2019 IL App (2d) 170312-U
No. 2-17-0312
Order filed July 3, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. KELVIN R. BROWN, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 16-CF-1802 Honorable John J. Kinsella, Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Jorgensen and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not commit plain error in sentencing defendant to five years' imprisonment (on a one-to-six range) for unlawful restraint: we presumed that the court considered defendant's mental illness as mitigating (to the extent that it was actually mitigating); the court properly relied in aggravation not on defendant's mental illness but on his future dangerousness stemming from that illness.

¶ 2 Defendant, Kelvin R. Brown, appeals from the judgment of the circuit court of Du Page County sentencing him to five years in prison on his conviction of unlawful restraint (720 ILCS 5/10-3 (West 2016)). He argues that the trial court improperly considered his mental illness as

an aggravating factor when imposing sentence. He asks that we vacate his sentence and remand for resentencing before a different judge. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 On November 1, 2016, defendant was indicted on one count of aggravated battery (*id.* §§ 12-3(a)(2), 12-3.05(c)) and one count of unlawful restraint (*id.* § 10-3(a)), in relation to an incident that occurred on October 5, 2016, involving a 15-year-old girl, S.T. (Defendant was also charged with misdemeanor disorderly conduct (*id.* § 26-1(a)(1)) related to the same incident.)

¶ 5 On December 16, 2016, defendant pleaded guilty to unlawful restraint and the State dismissed the remaining charges. The factual basis for the plea established as follows. S.T. would testify that, on October 5, 2016, she was 15 years old and worked as a volunteer at Elmhurst Hospital. After attending a "sensitivity training" class at the hospital, she went outside to wait for her ride. While waiting, she was approached by defendant. Defendant told her that it was his birthday. He told her that he had not had a hug that day and asked if she would give him one. S.T. agreed to give him a hug. When defendant hugged S.T., he did not release his grip. Instead, defendant placed his hands on S.T.'s back and then moved them down to her buttocks. S.T. had to squirm and push defendant to free herself from his grip. After freeing herself, S.T. sat down on a bench. Defendant asked S.T. if she liked his pants, which were gray sweatpants. When she looked at his pants, she noticed that defendant had an erection. Defendant left and entered the hospital. S.T.'s ride eventually arrived. Defendant had not received medical treatment at the hospital and had been at the hospital for several hours that day.

¶ 6 The trial court found that the facts were sufficient to establish defendant's guilt of unlawful restraint, a Class 4 felony, and that defendant was eligible for an extended-term

sentence. The court further found that defendant's guilty plea was knowingly and voluntarily entered. The matter was continued for a sentencing hearing and for a determination as to whether the offense was sexually motivated for purposes of the Sex Offender Registration Act (730 ILCS 150/1 *et seq.* (West 2016)).

¶ 7 The sentencing hearing took place on February 17, 2017. At the outset, the trial court indicated that it had received and reviewed a 15-page presentence investigation report (PSI) and a 22-page sex offender evaluation. The State indicated that it had four witnesses and four victim impact statements for consideration. Thereafter, the following testimony was presented.

¶ 8 Kimberly Urbanek, deputy chief of public safety for Elmhurst Hospital, testified that, on October 5, 2016, she was notified that a hospital food services employee, Monica Pina, reported that she had been touched inappropriately at work. Pina reported that she had been followed by a hospital visitor, later identified as defendant, to an area that was designated for employees only. Defendant asked her if she had a boyfriend and he was "trying to kiss and grope her." Later that day, Urbanek learned from the Elmhurst Police Department that it had received a report of another girl being touched inappropriately that day. Urbanek subsequently looked at surveillance camera footage from that day. (The hospital had almost 300 surveillance cameras located throughout the facility.) Urbanek testified that she found footage of the incident involving Pina. She also observed defendant sitting in the hospital's pediatric clinic waiting room on that same day. There was one female present in the room. Urbanek testified that "[defendant] grabbed a pediatric and woman's magazine, opened it so it was tented on his lap and stuck his hand in his pants and began masturbating." He remained there for about 12 to 15 minutes. Urbanek also saw defendant visit the Starbucks in the hospital, but he never made a purchase. Urbanek interviewed two Starbucks employees who told her that defendant "was

weird and creepy and that he was just kind of hanging out and trying to talk to them. And he was in and out several times with just really odd demeanor." She also saw defendant on two occasions walk past hospital security and avoid contact. For instance, when defendant saw an officer walking toward him, he "immediately turned his head to the right, pulled his hat down over his eyes, took his left hand up to his eyes to shadow his face, and looked at some art on the wall or pretended to pay attention until the officer passed." After learning of the two incidents that had occurred on October 5, 2016, she put out a "BOLO" alert concerning defendant, which means "[b]e on the lookout." After putting out the alert, Urbanek was contacted by a minor who volunteered at the hospital, who reported that she had an incident with defendant. Urbanek viewed video showing the minor in the hospital and downloaded still photos from the video, which she identified for the court. According to Urbanek, defendant traveled through the hospital from about 3 p.m. to 7 p.m. on that day. He was never seen by a physician or a nurse nor did he ever visit anyone.

¶ 9 Elmhurst police detective Jeff Kucera testified that, on October 5, 2016, he met with S.T., who told him about the incident with defendant. At that time, defendant was also a suspect in another incident at the hospital. (On October 9, 2016, a third victim came forward.) Kucera obtained a photograph of defendant from the hospital's security video footage and sent it to the surrounding police departments to help identify defendant. A few hours later, a detective from the Berkeley Police Department identified defendant. Kucera met with defendant on October 7, 2016, and defendant identified himself in the picture. Defendant told him that, on October 5, 2016, he had a headache and went to the hospital for treatment. Defendant told him that he never checked in with anyone at the hospital and never sought treatment. Defendant admitted to talking to S.T. Defendant told Kucera that S.T. gave him "a regular hug." Defendant also

acknowledged having contact with Pina. He claimed that he struck up a conversation with her near Starbucks and asked where the vending machines were. He also asked if she was married and whether he could have her phone number. Pina told him that she had a boyfriend. According to defendant, when they parted ways, she shook his hand and gave him a hug. Defendant denied masturbating in the hospital. He said that he "had shaved that area and that he had razor bumps, and that he may have had his hands in the pants because he was having to itch."

¶ 10 Kucera testified that he met with S.T., Pina, and another juvenile, S.A. His interviews with them were recorded and interview statements were prepared. The court viewed the videos during a recess. Kucera also testified that he viewed "two small snippets of video" from the hospital and photographs of defendant. The videos were played for the court. The videos showed defendant entering the hospital after speaking with S.T. His hand was in his pocket, over his crotch area.

¶ 11 Village of Hillside police corporal Sean Mikicic testified that, on May 16, 2015, he met with "Ms. Mitchell" to investigate an incident that had occurred at the Hillside Public Library. Mitchell told him that, while she was at the library with her seven-year-old son, she observed a man, later identified as defendant, with his right hand inserted in his right pocket and positioned over the top of a bulge in his pants. Defendant was wearing a baseball hat and sweatpants. She moved into the aisle and started looking at some books. Defendant moved into the adjacent aisle and began peering at her through the shelves. She moved to another aisle and defendant again moved to the adjacent aisle and attempted to make eye contact with her through the shelves. Mitchell exited the library with her son and went to her car. Defendant approached her and asked if they could go on a date. He told her that he recognized her from a bar or restaurant.

Mitchell left and drove less than a mile to the Berkley Public Library. Defendant was eventually apprehended at the Berkeley Public Library. Mikicic testified that he met with defendant later that day. Defendant told him that he had a "mutual conversation" with a woman at the library who was with her child. He denied that he was masturbating. Defendant claimed that he might have been scratching a scar on his abdomen and that the woman might have misunderstood.

¶ 12 Mikicic testified that defendant also had contact with a minor, K.M., at the Hillside Public Library on that same day. K.M. told Mikicic that she worked at the library and that defendant approached her and asked her about a specific book. When she could not locate the book, defendant walked away but then returned and asked about a different book. Defendant would not accept help from another employee. He followed K.M. around the library, peering through the shelves over the tops of books.

¶ 13 Mikicic testified to another incident involving defendant that occurred on June 22, 2015. Two 15-year-old girls were sitting on a bench near Eisenhower Park. Defendant approached and asked them how old they were, where they went to school, and where they lived. The girls were upset and walked away. They found a police officer nearby and told the officer what happened. Mikicic made contact with defendant and he admitted to speaking to the girls.

¶ 14 Mikicic testified to other incidents involving defendant. On September 13, 2012, defendant approached a female on the Prairie Path. He "approached her and struck up a conversation and made some sexual innuendo, also stating that sex was a good form of exercise." She did not wish to press charges. On November 6, 2012, defendant attempted to pass a counterfeit $100 bill at a liquor store. On September 22, 2014, officers were dispatched to an apartment complex to investigate a "verbal domestic dispute." The complainant, "Ms. Geary," was in a relationship with defendant. She reported that she and defendant were arguing and that

defendant "brandished or displayed a small pocketknife and said that he would fuckin' kill her." On July 27, 2014, officers were dispatched to a bar in Hillside where defendant was "highly intoxicated," had an argument with an employee, and stated that "he was going to burn the place down with everybody in it." No charges resulted from these incidents.

¶ 15 Village of Glen Ellyn police officer Joseph Flores testified that, on February 2, 2016, at about 11:12 a.m., he was dispatched to an office complex to investigate a domestic violence call. Defendant was identified as the suspect and his vehicle was stopped by another officer. When Flores arrived at the location of the traffic stop, defendant told him that he had gotten into an argument with his girlfriend, Michelle Ross, after learning that she received a phone call from an ex-boyfriend. Defendant told Flores that he tried grabbing Ross's keys and coat. He denied striking her. Defendant was ultimately arrested for driving while his license was revoked. A search revealed 11 counterfeit $50 bills. Flores later reviewed surveillance video of the lobby where the incident between defendant and Ross had occurred. The video, which was played for the trial court, showed that, as Ross was attempting to move to the door, defendant grabbed her and pulled her away. Defendant then "pushed her up against the wall in a tumultuous manner." Ross gave a written statement in which she stated that, when she told defendant that she was going to call the police, he told her that "if he went to jail, he was going to fuckin' kill her." On cross-examination, Flores clarified that, according to Ross, defendant stated, " 'if I go to jail, I'm going to fuck you up.' "

¶ 16 The State next presented victim impact testimony from S.T.'s father and S.T.'s mother. Thereafter the State rested.

¶ 17 The PSI revealed that defendant had a lengthy arrest history, consisting of 61 arrests. Thirty-four of those arrests resulted in convictions. Sixteen of those convictions were for driving on a suspended or revoked license. Nevertheless, the PSI noted as follows:

> "The defendant's arrest history is concerning in that a number of his arrests have been for offenses in which there was a potential for harm to others or in which a victim was harmed. He has been arrested for weapon possession, Domestic Battery, Public Indecency/Sex Conduct and the instant offense of Unlawful Restraint. *** The defendant was on Probation for Domestic Battery *** at the time the instant offense occurred. It is concerning the defendant has continued to reoffend. Since being sentenced to Probation for Domestic Battery *** in February 2016, the defendant has been arrested eight times."

The PSI also indicated that, in regard to the present offense, defendant "stated he was unaware he did anything wrong and if he did touch the victim's buttocks it was by accident as he had no intention to do so."

¶ 18 A psychological report, prepared by licensed clinical psychologist Lesley Kane, indicated that defendant "met the diagnostic criteria" for "antisocial personality disorder." According to the report:

> "The DSM-5 indicates the following criteria with respect to Antisocial Personality Disorder:
>
> There is a pervasive pattern of disregard for and violation of the rights of others occurring since age 15 years, as indicated by three or more of the following:
>
> 1. Failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest.

2. Deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure.

3. Impulsivity or failure to plan ahead.

4. Irritability and aggressiveness, as indicated by repeated physical fights or assaults.

5. Reckless disregard for the safety of self or others.

6. Consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations.

7. Lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another."

¶ 19 Dr. Kane also diagnosed defendant with "unspecified paraphilic disorder," which "applies to presentations in which symptoms characteristic of a paraphilic disorder that cause clinically significant distress or impairment in social, occupational, or other important areas of functioning predominate but do not meet the full criteria for any of the disorders in the paraphilic disorders diagnostic class." Dr. Kane noted defendant's history of "sexual impulsivity" and "propensity to act out sexually by touching or rubbing against non-consenting females." She stated: "[Defendant] has continued to engage in sexually inappropriate behavior for an extended time despite legal ramifications. While he exhibits a pattern of paraphilic acts, at this time, it is difficult to classify his behaviors under a specific diagnosis."

¶ 20 Dr. Kane also found that "compared to a representative and international sample of adult male sexual offenders," defendant had a " 'Well Above Average' risk" of being convicted of a future sex offense. Dr. Kane also noted that "[defendant's] behavior is concerning, as it has been

persistent in spite of legal intervention and other admonishments" and that "[defendant's] pursuit of females has an obsessive quality."

¶ 21 The State argued for the maximum sentence of six years. The State emphasized defendant's criminal history, noting that it "spans years and years and years" and covers seven pages in the PSI. The State noted that defendant had been sent to jail 15 times and currently had an order of protection against him. Defendant had been arrested eight times in 2016 alone. The State brought up the incident at the Hillside Public Library, noting that defendant was "brazen" in his conduct and followed the victim and her son to their car. The State noted that, while defendant was eight months into his sentence of conditional discharge, he committed domestic battery. The State also emphasized the facts of the present offense and defendant's lack of remorse. The State referenced Dr. Kane's report and her conclusion that defendant is not amenable to treatment. In discussing Dr. Kane's diagnosis of antisocial behavior disorder, the State argued: "[The] report states that the defendant is socially insensitive. He shows little remorse, he's impulsive, and he overlooks the consequences of his behavior. All, again, factor into being highly problematic for this Court and for the public safety." The State also argued that "while his sexual offense has been nonviolent, his history shows he has a propensity to engage in physically, aggressive acts." The State also emphasized the psychological harm to the victim, stating that it was the primary factor to consider in aggravation, in addition to the brazen nature of the crime itself. The State also argued that the offense was sexually motivated.

¶ 22 In arguing for a sentence of probation, defense counsel emphasized the absence of sexual assaults and violent crimes in defendant's criminal history. Counsel minimized the offense, stating that it was "a hug that lasted a couple seconds with his hand on her behind." Counsel stated that defendant would be amenable to treatment.

¶ 23 In allocution, defendant stated that he did not intend "to offend the young lady." He stated: "[T]here was an innocent hug with me and the young lady." He said he was "very sorry, plus embarrassed."

¶ 24 In imposing sentence, the trial court stated as follows:

"Defendant is a 37-year-old man who spent nearly an entire day roaming around a hospital seeking out young girls to accost. Those are the facts.

The offense for which he has been convicted is unlawful restraint. It's a Class Four felony.

This behavior is not isolated insofar as defendant's prior history. The incident in Hillside is, also, equally as troubling, disturbing and reflective of the same mentality that brought him to that hospital.

I read—is it Dr. Jones—no, it's Kane—Dr. Kane's report. It certainly describes an individual that has serious psychiatric issues in terms of having an antisocial personality disorder, in terms of having other sexually motivated—she describes it as unspecified paraphilic disorder, describing an individual who does not appreciate the seriousness of his psychiatric issues, does not see that he suffers from any of these problems or poses any risk to anyone else.

The best argument for probation is the fact that he would, of course, receive some form of treatment.

And if the psychologist had opined that he was suitable for such treatment, that argument might hold some weight. But as Dr. Kane indicated and I quote:

['']Based upon the aforementioned factors, [defendant] is not an ideal candidate for community-based sex offender treatment. He has a clear pattern of sexually deviant behavior, and his behavior has persisted, despite prior legal sanctions.['']

That is the opinion of the expert. So the likelihood of successful rehabilitative treatment as a condition of probation is very small.

The other major factor in weighing the appropriate sentence of this case, the defendant has engaged in a lifelong pattern of criminal behavior. Some if it, insignificant, if you want to call it that, is driving on a suspended or revoked license. But he's been arrested for that 21 times. That's the least of his criminal behavior, and it is persistent, consistent, and, basically reflects an attitude of I'm going to do what I want to do.

And 61 total arrests, six times he's been arrested for possession of a controlled substance. He says he doesn't have a controlled substance problem. He only deals it.

Three times he's been sentenced to the penitentiary.

The defendant's rehabilitation potential is, if I were to measure, it's close to nil.

And as a result, I'm not persuaded that probation is an appropriate sentence.

I recognize that the Department of Corrections will not be able to in any way meaningful [*sic*] address his psychiatric issues or his problems or his antisocial personality disorder. But we have to consider the options we have and impose sentence within those options that are available to us.

It would appear the defendant at 37 years of age is not likely to change his behavior and his conduct. It appears likely that he will engage in future criminal behavior.

I only hope that it doesn't continue to escalate, because I've seen instances where the sort of behavior that you've engaged in often escalates into situations that grow worse. And if that's the case, God help us and God help you. Because there's no 15-year-old girl that needs to be touched by you in a sexual manner or worse. And it does happens [*sic*].

No. You're done.

I wish I could do something to assure the community and myself that that would never, ever happen. Unfortunately, I don't have a crystal ball, and I can't predict what might happen in the future.

I only hope and pray that you have some reflection on your humanity and understand that life is not about your self pleasure. All right?

And that other people have a right not to be suffering from your perverse, deviant thoughts. And that's why you're here today. That's why you were in that hospital. That's why you were in that library. And if you can't understand that, then God help us.

The sentence of the Court, I think judging and weighing all those factors, five years in the Illinois Department of Corrections.

I find that the defendant is—the crime was, in fact, motivated as described in 730 ILCS 150/2([B])1.5, that it is an offensive [*sic*] of unlawful restraint and that the offense, as described in the statute, was sexually motivated, appears to have been, essentially, the only motivation for the defendant having contact with these young girls on that occasion."

¶ 25 Defendant filed a timely amended motion to withdraw his plea or reconsider the sentence. With respect to his sentencing argument, defendant argued only that the sentence was excessive. The trial court denied the motion.

¶ 26 Defendant timely appealed.

¶ 27 II. ANALYSIS

¶ 28 Defendant argues that his five-year sentence should be reduced or vacated because the trial court found that defendant's mental illness was a factor in aggravation rather than mitigation. Defendant concedes that he did not properly preserve this claim. See 730 ILCS 5/5-4.5-50(d) (West 2016) ("A defendant's challenge to the correctness of a sentence or to any aspect of the sentencing hearing shall be made by a written motion filed with the circuit court clerk within 30 days following the imposition of sentence."); *People v. Heider*, 231 Ill. 2d 1, 15 (2008) ("[S]entencing issues must be raised in a postsentencing motion in order to preserve them for appellate review."). Nevertheless, he contends that the issue is reviewable as second-prong plain error.

¶ 29 To obtain relief under the plain-error rule, a defendant must first show "a clear or obvious error." *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). "In the sentencing context, a defendant must then show either that (1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing." *Id.* Under either prong, the defendant has the burden of persuasion. *Id.* Here, defendant argues only that the issue is reviewable under the second prong "as a sentencing issues [*sic*] affects his fundamental right to liberty."[1] "We begin a plain-error analysis by determining if there was reversible error

[1] Although we have subscribed to this view of second-prong plain error (see *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 7), we have since called it into question, noting that

in the first instance, as '[a]bsent reversible error, there can be no plain error.' " *People v. Camacho*, 2018 IL App (2d) 160350, ¶ 38 (quoting *People v. Cosby*, 231 Ill. 2d 262, 273 (2008)).

¶ 30 It is well established that a trial court has wide latitude in sentencing, so long as it neither ignores relevant mitigating factors nor considers improper aggravating factors. *People v. Watt*, 2013 IL App (2d) 120183, ¶ 49. Accordingly, we ordinarily will not disturb a sentence absent an abuse of discretion. *Id.* However, when the issue is whether the court relied on an improper sentencing factor, our review is *de novo*. *People v. Morrow*, 2014 IL App (2d) 130718, ¶ 14. We presume that the court applied proper legal reasoning, and the defendant bears the burden to affirmatively establish that the sentence was based on improper considerations. *People v. Dowding*, 388 Ill. App. 3d 936, 942-43 (2009). In determining whether the court based the sentence on an improper factor, we consider the record as whole, rather than focus on a few words or statements of the court. *Id.* at 943.

¶ 31 Section 5-5-3.1(a) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-5-3.1(a) (West 2016)) lists factors in mitigation, which "shall be accorded weight in favor of withholding or minimizing a sentence of imprisonment." One of these factors is: "At the time of the offense, the defendant was suffering from a serious mental illness which, though insufficient to establish the defense of insanity, substantially affected his or her ability to understand the nature of his or her acts or to conform his or her conduct to the requirements of the law." *Id.* § 5-

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second-prong plain error is limited to errors "affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." (Internal quotation marks omitted.) *People v. Johnson*, 2017 IL App (2d) 141241, ¶¶ 51, 53 n.1. For our purposes here, however, we will assume that defendant's view remains viable.

5-3.1(a)(16). Section 5-5-3.2(a) lists factors in aggravation that the trial court may consider as reasons to impose a more severe sentence. *Id.* § 5-3.2(a). Mental illness is not listed as an aggravating factor.

¶ 32 Defendant pleaded guilty to unlawful restraint, a Class 4 felony (720 ILCS 5/10-3 (West 2016)). He was subject to an extended-term sentence as a result of prior convictions (730 ILCS 5/5-5-3.2(b)(1) (West 2016)). Thus, he faced a sentencing range of 1 to 6 years. See *id.* § 5-4.5-45(a).

¶ 33 Defendant first argues that defendant's diagnosis of antisocial personality disorder and unspecified paraphilic disorder brings him within the purview of section 5-5-3.1(a)(16) of the Unified Code. The State does not dispute that the diagnosis qualifies as a mental illness. However, the State does argue that defendant failed to present sufficient evidence at the sentencing hearing to establish that defendant's mental illness "substantially affected his *** ability to understand the nature of his *** acts or to conform his *** conduct to the requirements of the law" as required by section 5-5-3.1(a)(16). *Id.* § 5-5-3.1(a)(16). Thus, according to the State, the trial court was not required to consider defendant's mental illness as mitigating.

¶ 34 In support of his argument, defendant relies exclusively on Dr. Kane's report as evidence of defendant's inability "to conform his *** conduct to the requirements of the law." *Id.* Defendant notes that, according to Dr. Kane's report, a diagnosis of antisocial personality disorder is defined as a "pervasive pattern of disregard for and violation of the rights of others" as indicated by a combination of at least three of seven factors, which include "[f]ailure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest." Defendant also points to Dr. Kane's finding that defendant was " 'Well Above Average' risk" for sexual recidivism and to her statements that "[defendant's]

behavior is concerning, as it has been persistent in spite of legal intervention and other admonishments," and that "[defendant's] pursuit of females has an obsessive quality."

¶ 35 It is not entirely clear whether Dr. Kane's report is sufficient to establish that defendant's mental illness falls under section 5-5-3.1(a)(16) of the Unified Code, *i.e.*, that his mental illness "substantially affected his *** ability to understand the nature of his *** acts or to conform his *** conduct to the requirements of the law." *Id.* Although Dr. Kane diagnosed defendant with antisocial personality disorder, which includes as a marker "[f]ailure to conform to social norms with respect to lawful behaviors," we cannot say that defendant's "failure to conform" necessarily equates to an *inability* to do so stemming from a mental illness. In any event, even if the evidence conclusively established that defendant's mental illness was a mitigating factor, there is nothing in the record that affirmatively shows that the trial court failed to consider it as such. See *People v. Markiewicz*, 246 Ill. App. 3d 31, 55 (1993) ("Where mitigating evidence is before the court, it is presumed the court considered that evidence absent some contrary indication other than sentence imposed.").

¶ 36 That brings us to defendant's claim that the record affirmatively shows that the trial court improperly considered defendant's mental illness as aggravating. Illinois courts have not addressed the issue of the improper consideration of mental illness as an aggravating factor. However, defendant directs us to *Heider*, which we agree is instructive. At issue in *Heider* was whether the trial court improperly used the defendant's mental retardation as an aggravating factor rather than as a mitigating factor as required by section 5-5-3.1(a)(13) of the Unified Code (see 730 ILCS 5/5-5-3.1(a)(13) (West 2002)). The defendant, who was 19 years old and mentally retarded, pleaded guilty but mentally ill to one count of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2002)), arising out of an instance of sexual

contact with D.R., a 12-year-old female. D.R. had given a statement to police indicating that she initiated the relationship with the defendant. The trial court rejected the State's sentencing recommendation of 6 years in prison, instead sentencing the defendant to 10 years. The trial court stated:

> " 'His mental illness is somewhat of a double-edged sword. On one hand, it instills a great deal of sympathy and compassion, as [defense counsel] stated in his beginning remarks. And the system for which we work does not afford those types of individuals a great deal of consideration. But it also instills a great deal of fear in the community because, as demonstrated by this particular defendant, [despite] insistence by his parents, insistence by [D.R.'s] parents, insistence by this court in *** issuing orders of protection, *** none of those things were successful at keeping this young man away from this young girl.
>
> [Defendant] had more than ample opportunity throughout the course of this case to demonstrate his ability to control himself. He did not do so. And that should terrify the public.' " *Heider*, 231 Ill. 2d at 11.

¶ 37 On appeal, the defendant argued that the trial court erred in considering his mental impairment as a factor in aggravation. In considering the issue, the supreme court stated as follows:

> "There are two basic ways in which it might be said that mental retardation is used as an aggravating factor in sentencing. First, the trial court might conclude that the sentence of a mentally retarded defendant should be increased purely because he is mentally retarded. This would, in essence, be discriminatory—a consideration of mental retardation as a *per se* aggravating factor—which is prohibited under the statute.

> Alternatively, a trial court might conclude, from the evidence, that a defendant's mental retardation rendered him dangerous to the community, and for this reason decided to increase the defendant's prison sentence. If, for example, the evidence established that a defendant had diminished impulse control as a result of his mental deficiency, and if that lowered impulse control rendered him a threat to the community, a trial court might conclude that, because of the defendant's future dangerousness resulting from his lack of control, the defendant should be given a greater prison sentence in the interest of protecting the public. [Citation.] However, where mental retardation indicates future dangerousness, it is not the mental retardation that is being used as the aggravating factor. Rather, it is the future dangerousness that results from the mental retardation that is the aggravator. In our view, there is nothing improper in considering the effects of mental retardation in this way, so long as the evidence supports the conclusion that the defendant poses a future danger." *Id.* at 20-21.

The *Heider* court found that the record did not support the trial court's conclusion that the defendant's mental retardation rendered him a future danger. The court specifically noted:

> "Prior to this case, defendant's history—as shown in the presentence investigation report—included only traffic violations such as speeding, disregarding a stop sign and violation of the seat belt provisions of the Illinois Vehicle Code. There was nothing in his prior history that even remotely resembled a violent crime or an offense of a sexual nature. In the case at bar, the record shows that defendant did not initiate the relationship with D.R. It was D.R. who pursued defendant. Moreover, defendant socialized with students who were D.R.'s age—not in order to prey on them—but because they were, in essence, his peers in terms of emotional maturity." *Id.* at 23.

Thus, the court held that the trial court improperly relied on the defendant's mental retardation as an aggravating factor. *Id.* at 22-25.

¶ 38 Here, unlike in *Heider*, the record makes clear that the trial court did not rely on defendant's mental illness as an aggravating factor; rather, it relied on the future dangerousness that resulted from the mental illness. In sentencing defendant, the court specifically stated: "It would appear the defendant at 37 years of age is not likely to change his behavior and his conduct. It appears likely that he will engage in future criminal behavior." This conclusion was supported by the fact that the offense, as noted by the court, was not an isolated incident. The court cited defendant's prior history, specifically noting the incident at the Hillside Library, which the court stated was "reflective of the same mentality that brought him to that hospital." The PSI notes that "a number of his arrests have been for offenses in which there was a potential for harm to others or in which a victim was harmed." While on conditional discharge for the Hillside offense, defendant was charged with domestic battery. In addition, relying on Dr. Kane's report, the court noted that defendant "does not appreciate the seriousness of his psychiatric issues, does not see that he suffers from any of these problems or poses any risk to anyone else." The court also noted Dr. Kane's opinion that defendant was " 'not an ideal candidate for community-based sex offender treatment. He has a clear pattern of sexually deviant behavior, and his behavior has persisted, despite prior legal sanctions.' " This conclusion is supported by the record.

¶ 39 Defendant concedes that the "court clearly considered [defendant's] 'future dangerousness' when sentencing him" but argues that the court's comments concerned more than defendant's likelihood to reoffend, as it declared that " 'other people have a right not to be suffering from [defendant's] perverse, deviant thoughts.' " According to defendant, this

comment indicates that the court sentenced defendant for his "mere thoughts." Defendant is taking the court's comment out of context. The court stated:

> "I only hope and pray that you have some reflection on your humanity and understand that life is not about your self pleasure. All right?
>
> And that other people have a right not to be suffering from your perverse, deviant thoughts."

Taken in context, it is clear that the court was relying not merely on defendant's "perverse, deviant thoughts" but on his failure to understand others' rights not to suffer from them, which clearly affects his future dangerousness.

¶ 40 Viewing the record as a whole, we find that the trial court did not rely on defendant's mental illness as an aggravating factor in sentencing defendant to five years' imprisonment; rather, it relied on the future dangerousness resulting from that mental illness. Accordingly, we find no error, and therefore no plain error. See *Camacho*, 2018 IL App (2d) 160350, ¶ 38 (without reversible error, there is no plain error).

¶ 41 III. CONCLUSION

¶ 42 For the reasons stated, we affirm the judgment of the circuit court of Du Page County.

¶ 43 Affirm.