 730 ILCS 5/5-6-3(b)(4) (West 2016). These specific statutorily authorized conditions of probation are applicable even when, as in this case, the defendant was not convicted of any sex offense. Compare *id.* and 730 ILCS 5/5-6-3(a)(8.5) (West 2016) (providing for mandatory sex offender treatment for persons convicted of a felony sex offense).

¶ 40 The trial court's oral pronouncement did not specifically mention treatment, only a "sex offender evaluation." Of course, treatment without an evaluation makes little sense. But, the trial court's written sentencing order states that Mr. Garcia was to "Complete evaluation and treatment recommendations for sex offenders." In the case of a conflict, the court's oral pronouncement controls. *People v. Carlisle*, 2015 IL App (1st) 131144, ¶ 87. However, in this case we do not see these two orders as being in conflict. Rather, the written sentencing order is

an elaboration and clarification of the oral pronouncement. Given the facts of this case, which included what the trial court found to be unwelcome kissing by Mr. Garcia, we cannot conclude that requiring Mr. Garcia to have a sex offender evaluation and treatment if necessary was an abuse of discretion.

¶ 41 IV. CONCLUSION

¶ 42 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 43 Affirmed.