FIFTH DIVISION
November 18, 2016

No. 1-14-0835

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

	)	Appeal from the
THE PEOPLE OF THE STATE OF ILLINOIS,	)	Circuit Court of
	)	Cook County
Plaintiff-Appellee,	)	
	)	
v.	)	No. 12 CR 19592
	)	
GUADALUPE URIOSTEGUI,	)	
	)	Honorable
Defendant-Appellant.	)	Clayton J. Crane,
	)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Gordon and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: Affirming the judgment of the circuit court of Cook County where (1) the defendant's confession was made knowingly, intelligently, and voluntarily, and (2) defense counsel was not ineffective.

¶ 2 Following a bench trial, defendant Guadalupe Uriostegui was found guilty of exploitation of a child (720 ILCS 5/11-9.1(a)(2) (West 2012)) and sentenced to one year in the Illinois Department of Corrections. On appeal, defendant contends: (1) the trial court erroneously

denied his motion to suppress where his confession was not knowingly, intelligently, and voluntarily made; and (2) he received ineffective assistance of counsel. For the reasons that follow, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 Defendant was arrested and charged by indictment with sexual exploitation of a child based on the allegations that, on September 29, 2012, he knowingly exposed his penis to N.J., a 9-year-old girl, for the purpose of his own sexual gratification or arousal.

¶ 5 Prior to trial, defendant, who was represented by private counsel, filed a motion to suppress his oral and written statements because (1) he did not knowingly and intelligently waive his *Miranda* rights, (2) he was unable to understand the full meaning of his *Miranda* rights, and (3) his statements were involuntary because he was informed that if he signed the statement he would be able to go home. Defendant further alleged in his motion that he was born in Mexico, was a Spanish-speaking individual, had been schooled in Mexico for only three years, and does not read or write English.

¶ 6 At the suppression hearing, assistant State's Attorney Ronald Park (Park) testified that on September 30, 2012, he interviewed defendant at the police station along with Detective Manuel De La Torre (De La Torre) and Detective Mark DeMayo (DeMayo). Prior to interviewing defendant, De La Torre informed Park that defendant had minimal knowledge of the English language and preferred to speak in Spanish. Using De La Torre as a translator throughout the interview, Park introduced himself to defendant as an assistant State's Attorney and asked him if he was hungry, thirsty, or needed to use the restroom. Defendant responded, as translated by De La Torre, "that he already had a bottle of water that was provided to him." Park informed defendant of his *Miranda* warnings from memory and further explained each of his rights.

Defendant responded in Spanish that he understood his *Miranda* warnings and agreed to speak with Park. After defendant discussed the events of September 29, 2012, Park inquired if he would like to provide a written statement. Defendant agreed.

¶ 7 Park further testified that DeMayo then left the interview. Park drafted a typewritten statement with De La Torre translating defendant's words into Spanish. After the statement was complete, Park requested De La Torre to find an independent officer to act as a Spanish to English interpreter to go over questions with defendant regarding his treatment by the police. Officer Walenty Byk (Byk) agreed to act as a translator. De La Torre was not present when Park and Byk spoke with defendant. Byk first engaged defendant in a conversation and then informed Park that he and defendant were able to understand one another. Park then proceeded to inquire of defendant if he was treated well, offered something to eat, and was able to use the restroom when necessary, to which defendant responded affirmatively. Park also inquired whether any promises or threats were made to defendant, and he responded no. Defendant also indicated he provided his statement freely and voluntarily. Byk was then excused and De La Torre returned to the room.

¶ 8 According to Park, he, De La Torre, and defendant proceeded to review the typewritten statement. Park informed defendant that if there were any inaccuracies or corrections that needed to be made to alert him and he would revise the statement. Park read the statement in English while De La Torre translated it "sentence by sentence" into Spanish. Defendant would follow along as it was translated into Spanish. Two corrections were made on the first page, which were initiated by Park. Upon reviewing the second page, defendant indicated that he wanted to include that "he had turned off the television after he had locked the door." Park made that correction, reread the sentence in English, De La Torre translated the sentence into Spanish,

and defendant stated the sentence was correct. Defendant, Park, and De La Torre each signed every page of the written statement. According to Park, the purpose of defendant's signature was, "To ensure that we reviewed this first page or each page, and that it was true and accurate. And that these were his, that these were his words and that it was true and accurate."

¶ 9 At the State's request, Park published the following portion of the written statement to the trial court after it was received in evidence:

> "[Defendant] states that he is 49 years old and born on December 12, 1962. [Defendant] states that he was born in Guerrero, Mexico. [Defendant] states that he had lived in Chicago since he arrived in the United States in the early 1980's. [Defendant] states that he works at McKinney Brothers as a laborer and has been employed for the past 12 and a half years. [Defendant] states that he resides at *** North Avers Avenue in Chicago, Illinois, on the first floor. [Defendant] states that he resides with his sister ***, her husband ***, and their children ***, ten years old, ***, [and] 18 years old."

¶ 10 Park further testified that during the translation of the statement defendant was attentive. Park did not advise defendant that if he signed a statement he could go home and did not hear anyone else make such a promise to defendant.

¶ 11 On cross-examination, Park testified that he had interviewed other individuals concerning the incident prior to speaking with defendant.

¶ 12 Officer Byk of the U.S. Marshall's Task Force, testified he grew up speaking Spanish and is bilingual. On September 30, 2012, he was at the police station when he was asked to translate for Park. According to Byk, Park initially asked him to determine if he and defendant could understand each other. Byk introduced himself to defendant and they had a brief conversation. Defendant indicated he understood Byk. Byk testified he translated the questions asked by Park

to defendant and related defendant's responses. On cross-examination, Byk testified that when he translated for defendant he was in plain clothes and his weapon was visible.

¶ 13 Detective De La Torre of the Chicago Police Department testified that he was born in Mexico and Spanish is his primary language, which he has spoken all of his life. De La Torre further testified that on September 30, 2012, he was assigned to defendant's case and arrived at the police station at 3:30 p.m. with his partner, DeMayo. Prior to interviewing defendant, De La Torre "read some reports that described briefly what had transpired the day before." De La Torre asked defendant if he understood English. Defendant informed him that he could understand some English, but that he preferred if he would speak to him in Spanish. De La Torre then read defendant his *Miranda* rights from his "FOP book" in Spanish. Defendant indicated he understood his rights by responding verbally and nodding his head. De La Torre then inquired if defendant wanted to answer some questions, to which defendant responded affirmatively. According to De La Torre, as he asked defendant questions defendant was responsive, appeared to be normal, and appeared to understand what he said. After a fifteen minute conversation with De La Torre, defendant made an inculpatory statement. De La Torre advised DeMayo to have an assistant State's Attorney to review the case.

¶ 14 Park arrived shortly thereafter and both Park and De La Torre met with defendant. De La Torre testified he translated everything Park said to defendant from English into Spanish and then translated defendant's responses from Spanish into English. Park first advised defendant of his *Miranda* rights, which De La Torre translated into Spanish. Park then asked defendant questions regarding the incident with De La Torre translating. According to De La Torre, "There were several instances where the [assistant] State's Attorney asked the question in English and the defendant responded to the question before I had a chance to translate it back into English."

De La Torre testified this behavior "confirmed what [defendant] had told me before, that he understood some English."

¶ 15 De La Torre also assisted in translating the typewritten statement, however, he left when Byk came to translate a portion of the statement. When De La Torre returned a short time later, he assisted Park and defendant by going through the typewritten statement. De La Torre translated each page of the statement for defendant and witnessed defendant sign each page. De La Torre further testified that he did not tell defendant he could go home once he provided his statement.

¶ 16 On cross-examination, De La Torre testified he was aware defendant had been arrested the previous day and was also aware of the allegations which were made against the defendant. De La Torre further testified that defendant's statement was not recorded.

¶ 17 The State rested and defendant first presented De La Torre who again testified that defendant's statements were not recorded.

¶ 18 Next, defendant, through the assistance of an interpreter, testified as follows. He was born in Mexico where he obtained a third grade education. He speaks "very little" English and cannot read or write in English. At the time he was arrested he worked at a meat company loading and unloading trucks. On September 29, 2012, he was taken by police officers (who did not speak Spanish) in handcuffs to a police station located at Belmont and Western. Defendant was interrogated by a female police officer who spoke Spanish, but he refused to answer her questions. He was then transported to a police station located at Harrison and Kedzie.

¶ 19 According to defendant, he spent the night at a police station and was given nothing to eat and did not use the restroom, although he was provided with one bottle of water. Defendant further testified he was not advised that he could have an attorney present at the police station if

he requested one and he did not know that a judge could appoint him an attorney if he could not afford one. Defendant also testified he knew he could make a phone call, but declined to do so.

¶ 20 Defendant testified he had never been questioned by an officer or detective; however, he admitted he was previously arrested because he was riding his bicycle the "wrong way." Defendant further testified he was "convinced" to sign the statement "because they told me they would let me go. That's what happened. And I was – My friend – I was really sleepy. That's why. You could tell I was really tired. I need to take a break and be quiet. That's it. That's why I signed the document."

¶ 21 On cross-examination, defendant testified that De La Torre: spoke to him in Spanish; informed him that if he needed to go to the bathroom or wanted something to eat or drink to tell him; and got him a bottle of water. Defendant further testified that De La Torre informed him of his *Miranda* rights: specifically, that he had a right to remain silent and anything that he said could be used against him, that he had a right to have an attorney present during questioning and that an attorney could be hired on his behalf if he could not afford one. Defendant testified he told De La Torre that he understood those statements and agreed to speak with him. After speaking with De La Torre defendant agreed to speak with Park. De La Torre translated what Park said from English to Spanish. Defendant testified that Park also informed him that if he wanted anything to eat or drink he could ask. Defendant further testified that Park advised him of his *Miranda* rights and that he told Park he understood those rights. Defendant then made a statement to Park. While writing the statement, Park requested De La Torre step away and another officer translated Park's questions. Defendant told the new officer that he had been treated well. Defendant also testified he was not handcuffed when he initially spoke with De La Torre or when he spoke with Park. According to defendant, De La Torre then came back and

translated the statement. Defendant placed his signature on each page indicating it was true and correct. He also initialed changes that were made to the statement.

¶ 22 In closing, defense counsel argued that defendant was easily influenced to make and sign the statement and that he did so because he believed he would be free to go home after he made such a statement. The State, in contrast, argued defendant's statement was voluntary and that he understood his rights.

¶ 23 The trial court denied defendant's motion to suppress finding defendant knowingly and intelligently waived his *Miranda* rights and voluntarily made his statement. In so finding, the trial court stated as follows:

> "The Court had the ability to observe the witnesses, their interest and bias as they testified in this case. There's a couple of issues raised in the Motion to Suppress the Statement. The first issue is that the defendant was not correctly or fully advised of his rights and then the second part is whether or not he voluntarily waived his rights and his will was overborne.
>
> As to the issue of whether or not he was read his rights, it's clear to this Court that he was read his rights. The question becomes whether he understood his rights and had he understood his rights, did he voluntarily waive them. The defendant is not - - English is the defendant's second language. He came here from Mexico. He has limited education in this country. He's obviously, based on what's been presented, a hardworking man who does manual labor and follows directions as he gives his manual labor. He voluntarily follows those directions so he can get a paycheck.
>
> The testimony received by the Court from the detective, the State's Attorney and the additional officer in this matter don't lead me to believe they overbore his will in this

> matter. I find that he voluntarily gave the statements in this matter. What reasons he had for that is unclear to me as he explained where he was and as he moved around between police stations. It's clear to me that the statement that was given based upon his representation in this courtroom is voluntary and his will was not overborne. Under those circumstances the motion is denied."

¶ 24 The matter then proceeded to trial where defendant was provided with a Spanish language interpreter throughout the proceedings.

¶ 25 At trial, B.K., the mother of the victim N.J., testified she and her family formerly resided next door to defendant on the 800 block of North Avers and that defendant's niece J., who resided with defendant, was friends with N.J. B.K testified that on September 29, 2012, she dropped N.J. off at J.'s home for a play date shortly before 4 p.m. B.K. gave N.J. her cell phone and waited outside until N.J. was inside the residence. B.K. observed defendant open the door for N.J. and then she drove off. Approximately 10 minutes later, B.K. heard her "computer phone" ringing. B.K. answered the phone and spoke with N.J. who sounded shaken and like she was crying. After speaking with N.J., B.K. drove back to defendant's house and observed N.J. standing with an adult woman on the porch of a house next door. N.J. was crying and explained what happened to her mother. After N.J. did so, B.K. called the police. The police arrived, brought defendant to the front of his house, handcuffed him, and took him away.

¶ 26 N.J. testified that on September 29, 2012, she was nine years old and was in the fourth grade. At 4 p.m. her mother drove her to her friend J.'s house. J. was once her neighbor. According to N.J., defendant resided with J. and she had seen defendant approximately 15 to 20 times before September 29, 2012. Defendant opened the door and her mother drove away. Defendant offered her something to drink and asked if she wanted to watch television. N.J.

watched television in the living room and defendant gave her some juice. Two minutes later, defendant came out of the bathroom and told her to come to his room. She walked into the doorway of his room and observed defendant pull off his pants. Defendant then lay on the bed and she viewed his penis. N.J. testified she had never seen a penis before except in health class. N.J. immediately ran out of the apartment and to defendant's next door neighbor's house where a girl was playing on the porch with her friends. N.J. told the girl what had happened and the girl went to find her grandmother. The grandmother came to the porch and N.J. called her mother. Shortly thereafter, her mother arrived.

¶ 27 On cross-examination, N.J. testified that when defendant answered the door, he did not say anything to her and she denied telling police officers that defendant told her J. would be right home. According to N.J., defendant never did or said "anything bad" to her before. N.J. further testified it was dark in defendant's bedroom, defendant was laying face up in the bed, and he did not say anything to her when she was in his bedroom. N.J. also testified that defendant did not touch her and did not run after her.

¶ 28 D.S., defendant's next door neighbor, testified that on September 29, 2012, she was 11 years old and was playing outside on her grandmother's porch with friends when a little girl came running towards her grandmother's house crying. The little girl approached her and was "crying real hard." D.S. asked her what was wrong and the little girl was "shaky, kind of didn't want to say nothing." D.S. put her arm around her and walked her up the stairs of the porch and into the house and again asked her what had happened. After speaking with the little girl, D.S. called for her grandmother and told her it was an emergency. D.S.'s grandmother came downstairs and then the little girl, who was still crying and "very shaky," called her mother.

¶ 29 Park's testimony was similar to that provided during the motion to suppress hearing.

Park, however, also testified regarding the statement defendant provided. According to Park, defendant initially made an oral statement that on September 29, 2012, "while one of his niece's friends was coming over that an incident had occurred where he had exposed his penis to that individual." Park further testified that defendant identified a photograph of N.J. as the individual to whom he had exposed himself.

¶ 30 Defendant's typewritten statement was admitted into evidence and Park published it to the court. The typewritten statement provides in pertinent part as follows:

> "[Defendant] states on September 29, 2012 he was home at 842 North Avers Avenue in Chicago, Illinois. [Defendant] states that at approximately 2:30 he was in the kitchen and he heard a knock at the door. [Defendant] states that he went to the door and saw [J.]'s friend. [Defendant] states that he does not know her name but identified [J.]'s friend in a photograph in Exhibit 1. [Defendant] states that [J.]'s friend is about nine years old. [Defendant] states that he opened the door and told [J.]'s friend to have a seat on the couch and watch television. [Defendant] states that he told her that [J.] would be home in a few minutes and gave her some mango juice. [Defendant] states that she stayed in the living room and he went to take a shower.
>
> [Defendant] states that while he was taking a shower, he started to masturbate in the shower and his penis became erect. [Defendant] states that after he finished showering and he got dressed in shorts, underwear and a t-shirt [*sic*]. [Defendant] states that he went to his bedroom and pulled his shorts and underwear down to his knees. [Defendant] states that he was lying on the bed and continued to masturbate. [Defendant] states that his penis was semi-erect. [Defendant] states that he called for [J.]'s friend to come to his room. [Defendant] states that she responded and walked to the doorway.

> [Defendant] states that she saw him and he pointed to his penis and told her to look at it. [Defendant] states that [J.]'s friend immediately ran out of the room and out of the apartment. [Defendant] states that he wanted her to masturbate him and perform oral sex on him but she ran out of the room."

¶ 31 On cross-examination, Park testified that De La Torre was the investigating detective in this matter. Park further testified that neither he nor De La Torre spoke with the victim as her interview was "done through a victim sensitive interview."

¶ 32 Thereafter, the State presented the testimonies of De La Torre and Byk which were similar to their testimonies during the suppression hearing. De La Torre testified defendant's typewritten statement was a true and accurate memorialization of the questions that were asked by Park and the responses provided by defendant. Byk also testified that the typewritten statement was "exactly" what he translated to Park.

¶ 33 The State rested and defendant moved for a directed finding, which was denied.

¶ 34 Defendant then presented the testimony of Christina Uriostegui (Christina) by way of a Spanish interpreter. Christina testified that she is defendant's sister and has been living with him for the last 20 years in the building she owned on the 800 block of North Avers. Christina also resided in an apartment in that building along with her husband, son, and daughter, J. Christina further testified about the layout of the apartment in which she and defendant resided. According to Christina, it was a three-bedroom, one-bathroom apartment. Her son and defendant each had their own bedrooms while she, her husband, and J. occupied the third bedroom. According to Christina, defendant worked six days a week, Monday through Saturday, from 6 a.m. until 2 p.m. Christina also testified that on September 29, 2012, she left the apartment with J. and returned at approximately 3:15 p.m.

¶ 35 Defendant waived his right to testify and the defense rested. The trial court then found defendant guilty, stating:

> "The Court had the ability to observe the witness's interest and bias as they testified in this case. The young girl indicated that, in fact, she came over to the house, that her playmate was not there at the time she arrived at the house. She sat and watched some TV for a short period of time, she was given some juice. She saw the defendant come out of the bathroom, she was, according to her testimony, she was invited into the bedroom at that point. She saw the defendant's penis, she ran out of the house and she had several outcries to both the young girl and the grandmother at the house across the street.
>
> The question is – there's no question that [N.J.] believed that she saw the defendant's penis, that's somewhat conceded in argument in this case. The question is whether or not she saw what she said she saw. It comes down to this Court's observations of her testifying and whether or not to [*sic*] anything she testified to was corroborated.
>
> I saw her testify and found her quite believable when she testified in this case. To tie a ribbon on this case, the defendant gave a confession. Finding of guilty."

¶ 36 Defense counsel filed a posttrial motion for a new trial, which was denied. The matter immediately proceeded to sentencing where defendant was sentenced to one year imprisonment in the Illinois Department of Corrections. This appeal followed.

¶ 37 ANALYSIS

¶ 38 On appeal, defendant contends: (1) the trial court erroneously denied his motion to suppress where his confession was not knowingly, intelligently, and voluntarily made; and (2) he

received ineffective assistance of counsel. We address each argument in turn.

¶ 39 Motion to Suppress

¶ 40 On appeal, defendant argues that the trial court erred in failing to suppress his typewritten statement because the State did not establish that the statement was made knowingly, intelligently, and voluntarily. Defendant first maintains that he did not knowingly and intelligently waive his *Miranda* rights. Defendant further asserts that his statement was not made voluntarily where (1) the record fails to establish that the *Miranda* warnings provided to him in Spanish were objectively sufficient and intelligible or that defendant understood the warnings, (2) the only interpreter available to defendant was a detective who, in addition to simultaneously interrogating and interpreting for him, previously interviewed the complainant in this case, and (3) since no part of defendant's interrogation or alleged confession was recorded, the record is devoid of any objective way to verify that the English *Miranda* waiver and custodial statement, which defendant could not read, were accurately interpreted before he signed them.

¶ 41 In response, the State asserts that defendant forfeited these claims on appeal for failing to raise them before the trial court. Specifically, the State maintains that defendant did not argue that (1) because the statement was written in English he could not understand it; (2) that he did not knowingly sign the *Miranda* waiver form because it was in English; (3) that there was a faulty translation of *Miranda*; (4) that De La Torre was biased or an improper translator; (5) that the State was required to provide defendant with a Spanish version of the statement for his signature; (6) that details in the statement were not provided by the defendant; and (7) that the interview was required to be recorded or taped to verify the translation.

¶ 42 To preserve an issue for review, defendant must object both at trial and in a written posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Failure to do so operates as a

forfeiture as to that issue on appeal. *People v. McCarty*, 223 Ill. 2d 109, 122 (2006). This court can, however, consider unpreserved issues under the plain-error doctrine. See Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). The plain-error doctrine "allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). The plain-error rule, however, "is not 'a general savings clause preserving for review all errors affecting substantial rights whether or not they have been brought to the attention of the trial court.' " *People v. Herron*, 215 Ill. 2d 167, 177 (2005) (quoting *People v. Precup*, 73 Ill. 2d 7, 16 (1978)). Rather, our supreme court has held that the plain-error rule is a narrow and limited exception to the general rules of forfeiture. *Herron*, 215 Ill. 2d at 177. It is the defendant who carries the burden of persuasion under both prongs of the plain-error doctrine. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009).

¶ 43 This court must first consider whether any error occurred. *People v. Boston*, 2016 IL App (1st) 133497, ¶ 56 (citing *Herron*, 215 Ill. 2d at 181-82). Accordingly, we first turn to consider whether the trial court erred when it denied defendant's motion to suppress.

¶ 44 On appeal, defendant raises two challenges to the trial court's ruling on his motion to suppress, namely, that (1) he did not knowingly and intelligently waive his *Miranda* rights and (2) his statement was not voluntary. In reviewing a trial court's ruling on a motion to suppress, we apply the two-part standard of review adopted by the Supreme Court in *Ornelas v. United States*, 517 U.S. 690, 699 (1996). *People v. Luedemann*, 222 Ill. 2d 530, 542 (2006). Under this

standard, the ultimate question of whether defendant's statement was voluntary is reviewed *de novo*. *People v. Sorenson*, 196 Ill. 2d 425, 431 (2001). Findings of historical fact, however, will be reviewed only for clear error and the reviewing court must give due weight to inferences drawn from those facts by the fact finder. *Ornelas*, 517 U.S. at 699. "This deferential standard is grounded in the reality that the circuit court is in a superior position to determine and weigh the credibility of the witnesses, observe the witnesses' demeanor, and resolve conflicts in their testimony." *People v. McDonough*, 239 Ill. 2d 260, 266 (2010). "Accordingly, we will accord great deference to the trial court's factual findings, and we will reverse those findings only if they are against the manifest weight of the evidence; however, we will review *de novo* the ultimate question of the defendant's legal challenge to the denial of his motion to suppress." *Sorenson*, 196 Ill. 2d at 431. In reviewing a trial court's ruling on a motion to suppress we may consider evidence adduced at trial as well as at the suppression hearing. *People v. Richardson*, 234 Ill. 2d 233, 252 (2009).

¶ 45 Defendant first contends that his confession should have been suppressed because he did not knowingly and intelligently waive his *Miranda* rights. "[B]efore a defendant's confession can be admitted at trial, the State must prove by a preponderance of the evidence that defendant validly waived [his or] her privilege against self-incrimination and [his or] her right to counsel." *People v. Daniels*, 391 Ill. App. 3d 750, 780 (2009). A valid waiver of *Miranda* rights occurs where: (1) the decision to relinquish those rights was voluntary in the sense that it was not the product of intimidation, coercion, or deception; and (2) it was made with a full awareness of the nature of the rights being abandoned and the consequences of the decision to abandon them. *People v. Crotty*, 394 Ill. App. 3d 651, 662 (2009); *People v. Goins*, 2013 IL App (1st) 113201, ¶ 48. Whether a waiver is knowing and intelligent depends, in each case, on the particular facts

and circumstances of that case. *People v. Brown*, 2012 IL App (1st) 091940, ¶ 40 (quoting *People v. Bernasco*, 138 Ill. 2d 349, 368 (1990)). To that end, whether a defendant knowingly and intelligently waived his *Miranda* rights is a question of fact to be determined in light of the totality of the circumstances. *Brown*, 2012 IL App (1st) 091940, ¶ 25. Among the factors to be weighed in this decision are defendant's intellectual ability, his familiarity with the English language, and his age, education and experience. *People v. Teran-Cruz*, 272 Ill. App. 3d 573, 579 (1995). "The defendant need not understand far-reaching legal and strategic effects of waiving his or her rights or appreciate how widely or deeply an interrogation may probe; instead, the defendant must, at a minimum, understand basically what those rights encompass and minimally what their waiver will entail." (Internal quotation marks omitted.) *People v. Jones*, 2014 IL App (1st) 120927, ¶ 49 (quoting *Bernasco*, 138 Ill. 2d at 363).

¶ 46 Defendant asserts that the State did not meet its burden of proof that he knowingly and intelligently waived his *Miranda* rights before making the statement because the State failed to present any evidence of the actual translation that De La Torre used to inform defendant of his rights. Defendant further argues that no weight can be afforded to his signature on the *Miranda* waiver form because the waiver was written in English, a language he does not understand.

¶ 47 The defendant cites to *People v. Braggs*, 209 Ill. 2d 492, 515 (2003), where an accused's *Miranda* waiver was deemed to be invalid because of the individual's limited mental or intellectual capacity. However, as we have previously noted, whether a waiver is knowing and intelligent depends, in each case, on the particular facts and circumstances of that case. Thus, we find the case cited by defendant to be of no particular value to our analysis where defendant here is not asserting he has a limited mental or intellectual capacity. See *Brown*, 2012 IL App (1st) 091940, ¶ 40 (when the question is whether a defendant has intelligently waived his *Miranda*

rights, other cases are of limited value as the issue depends, in each case, on the particular facts and circumstances of that case).

¶ 48 We, however, find *People v. Villagomez,* 313 Ill. App. 3d 799 (2000), to be instructive as the facts of that case are nearly identical to the facts here. In that case, the defendant argued on appeal that the State failed to produce evidence that the Spanish words the detective used accurately conveyed the content of the *Miranda* warnings. *Id.* at 808. Although the defendant did not preserve this error for appellate review, the court nonetheless considered the argument and found that the record revealed: (1) defendant was provided *Miranda* warnings on at least three occasions; (2) the *Miranda* warnings were given to the defendant in Spanish upon arrest; and (3) the defendant was read his *Miranda* rights before his initial interrogation and before being questioned by the assistant State's Attorney. *Id.* In addition, the record was devoid of any evidence that defendant did not understand the *Miranda* warnings when they were recited to him. *Id.* Accordingly, based on these facts, the *Villagomez* court concluded that the testimony adduced at the suppression hearing and at trial was sufficient to support the conclusion that the police advised defendant of his *Miranda* rights. *Id.*

¶ 49 Here, the totality of the circumstances demonstrates that defendant knowingly and intelligently waived his *Miranda* rights. The record reflects that defendant was provided with the *Miranda* warnings in Spanish on at least two separate occasions: first, when he was first interrogated by De La Torre; and second, when he was first questioned by Park. In addition, the *Miranda* warnings were included in the typewritten statement that Park, De La Torre, and defendant testified was reviewed and translated from English into Spanish. Park also testified that defendant responded in Spanish that he understood his *Miranda* warnings. Similarly, De La Torre testified that after he initially read defendant his *Miranda* rights from his "FOP book" in

Spanish, defendant indicated he understood his rights by responding verbally and nodding his head. In addition, on cross-examination, defendant testified De La Torre informed him that: (1) he had a right to remain silent; (2) anything that he said could be used against him; (3) he had a right to have an attorney present during questioning; and (4) an attorney could be hired on his behalf if he could not afford one. Defendant also admitted that he informed Park that he understood his *Miranda* rights and proceeded to make his statement. Moreover, at trial De La Torre testified that defendant's typewritten statement was a true and accurate memorialization of the questions that were asked by Park and the responses provided by defendant. These questions included whether defendant understood his *Miranda* rights. As in *Villagomez*, the record here is also devoid of any evidence that defendant did not understand these warnings when they were recited to him. See *id.*

¶ 50 Defendant further maintains that in rendering its ruling on the motion to suppress the trial court did not consider defendant's inability to comprehend English. The record belies defendant's assertion. At the suppression hearing, the trial court was presented with evidence that defendant was born in Mexico, received a third grade education there, and that Spanish was his primary language. Defendant also testified with the aid of a Spanish interpreter. Moreover, in stating its ruling the trial court acknowledged that defendant came to the United States from Mexico and that English was his second language.

¶ 51 Defendant cursorily asserts that, "The law acknowledges the inherent bias of an arresting officer and the fact that biased parties may have a temptation to testify falsely." Defendant's claim is made with respect to De La Torre who was the investigator of defendant's case and also translated the *Miranda* warnings for defendant. Defendant, however, points to no place in the record which evidences De La Torre's "inherent bias" or "temptation to testify falsely." In fact,

the trial court observed De La Torre testify at the suppression hearing and, based in part on that testimony, concluded that defendant knowingly and voluntarily waived his *Miranda* rights. We give great deference to the trial court as it is in a superior position to determine the credibility of the witnesses and we will not substitute our judgment for that of the trial court. See *McDonough*, 239 Ill. 2d at 266.

¶ 52 Defendant also contends that his lack of relevant experience with the criminal justice system demonstrates that he had an insufficient understanding of his rights. Defendant relies on *People v. Higgins*, 239 Ill. App. 3d 260, 270 (1993), for the proposition that a "[d]efendant's prior experience with the police must also be considered, for, if the defendant had been given his rights on numerous other occasions, he might have had sufficient understanding to waive his rights." While the *Higgins* court noted that the record there lacked any "concrete evidence that [the defendant] had been given his *Miranda* rights" in his "many encounters with the police," the record also revealed that the defendant was (1) a juvenile, (2) not advised of his rights repeatedly, (3) not asked if he understood those rights, and (4) not further explained those rights. *Id.* In addition, testimony was adduced at the suppression hearing from two psychologists, which indicated that "a rote reading of the *Miranda* rights to the defendant would be problematic to the defendant's understanding of his rights and that many of the words contained in the rights would be beyond the defendant's understanding." *Id.* Consequently, we find *Higgins* to be inapplicable to the case at bar. We note that the trial court here heard defendant's testimony at the suppression hearing that he had never previously been questioned by an officer or a detective. This information alone, however, is not conclusive of whether a defendant knowingly and intelligently waived his rights.

¶ 53 In light of all the evidence presented at the suppression hearing and at trial, we conclude

that evidence was sufficient to support the conclusion that defendant was advised of his *Miranda* rights. See *Villagomez*, 313 Ill. App. 3d at 808.

¶ 54 Defendant next argues that the State failed to prove that the typewritten statement was voluntarily adopted by him. Defendant maintains that the statement was involuntary where (1) it was written in English, (2) interpreted to him by an investigator on the case, and (3) no recording exists to verify the typewritten statement.

¶ 55 When a defendant seeks to suppress a confession, the State must demonstrate by a preponderance of the evidence that the confession was voluntary. 725 ILCS 5/114-11(d) (West 2012) ("The burden of going forward with the evidence and the burden of proving that a confession was voluntary shall be on the State."); *People v. R.D.*, 155 Ill. 2d 122, 134 (1993). The test of voluntariness is whether the defendant made the statement freely, voluntarily, and without compulsion or inducement of any sort, or whether the defendant's will was overcome at the time he or she confessed. (Internal quotation marks omitted.) *Richardson*, 234 Ill. 2d at 253 (quoting *People v. Slater*, 228 Ill. 2d 137, 160 (2008)). Factors relevant in determining the voluntariness of a confession are similar to those we consider when determining whether a defendant's waiver of his *Miranda* rights were knowing and voluntary. These factors include the defendant's age, intelligence, education and experience, his physical condition at the time of the interrogation, the duration of the interrogation, the presence of *Miranda* warnings and the presence of any physical or mental abuse. *People v. Harris*, 2012 IL App (1st) 100678, ¶ 63. A court may also consider any threats or promises made to the defendant (*Richardson*, 234 Ill. 2d at 253-54) as well as defendant's fluency in the English language (*Teran-Cruz*, 272 Ill. App. 3d at 579). No one factor is controlling and a court looks to the totality of the circumstances in determining whether defendant's confession was voluntary. *People v. Willis*, 215 Ill. 2d 517,

536 (2005).

¶ 56 Defendant's primary contention is that his inability to speak and understand English rendered his statement involuntary. Defendant does not assert his statement was involuntary based on his age, intelligence, education and experience, physical condition, the duration of the interrogation, or the presence of physical or mental abuse.

¶ 57 Illinois courts have previously held that written statements translated into English from a non-English speaking defendant were voluntary. Similar to the instant case, in *Villagomez*, a detective testified at the hearing on the defendant's motion to suppress that he interviewed the defendant in Spanish and gave the defendant his *Miranda* rights in Spanish. *Villagomez*, 313 Ill. App. 3d at 801. Later, the detective acted as an interpreter when the defendant gave a statement to an assistant State's Attorney. *Id.* at 802. The detective translated each line of the statement into Spanish for the defendant and the defendant indicated that he understood. *Id.* The defendant, however, testified that the detective accused him of lying, threatened him, and told him that the assistant State's Attorney was the defendant's attorney. *Id.* The trial court denied the motion to suppress. *Id.* at 803.

¶ 58 On appeal, the defendant argued that the statement was not voluntary because of the English-Spanish language barrier. *Id.* at 808. The reviewing court rejected this argument, stating:

> "The record reveals that the State presented testimony that defendant was informed of his constitutional rights in Spanish. [The detective] and the assistant State's Attorney both testified that as defendant gave his statement in Spanish, [the detective] translated to English and the assistant State's Attorney wrote the statement in English. Once the statement was written, [the detective] translated each sentence to Spanish for defendant

> and asked if the sentence was correct. Any corrections were made sentence by sentence. [The detective] then read the entire corrected statement to defendant in Spanish with defendant signing the written statement and initialing the bottom of each page. We further note that there is no evidence in the record to suggest that defendant had difficulty understanding [the detective] or that he expressed a desire for a different interpreter." *Id.* at 808-09.

¶ 59 The reviewing court in *People v. Joya*, 319 Ill. App. 3d 370, 379 (2001), followed the holding in *Villagomez*. In that case, the defendant also challenged the voluntariness of his statement based on the language barrier, contending that the statement contained words he never said. The *Joya* court found as follows:

> "Whenever a witness' or a defendant's statements are not in English, translation is a necessity to make those statements intelligible to the court and the jury. This is why the statements are translated to English in the first place. To say that the written statement must be taken in the defendant's own language and then translated to the court and jury would not make it any more accurate. Testimony regarding a confession by a non-English speaking defendant is admissible because it satisfies the most important requirements of other exceptions to the hearsay rule: (1) it has circumstantial guarantees of trustworthiness; (2) it concerns admissions of a party; (3) it consists of admissions against the declarant's penal interest. Of course, the fact that an interpreter is used and significantly, the fact that the written statement is not intelligible to the defendant are bases upon which to attack the statement's accuracy. However, if the trial court finds the statement to have been voluntarily made, such statements are admissible." *Id.* at 380 (citing *People v. Gukouski*, 250 Ill. 231, 235 (1911)).

¶ 60 Defendant attempts to distinguish this case from *Villagomez* by asserting that "Detective De La Torre was not a government agent who was unrelated to or only remotely involved in the case. Rather, he was the lead investigator on this case, and the person who testified before the grand jury." Despite defendant's contention, neither *Villagomez* nor *Joya* limited the finding of a voluntary statement to instances in which the translating detective was unrelated or remotely involved in the case. *Villagomez*, 313 Ill. App. 3d at 808-809; *Joya*, 319 Ill. App. 3d at 378-79. Instead, defendant relies on *United States v. Monreal*, 602 F.Supp.2d 719 (E.D. Va. 2008). In that case, the defendant was charged with the possession of heroin shortly after crossing the Mexico border. *Monreal*, 602 F.Supp.2d at 721. The defendant did not speak English and was questioned by a police department agent in Spanish with a Drug Enforcement Agency (DEA) agent acting as a witness. *Id.* The police department agent transcribed the defendant's statement in English. *Id.* The defendant subsequently filed a motion to suppress. *Id.* at 722. The district court granted the defendant's motion to suppress, finding the law enforcement officers' testimony "incredible." *Id.* at 723. The district court observed that it was "undisputed" that the defendant did not understand English and there was no indication that she had spent a significant amount of time in the United States. *Id.* The district court based its holding on three grounds: (1) inconsistencies in the testimony that the DEA agent was present during the questioning; (2) its observation that the police department agent "stumbled and hesitated" when translating the "Spanish Advise of Rights" into English; and (3) the court found the police department paraphrased the defendant's statement and the district court was "unsure of where [the police department agent's] paraphrasing begins and where the Defendant's actual testimony ends." *Id.*

¶ 61 In contrast, De La Torre testified that he was born in Mexico and that Spanish was his primary language. De La Torre further testified that defendant informed him he could

understand some English and that he first came to this country in the early 1980s. At the suppression hearing, defendant testified he had previously been arrested and an examination of the record on appeal reveals that defendant had previously been found guilty of disorderly conduct in 2000, and had previously been arrested for driving under the influence in 2002 and aggravated assault in 1990. Moreover, the trial court in this case did not find that De La Torre paraphrased defendant's statement and found De La Torre's testimony to be credible. Based on these circumstances, we find *Monreal* to be distinguishable.

¶ 62 Defendant further notes that "the Illinois General Assembly recently enacted a law that expanded the interrogation recording requirement previously in place for homicide suspects," and, while acknowledging that the bill is not applicable to his circumstance, requests this court "recognize that the unique circumstances in this case demand that same protection." Defendant, however, fails to cite any authority holding that legislation not in existence at the time of the suppression hearing is relevant to our review of the motion to suppress. Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013) requires an appellant's brief to include "[a]rgument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." Contentions supported by some argument, but with no authority, do not meet the requirements of Rule 341(h)(7). Accordingly, we find defendant has forfeited this argument. See *People v. Macias*, 2015 IL App (1st) 132039, ¶ 88 (finding defendant's claim forfeited pursuant to Rule 341(h)(7)).

¶ 63 In the instant case, the translator, De La Torre, testified to defendant's statement. As previously discussed, De La Torre was born in Mexico and Spanish is his primary language. In great detail, De La Torre testified regarding the process of obtaining the statement from defendant, which included giving defendant his *Miranda* rights from his "FOP book" in Spanish

and providing defendant with his *Miranda* rights a second time when he translated the typewritten statement to defendant, which defendant signed. De La Torre was fully cross-examined regarding his translation of defendant's statement and the substance of defendant's statement. See *Joya*, 319 Ill. App. 3d at 378. De La Torre and Park both testified that as defendant provided his statement in Spanish, De La Torre translated it into English and Park typed the statement in English. Once the statement was memorialized, De La Torre read the statement sentence-by-sentence to defendant in Spanish and defendant signed each page acknowledging the statement was true and correct. Defendant admitted on cross-examination that he signed each page of the statement for this purpose. Thus, when looking at the totality of the circumstances we find the State met its burden of proof of establishing defendant's confession was voluntary. See *Villagomez*, 313 Ill. App. 3d 808-09; *Joya*, 319 Ill. App. 3d 378-79; *Teran-Cruz*, 272 Ill. App. 3d at 579-80. We conclude the trial court properly denied defendant's motion to suppress.

¶ 64 As we have found that the trial court did not err when it denied defendant's motion to suppress, it follows that there can be no plain error. See *People v. Maxey*, 2016 IL App (1st) 130698, ¶ 73 ("Because there is no error, there can be no plain error."). Defendant, however, asserts in the alternative that his counsel was ineffective for failing to specifically challenge the content of De La Torre's interpretations, both with regard to the *Miranda* warnings and with regard to the typewritten statement drafted by Park. Claims of ineffective assistance of counsel are resolved under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Henderson*, 2013 IL 114040, ¶ 11. In *Strickland*, the Supreme Court delineated a two-part test to use when evaluating whether a defendant was denied the effective assistance of counsel in violation of the sixth amendment. Under Strickland, a defendant must demonstrate

that counsel's performance was deficient and that such deficient performance substantially prejudiced the defendant. *Id.* at 687. To demonstrate performance deficiency, a defendant must establish that counsel's performance fell below an objective standard of reasonableness. *People v. Edwards*, 195 Ill. 2d 142, 163 (2001). In evaluating sufficient prejudice, "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome." *Strickland*, 466 U.S. at 694. "A defendant's failure to establish either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel." *Henderson*, 2013 IL 114040, ¶ 11.

¶ 65 In asserting a claim of ineffectiveness, the defendant must overcome a strong presumption that his or her counsel's inaction resulted from sound trial strategy and not incompetence. *People v. Patterson*, 217 Ill. 2d 407, 441 (2005). Generally, the decision of whether to file a motion to suppress is a matter of trial strategy and "therefore one in which the court will not indulge a hindsight analysis to determine whether the attorney's decision was reasonably adequate under the circumstances." *People v. Morris*, 229 Ill. App. 3d 144, 157 (1992) (citing *People v. Bryant*, 128 Ill. 2d 448, 458 (1989)). Hence, to prevail a defendant must demonstrate that a reasonable probability existed that the motion would have been granted and the outcome of the trial would have been different had the evidence been suppressed. *Morris*, 229 Ill. App. 3d at 157.

¶ 66 Defendant fails to satisfy his burden under *Strickland*. Based on our aforementioned conclusion that defendant knowingly and intelligently waived his *Miranda* rights and voluntarily produced the statement, defendant cannot demonstrate that a reasonable probability existed that but for defense counsel's ineffectiveness the motion to suppress would have been granted. See

id. Thus, defense counsel's performance in failing to specifically challenge the content of De La Torre's interpretations did not fall below an objective standard of reasonableness. Further, counsel's actions did not prejudice defendant because the evidence against him was overwhelming where the nine-year-old victim's testimony was found credible by the trial court and the victim immediately reported defendant's acts to others. Accordingly, we reject defendant's claim that defense counsel was ineffective. See *Henderson*, 2013 IL 114040, ¶ 51.

¶ 67 Ineffective Assistance of Counsel

¶ 68 Defendant next argues that his counsel was ineffective on three grounds: (1) failing to argue his confession was inadmissible hearsay; (2) failing to object to Park's publication of defendant's statement; and (3) failing to seek a determination of N.J.'s competency as a witness. As set forth previously, to establish an ineffective assistance of counsel claim, the defendant must demonstrate the counsel's representation fell below an objective standard of reasonableness and he suffered resulting prejudice such that there is a reasonable probability that, but for the counsel's errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694; *Henderson*, 2013 IL 114040, ¶ 11. We address each argument in turn.

¶ 69 Defendant first asserts that even if De La Torre provided an honest and unbiased interpretation of defendant's statement, it was merely an inadmissible summary of De La Torre's conversation with defendant in Spanish, written in English by Park. Defendant maintains that this "arrangement frustrated the whole purpose of having a prosecutor, rather than an officer, memorialize the statement" because the prosecutor's presence typically adds reliability to the statement. According to defendant, in this instance Park did not have firsthand knowledge of what defendant actually said. Defendant concludes that the typewritten statement was "merely a police report summarizing a suspect's comments" and as such was inadmissible.

¶ 70 Hearsay is an out-of-court statement offered in court to prove the truth of the matter asserted in the statement. *Caffey*, 205 Ill. 2d at 88. The statement of a party-opponent, such as defendant, is not hearsay. Ill. R. Evid. 801(d)(2) (eff. Jan. 1, 2011). Moreover, as previously discussed, courts have permitted the admission of statements written in English by Spanish speaking defendants where the detective who translated the statement testified as to the taking of the statement. See *Villagomez*, 313 Ill. App. 3d at 808-09; *Joya*, 319 Ill. App. 3d at 378-79 (2001).

¶ 71 We again find *Joya* to be particularly instructive to the case at bar. The defendant in *Joya* argued that the statement written by an assistant State's Attorney in English should not have been introduced into evidence where the defendant had no opportunity to select an interpreter or for the court to appoint an interpreter for him. *Joya*, 319 Ill. App. 3d at 377. The defendant further argued that the detective did not act as a standard interpreter because he did not write down the questions in Spanish, did not write down the defendant's answers, and he failed to write out the defendant's alleged statement in Spanish for the defendant to read and then sign. *Id.* In considering whether the defendant's statement was admissible, the *Joya* court observed that " '[t]he hearsay exception for a criminal defendant's voluntary confession is firmly rooted in the law and comports with the substance of the constitutional protection of the confrontation clause of the sixth amendment.' " *Id.* at 378 (quoting *People v. Grisset*, 288 Ill. App. 3d 620, 630 (1997)).

¶ 72 The *Joya* court found that the testimony before the trial court demonstrated that the detective who acted as the defendant's translator was a native Spanish speaker with 24 years of experience translating and was fully cross-examined regarding his translation and substance of the defendant's statement. *Id.* The detective further testified regarding the process of obtaining

the statement from the defendant. *Id.* at 379. The detective and the assistant State's Attorney also testified that the defendant gave his statement in Spanish and that the detective translated it to English and the assistant State's Attorney wrote the statement in English. *Id.* Once the statement was written, the detective read the entire statement "word for word" to the defendant in Spanish and only then did the defendant sign it. *Id.*

¶ 73 Similarly and as already discussed at length, De La Torre testified he was a native Spanish speaker, having been born in Mexico. De La Torre was extensively cross-examined, at the suppression hearing and at trial, regarding his translation as well as the substance of defendant's confession. De La Torre also testified at length regarding the process of obtaining the statement from defendant and that, once the confession was written in English, De La Torre translated each page for defendant. Defendant and Park testified similarly regarding this process with Park stating that De La Torre translated the statement "sentence by sentence." As defendant's voluntary confession was not hearsay, we cannot say that defense counsel was ineffective for failing to argue that it was.

¶ 74 We further observe that defendant makes an assumption that Park did not transcribe defendant's words, but a "summary of what he heard from Detective De La Torre." Defendant does not take into consideration that after the typewritten statement was complete, De La Torre translated each page sentence by sentence to defendant. Defendant then signed the document eight times: twice on the first page, and once on every page thereafter. Moreover, both De La Torre and Byk testified that their translations of defendant's statement were true and accurate. Finally, defendant admitted he signed the document indicating that each page was true and correct and also initialed any changes that were made to the statement. Accordingly, the record fails to support defendant's contention.

¶ 75 Defendant also asserts that his signature on the typewritten statement "implies an acknowledgement and acceptance" that he could not have given because he does not speak English. In support of this proposition, defendant relies on two cases *People v. Pena*, 594 N.Y.S. 2d 586, 588 (N.Y. County Ct. 1993) and *Laughlin v. Chenoweth*, 92 Ill. App. 3d 430, 433-35 (1980). Neither case is applicable to the matter at bar. We initially observe that *Pena* is a New York State trial order and, thus, is not binding on this court. See *People v. Jarvis*, 2016 IL App (2d) 141231, ¶ 25 (such decisions, however, may be considered persuasive authority). In *Pena*, the defendant moved to suppress a statement written in English that was the product of an oral statement he made in Spanish to an investigator on the basis that it was involuntary. *Id.* at 587. After conducting a suppression hearing where the defendant did not testify, the trial court found that the defendant was not able to read the statement and "he could not and did not comprehend or assent to the translation of that statement by [the investigator], and his signature on the written document here at issue implies an acknowledgement and acceptance of that written document which defendant could not have given." *Id.* at 588. In contrast, defendant here testified at the suppression hearing and his testimony, along with the testimonies of De La Torre, Park, and Byk, established that defendant assented to the translation process. Moreover, defendant admitted he signed the typewritten statement and accepted the statement as true and correct.

¶ 76 In *Laughlin*, a civil case involving liability after an automobile collision, the defendant sought the admission of a statement the 10-year-old plaintiff made two weeks after the accident occurred for the purposes of impeachment. *Laughlin*, 92 Ill. App. 3d at 432, 434. The reviewing court upheld the trial court's order denying its admission finding, "Had it been shown that the minor had read the statement prior to signing, that would have been sufficient to require its admission." *Id.* at 435. In the present case, the suppression hearing testimony established that

De La Torre translated the typewritten statement sentence-by-sentence for defendant and in doing so asked defendant to point out any inaccuracies, which defendant did on page two. Furthermore, the evidence at the suppression hearing established that defendant followed along while the statement was being read out loud by Park and translated by De La Torrre. Defendant also testified that he placed his signature on each page of the statement after it was read out loud indicating it was true and correct and acknowledged that there were "some mistakes and they want to make sure that they fix it." Thus, unlike the facts of *Laughlin*, which involved a minor, the record here reflects defendant read the statement prior to signing. Based on the circumstances of this case, we conclude that defense counsel was not ineffective for failing to object to the admission of defendant's confession as hearsay because defendant cannot demonstrate that the objection would have been sustained.

¶ 77 Next, defendant argues that defense counsel was ineffective for failing to object to the publication of his statement by Park because an interpreter's translation of a statement made by a declarant in a foreign language is inadmissible as hearsay unless the interpreter himself testifies.

¶ 78 This court's holding in *Villagomez* is once again dispositive of this issue. In *Villagomez*, the defendant argued that his confession should have been excluded as hearsay because the assistant State's Attorney published the statement when the statement was the investigator's translation of the defendant's statement. *Villagomez*, 313 Ill. App. 3d at 809. As here, the *Villagomez* defendant maintained that the investigator was the proper person to publish the statement. *Id.* The *Villagomez* court held the defendant was not prejudiced by the assistant State's Attorney's act of publishing his statement to the jury because the statement was properly admitted into evidence. *Id.* The *Villagomez* court based this holding on the fact that the investigator was fully cross-examined regarding his involvement in translating the defendant's

statement and the substance of the defendant's statement and laid the porper foundation for its admissibility. *Id.* The investigator also testified in great detail the process of obtaining the statement from the defendant. *Id.* The reviewing court, however, emphasized that "unless the person who acts as the interpreter testifies as to the taking of the statement, the statement is inadmissible hearsay." *Id.* (citing *People v. Torres*, 18 Ill. App. 3d 921, 928-29 (1974)). Here, De La Torre acted as the interpreter and testified as to taking defendant's statement. Thus, the statement was not inadmissible hearsay and was properly admitted into evidence and published to the jury by Park. See *id.* Accordingly, pursuant to *Villagomez*, we conclude defense counsel was not ineffective for failing to object to Park's publication of defendant's statement. See *id.*

¶ 79 Lastly, defendant asserts that defense counsel was ineffective for failing to investigate and request a competency hearing regarding N.J. who was ten-and-a-half years old at the time of trial. According to defendant, defense counsel should have investigated N.J.'s competency where there were two "red flags:" (1) her age; and (2) the fact 15 months had passed between the date of the offense and the date she testified.

¶ 80 We initially observe that while a presumption used to exist which required that competency hearings be conducted for witnesses under 14 years of age, that presumption was abolished in 1989 when section 115-14 of the Code of Criminal Procedure of 1963 was implemented. *People v. Westpfahl*, 295 Ill. App. 3d 327, 330-31 (1998); 725 ILCS 5/115-14 (West 2012). As the law currently stands in Illinois, *all* witnesses irrespective of age are presumed competent to testify. *People v. Nowicki*, 385 Ill. App. 3d 53, 86 (2008); see 725 ILCS 5/115-14(a) (West 2012); *People v. Sutherland*, 317 Ill. App. 3d 1117, 1124 (2000). Accordingly, defendant's argument that defense counsel was ineffective for failing to investigate N.J.'s competency based on her age alone fails.

¶ 81 Defendant, however, asserts in reply that it is not N.J.'s age alone that renders her incompetent to testify, but her age *in conjunction with* the amount of time that had passed prior to her testimony at defendant's trial.

¶ 82 Potential witnesses can be disqualified if they are (1) incapable of expressing themselves concerning the matter at hand, so as to be understood, or (2) incapable of understanding the duty of a witness to tell the truth. See 725 ILCS 5/115-14(b) (West 2012). The burden of proving that a witness is not competent to testify falls upon the party challenging the witness' ability to testify. See 725 ILCS 5/115-14(c) (West 2012). A witness may be found incompetent to testify if the moving party can demonstrate that "he or she is *incapable* of either expressing himself or herself so as to be understood [citation] or of understanding the duty of a witness to tell the truth." (Emphasis in original.) *People v. Hoke*, 213 Ill. App. 3d 263, 272 (1991).

¶ 83 The issue here is not whether N.J. was competent to testify. The issue is whether defense counsel's failure to investigate and challenge N.J.'s competency to testify amounted to ineffective assistance of counsel under the circumstances in this case. See *Nowicki*, 385 Ill. App. 3d at 88.

¶ 84 Under the circumstances in this case, we decline to find defense counsel ineffective for failing to investigate and challenge N.J.'s competency. The record contains no indication that N.J. was not reasonably competent to testify. In discovery, the State produced a copy of N.J.'s videotaped victim sensitive interview and provided it to defendant. N.J.'s interview was provided to this court in the record on appeal. A review of the interview reveals that N.J., who was then nine years old, was capable of expressing herself concerning the matter so as to be understood and further expressed herself to other witnesses in this case at or near the time the offense occurred. N.J. testified similarly 15 months later, thus, we disagree with defendant that

her age and the 15 months leading up to her testimony affected her competency. See *People v. Velasco*, 216 Ill. App. 3d 578, 586 (1991).

¶ 85 While defendant did not initially raise any challenge to N.J.'s understanding of the duty of a witness to tell the truth, he did raise it briefly in his reply and generally asserts that defense counsel was ineffective for failing to question N.J.'s ability to tell the truth. "Section 115-14 suggests that intellectual rather than moral fitness is the true measure of witness competency" since that section disqualifies a witness who is incapable of understanding the duty to tell the truth, but not a witness who is unlikely to tell the truth. *People v. Mason*, 219 Ill. App. 3d 76, 81 (1991). Here, the victim sensitive interview revealed that the interviewer initially asked N.J. a series of questions to determine whether or not N.J. knew the difference between the truth and a lie. N.J. informed the interviewer that she knew the difference between the truth and a lie in each of the various scenarios presented by the interviewer. Defense counsel, who was provided with this interview during the discovery process, was therefore also aware of N.J.'s ability to differentiate the truth from a lie. As such, we conclude that under the present circumstances, defense counsel could have reasonably concluded that it was unnecessary to challenge N.J.'s competency as any such challenge would have had very little, if any at all, chance of success. See *Nowicki*, 385 Ill. App. 3d at 88.

¶ 86 In sum, we conclude defendant has failed to meet his burden under *Strickland* where (1) his statement was not hearsay, (2) Park properly published the statement to the trial court as De La Torre had testified laying a proper foundation for the statement which was admitted into evdence, and (3) under the circumstances of this case, defense counsel reasonably declined to challenge N.J.'s competency and his actions were appropriate trial strategy. Accordingly, we affirm the judgment of the circuit court.

¶ 87 CONCLUSION

¶ 88 For the reasons stated above, we affirm the judgment of the circuit court.

¶ 89 Affirmed.