2017 IL App (2d) 150748-U
No. 2-15-0748
Order filed May 23, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. SCOTT GATES, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 11-CF-2982 Honorable John J. Kinsella, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Presiding Justice Hudson and Justice McLaren concurred in the judgment.

ORDER

¶ 1 Held: There was sufficient evidence to prove defendant guilty beyond a reasonable doubt of aggravated criminal sexual abuse against N.Z., and we affirmed these convictions. However, the record supported defendant's argument that the trial court improperly considered its personal opinion of child abusers in sentencing defendant. Therefore, we reversed and remanded on this issue. We noted that the trial court further erred in imposing an extended-term sentence for defendant's conviction of aggravated criminal sexual abuse against V.M., as there was no substantial change in the nature of defendant's criminal objective between the act underlying that crime and the acts constituting predatory criminal sexual assault against V.M.

¶ 2 Following a jury trial, defendant, Scott Gates, was convicted of two counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2010)) and four counts of

aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West 2010)). He was sentenced to a total of 46 years' imprisonment. On appeal, defendant argues that: (1) there was insufficient evidence to find him guilty of the three counts of aggravated criminal sexual abuse against one of the victims, N.Z.; (2) at sentencing, the trial court improperly relied on its own personal beliefs and did not sufficiently consider defendant's rehabilitative potential and other substantial evidence in mitigation; and (3) the trial court exceeded its statutory authority in imposing an extended term sentence for one of the aggravated criminal sexual abuse convictions. We affirm in part, reverse in part, and remand.

¶ 3 I. BACKGROUND

¶ 4 On January 31, 2012, defendant was charged by indictment with two counts of predatory criminal sexual assault of a child; five counts of aggravated criminal sexual abuse; 12 counts of home invasion (720 ILCS 5/12-11(a)(6) (West 2010)); and one count of residential burglary (720 ILCS 5/19-3(a) (West 2010)). The predatory criminal sexual assault charges alleged that on or about June 11, 2011, defendant put his finger and his mouth on the sex organ of V.M., a child under 13 years of age. Two of the aggravated criminal sexual abuse charges also alleged contact with V.M. on the same date, specifically touching her chest and sex organ for sexual arousal or gratification. The other three aggravated criminal sexual abuse charges involved N.Z., also a child under 13 years of age. They alleged that between April 16, 2010, and April 15, 2011, in three separate acts, defendant touched N.Z.'s sex organ for sexual arousal or gratification. The sex offenses were predicates for the home invasion and residential burglary charges.

¶ 5 Pursuant to a motion by the State, on February 5, 2013, the trial court allowed statements by the victims to be admitted at trial under section 115-10 of the Code of Criminal Procedure of

1963 (725 ILCS 5/115-10 (West 2012)). Specifically, it allowed statements by V.M. to her mother and statements by V.M. and N.Z. to an investigator.

¶ 6 The trial began on January 26, 2015. The State proceeded on two counts of predatory criminal sexual assault of a child, four counts of aggravated criminal sexual abuse (one involving V.M. alleging touching her chest and three involving N.Z.), and three counts of home invasion; the State nol-prossed the remaining charges.

¶ 7 Lisette Z., the victims' mother, testified as follows. She had five daughters, including A.M., V.M., and N.Z. Lisette and defendant began dating in April 2008. Defendant then moved in with her and the girls at their home on Highview Avenue in Addison, Illinois. Lisette's mother, Helen, also lived in the house. Lisette and defendant stopped dating in March 2010 and defendant moved out of the residence, but they remained friends. Defendant would still come over anywhere from once a week to once a month to help around the house or take the girls to sports practices or other activities. Lisette never noticed anything inappropriate about his behavior. N.Z. had the closest bond to defendant because she was the youngest when Lisette started dating him.

¶ 8 In May 2011, Lisette moved to Texas for a new job. She had suggested that defendant move there too, but he said that he was not ready to leave his family in Illinois. When Lisette first moved to Texas, the girls remained behind with Helen so they could finish the school year. Lisette arranged for movers to come to the Addison house on June 11, 2011. The night before, Lisette helped a friend take some of her furniture to Chicago, and Lisette stayed in Chicago overnight. She received some texts from defendant asking if she would like to have sex with him one last time, and she replied in the negative. When Lisette returned home the next morning, she saw defendant's car in the driveway. She was upset and annoyed because she was not sure why

he was there. Defendant was sleeping on a mattress in the family room. However, Lisette did not ask defendant to leave, and he remained with the family during the day. Defendant drove her and the girls to a hotel the night of June 11, 2011, and they left early the next morning for a flight to Texas.

¶ 9 At the end of June or early July 2011, Lisette came home one night in Texas to find V.M. crying hysterically. She said that she needed to tell Lisette something. V.M. asked if she remembered their last night in Addison before they moved to Texas, when defendant was over. V.M. said that something bad had happened. Lisette reassured her, and V.M. said that she had been asleep and was woken up by camera lights and the feeling of someone pulling her shorts down. She said that the person put her legs in the air and licked her. V.M. identified the person as defendant and said that he asked whether she missed her mommy.

¶ 10 Lisette woke up her other daughters and asked them if defendant had touched them or made them feel uncomfortable. N.Z., who was still groggy, said no. Lisette then called the Addison Police Department. Within 10 days, the police had arranged for interviews at the Children's Advocacy Center in Texas. While they were in the waiting area, N.Z. said that there was something she had to tell Lisette about defendant. Lisette told N.Z. to tell the interviewer what had happened.

¶ 11 Lisette testified that in 2010 and 2011, N.Z. would mostly sleep with Helen but would sometimes sleep with her sisters. "Sometimes" N.Z. would sleep with her. Lisette "[could not] say specifically" if N.Z. slept with her and defendant. "[I]f that did occur," N.Z. would be against the wall and Lisette would be in the middle. Lisette recalled N.Z. sleeping with them once, when N.Z. was sick, "[b]ut it was not a regular occurrence."

¶ 12 Helen testified that on June 11, 2011, A.M. and V.M. came up to her room just before 7 a.m., crying. They looked confused and upset. When Helen asked what was wrong, V.M. did not say anything. A.M. said that she had a bad dream. They were both wearing shorts and t-shirts. Helen laid them in the bed with her to calm them. She then went downstairs and saw defendant sleeping on the couch. Helen was surprised to see him because he did not live there anymore, but she was not alarmed. Lisette came home at about 7:15 a.m. and started directing the movers.

¶ 13 A.M. testified that she was 14 years old at the time of trial. On June 10, 2011, she was sleeping on the living room couch with V.M. because their bedroom mattresses had been taken away. A.M. woke up in the middle of the night and saw that someone was sleeping on a mattress next to the couch. She went back to sleep but woke up a second time when she saw flashes from a camera phone directed at V.M. A.M. closed her eyes for about five minutes. She then saw that V.M.'s legs were spread open in a V-shape, and defendant was kneeling between them, touching V.M.'s vagina with his hands. A.M. asked defendant what he was doing. Defendant got up, tried to get between the girls, and said that he was waiting for their mom. A.M. and V.M. ran upstairs to Helen's room; she was sleeping with N.Z. V.M. asked A.M. not to tell anyone what happened.

¶ 14 V.M. was born on April 16, 2002, and was 12 years old at the time of trial. V.M. testified that on the night of June 10, 2011, she woke up feeling cold. She felt someone touching her inside her pants but over her underwear. V.M. saw flashes of light, like someone was taking pictures. The person then laid down on the mattress on the floor and appeared to be scrolling on his phone. V.M. was very scared and thought that the person would hurt A.M. The person then came back, gently removed V.M.'s pants and underwear, and spread her legs apart. He licked

her vagina for 20 or 30 minutes and put his hand up her shirt, and she also felt a fingernail inside her vagina. The person then whispered in her ear, "[D]o you miss your mom[?]" He smelled like alcohol.

¶ 15 V.M. testified that A.M. then sat up and asked who the person was. He replied, "Scott," and V.M. saw his face. She also realized that he was naked. She told defendant that he was disgusting, and she and A.M. went upstairs to Helen's room. They woke up Helen, and she asked what was wrong. V.M. said that she had a nightmare about a cat in a scary movie that she had seen; V.M. was afraid to say what had happened because she thought that defendant would hurt someone in the house. When V.M. went to the bathroom, it was painful.

¶ 16 The next morning, defendant stayed around and helped the family move. V.M. did not tell her mom about the incident until the middle of the summer. V.M. wanted to wait until they were in Texas, but when they first moved there, she was afraid that her mother would be angry. After speaking to her mom, V.M. went to a children's center and talked to an investigator. V.M. agreed that she had known defendant for a long time and that he was a father figure. He came over almost every day from 2009 until the night they moved.

¶ 17 N.Z., born April 16, 2005, was nine years old at the time of trial. She provided the following testimony. When she was six years old and living on Highview in Addison, "something" happened between her and defendant more than three times but less than 100. She would sleep in her mother's room "[e]very night," though she also agreed that she would either always sleep with Helen or sleep with her every weekend. On some mornings when N.Z. was sleeping in Lisette's bed, defendant touched her "bladderal [*sic*] system," meaning her vagina, on top of her underwear. It tickled, and when N.Z. would wake up, defendant would say good

morning. N.Z. was afraid and did not tell her mom what had happened until after they moved to Texas. N.Z. also spoke to a woman at the Children's Advocacy Center.

¶ 18 The July 12, 2011, video-taped interviews of V.M. and N.Z. from the Children's Advocacy Center in Texas were played in open court. We summarize only the interview of N.Z., as the witnesses provided detailed testimony regarding the offenses involving V.M., and defendant does not appeal the underlying convictions involving her. N.Z. stated as follows. She was six years old. When her mom worked at night, defendant would always come and sleep with N.Z. When she woke up, he would be touching her on top of her clothes on her "pee" with the tip of his finger. It tickled when he touched her. Defendant would then say, "Good morning." N.Z. told the investigator not to tell anyone. She had not told anyone before because she was afraid. N.Z. finally decided to tell after Lisette called the police about defendant touching her "sisters." N.Z. spoke up that day because "things were going to be all right." N.Z. did not know how many times defendant touched her, but it was more than three times. The last time defendant touched her was when she was five years old, before Christmas.

¶ 19 Defendant testified as follows. He was 34 years old and had been convicted of aggravated battery with a firearm in 2002. He met Lisette in 2007, when she was about 35 years old. He moved in with Lisette and her family around November 2007. He and Lisette shared the master bedroom, which was on the first floor. Lisette was hardly ever home due to her work as a midwife, so defendant was the father figure for the children and often took them to school and activities. Helen was around, but defendant was the adult enforcing discipline, such as telling the children to clean their rooms. Defendant had a good relationship with V.M. and N.Z. N.Z. called him "Poppy." She was five years old, the same age as defendant's biological daughter when he went to jail, so he felt that he "was able to capture those missing years [he] didn't have

with [his] daughter." N.Z. did not have her own bedroom. She slept with Helen in Helen's bedroom and sometimes in A.M.'s and V.M.'s room. On occasion, N.Z. would come into bed with defendant and Lisette, and the only reason defendant would ever have been in bed alone with N.Z. was if Lisette was on call and had to leave in the middle of the night. Defendant had tickled N.Z. on her belly and neck, but he had never touched her inappropriately. There were a few times where defendant would help N.Z. shower by starting the water for her and giving her a towel afterwards, but he toweled her dry only a few times.

¶ 20 Defendant and Lisette broke up in March 2009. Defendant started dating another woman, but he and Lisette would still talk or text four or five times per month. She never told him to return the house key but instead instructed him to use it a few times. On June 10, 2011, defendant texted Lisette and said that he could be there to help with the movers. He came to the house after 11 p.m.; he had not been drinking. Defendant saw a mattress on the floor that no one was using, so he slept there. A.M. and V.M. were sleeping on the couch. When defendant woke up, he heard some "chattering" and saw the girls going upstairs. He denied taking pictures of V.M. or touching her. After the movers came, defendant played with A.M., V.M., and N.Z., to keep them occupied. He went to some activities with the family and then drove them to their hotel. Lisette had given him her truck a few weeks prior, and they also agreed that defendant would rehab the house to get it ready to sell.

¶ 21 The police searched defendant's phone but did not find any evidence relating to the case.

¶ 22 The jury found defendant guilty of the two counts of predatory criminal sexual assault of a child and the four counts of aggravated criminal sexual abuse. It found him not guilty of home invasion.

¶ 23 On March 2, 2015, defendant filed a motion for a new trial, which the trial court denied on April 16, 2015. Defendant's sentencing hearing took place on June 26, 2015. Victim impact statements from Lisette, N.Z., V.M., A.M., and one of their older sisters were read. Defendant's grandmother and aunt testified in mitigation about his positive interactions with V.M., N.Z., their sisters, and defendant's family members. They further testified that he was truthful and trustworthy.

¶ 24 Defendant spoke in allocution. He apologized for the toll the trial had taken on Lisette's family and for the emotional and financial burden on his family. His prior conviction for aggravated battery with a firearm was a result of him overacting when he was young. He regretted the mistake every day, but he had made amends with the victim from that crime. While in prison for that offense, he had received his GED and CDL and studied Spanish and real estate. He had been employed from 2007 to 2012, when he was arrested for this case, including one year of continuous employment with his last employer. He had been planning to pursue higher education. Defendant stood by his testimony at trial and planned to appeal the convictions.

¶ 25 The trial court stated as follows. Defendant's criminal history was not lengthy but included a "significant violent felony." The trial court recognized the harm to V.M. and N.Z. and their family. It had regularly seen examples of the long-term adverse impact of child sexual abuse on the victims. The trial court continued:

> "[Defendant] actually penetrated these young girls – the young girl as well as the other acts of sexual contact. And that is – you know, it's *ghastly*. Those are acts which are *abhorrent* to everything that we as a society look to; for any adult male to sexually abuse or take advantage of a vulnerable young little girl is *sick*. And the jury determined and the Court agrees. The facts supported the conclusion that you did those things, and

> for that you deserved [*sic*] serious punishment. You can't unring that bell. It can't be apologized away. It can't be explained away. It can't be justified. I don't know what causes a person such as you to think that that's something that you would want to do, but there is a great deal of unknown when it comes to human sexuality and what motivates people to do things. But it is *perverted* to abuse a child in that fashion, and it's completely unacceptable and *it merits the most severe of consequences when it happens,* and in this case it did happen. And we – like I said, we don't know what the full range of consequences will be to these children, but we hope that they're able with some help to come to grips with it and not allow it to adversely affect their future lives and relationships with other people." (Emphases added.)

The trial court stated that "the whole family was victimized by this event" and that it was "based upon the defendant's shameful and despicable conduct for which [he was] going to be sentenced in this case." It sentenced him to 18 years on each of the predatory criminal assault convictions and 10 years on each aggravated criminal sexual abuse conviction. The 18-year sentences and the first 10-year sentence were consecutive, with the remaining 10-year sentences to run concurrently. Thus, defendant received a total of 46 years' imprisonment.

¶ 26 Defendant filed a motion to reconsider the sentences on July 24, 2015. He argued, among other things, that the sentences were excessive in that: they failed to take into account his employment history and childhood trauma; they were not proportionate to the nature of the offenses; and they were influenced in part by the trial court's passion, outrage, and personal indignation against him. At a hearing the same day, the trial court stated that it rejected the notion that the sentences were the product of passion or emotion. It stated that it was appropriate

to point out that the sexual abuse of young children was a vile and shameful act. The trial court denied defendant's motion to reconsider, and defendant timely appealed.

¶ 27 II. ANALYSIS

¶ 28 A. Sufficiency of the Evidence

¶ 29 Defendant first argues that there was insufficient evidence to find him guilty beyond a reasonable doubt of the aggravated criminal sexual abuse charges against N.Z. He maintains that her testimony was internally inconsistent and conflicted with other witnesses' testimony, raising serious doubts about whether her allegations were influenced by her knowledge of the incident between defendant and V.M.

¶ 30 The three charges at issue alleged that defendant committed aggravated criminal sexual abuse against N.Z. on or between April 16, 2010, and April 15, 2011, when he was 17 years or older and N.Z. was under 13 years of age. The charges alleged that defendant touched N.Z.'s sex organ with his hand for the purpose of sexual arousal or gratification, in three separate acts.

¶ 31 When faced with a challenge to the sufficiency of the evidence, we must determine whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *People v. Collins*, 106 Ill. 2d 237, 261 (1985). The trier of fact has the responsibility to assess witnesses' credibility, weigh the evidence, resolve conflicts in the evidence, and draw reasonable inferences from the evidence. *People v. Washington*, 2012 IL 110283, ¶ 60. We will not set aside a criminal conviction unless the evidence is so improbable, unsatisfactory, or unreasonable that it creates a reasonable doubt of the defendant's guilt. *People v. Bardford*, 2016 IL 118674, ¶ 12.

¶ 32 Defendant points out that N.Z. was born on April 16, 2005. During the victim sensitive interview on July 12, 2011, N.Z. said that the incidents took place when she was five years old and that the last incident took place before Christmas, which would have been December 2010. Defendant notes that at trial, however, N.Z. testified that the abuse took place when she was six years old, a few months before her family moved to Texas. Defendant maintains that while it may be understandable that N.Z. could not recall exactly when the abuse occurred, her inconsistent testimony about her age when the incidents occurred is troubling, especially because the other evidence indicated that he would have had little opportunity to commit the crimes under the circumstances and with the frequency that N.Z. described.

¶ 33 Defendant notes that Lisette testified that he moved out of the residence when they broke up in March 2010. She testified that they remained friends and that he would come over no more than once per week to once per month. He maintains that, therefore, regardless of whether the incidents alleged against N.Z. occurred when she was five or six years old, none of them could have occurred when he was living in the residence and presumably sleeping in Lisette's bed on a regular basis. Defendant further argues that N.Z.'s testimony about where she slept was internally contradictory and that Lisette also contradicted N.Z.'s testimony about where she slept. Specifically, N.Z. testified that she would "always" sleep with Helen, that she would sleep with Helen when Helen was over on the weekends, and that she would sleep with Lisette "every night." According to defendant, Lisette could recall only one time when N.Z. had slept in her bed when she and defendant were dating, testifying that N.Z. doing so was "not a regular occurrence." Lisette testified that N.Z. mostly slept with Helen and occasionally slept with her sisters.

¶ 34 Defendant contends that N.Z.'s testimony about how she reported the incidents was also self-contradictory and contrary to Lisette's testimony. N.Z. testified that she told Lisette about the abuse a couple of months after they moved to Texas. She testified that V.M. told Lisette about defendant, and then she told Lisette that something happened to her as well. N.Z. also testified that she heard about the incident with V.M. from A.M. the same day, but she did not say anything until V.M. said something. In the victim sensitive interview, N.Z. stated that she was telling someone about the abuse for the first time. In contrast, Lisette testified that after V.M. revealed the abuse, she woke up N.Z. to ask if defendant had done anything to her, and N.Z. replied in the negative. Lisette testified that N.Z. first brought up that something happened to her when they were at the Child Advocacy Center on July 12, 2011.

¶ 35 Defendant argues that the substantial inconsistencies between N.Z.s testimony and that of the other State's witnesses raise serious doubts about her ability to recall events, as well as her veracity, which was crucial given that she was the only witness to the alleged abuse. Defendant emphasizes that she denied any abuse when initially asked and indicated that she had been abused only after learning of the incident between him and V.M. Defendant maintains that her allegations were vague and bore no similarities to the situation described by V.M. and that N.Z.'s behavior during the interview was "surprisingly nonchalant," undermining her claim that she had been afraid to discuss the incidents. Defendant contends that the conduct that she did describe, touching her "pee" in a manner that tickled while she was clothed and defendant was saying good morning, could easily have been innocent conduct that N.Z. misconstrued after learning of V.M.'s abuse. Defendant argues that, in short, N.Z.'s allegations may have been a misguided attempt to relate to V.M. or A.M. or show solidarity with them, to compete with them for attention, or describe memories of innocent interactions tainted by the influence of learning of

V.M.'s experience. Defendant argues that each of these scenarios is more plausible than the one N.Z. described, especially considering that all of the other evidence presented by the State suggested that it was highly unlikely that he had the opportunity to abuse her at age five or six in the manner and with the frequency she described.

¶ 36 The State argues that in addition to N.Z.'s trial testimony, it was especially important that there was a taped interview of her from years before. The State cites *People v. Cookson*, 215 Ill. 2d 194, 211 (2005), where the court stated that the value of taping interviews of a child sex offense complainant is widely recognized because: children may not recall events between the long period of time between the abuse and trial; the tape allows for preserving the child's account while it is still fresh in the child's memory; and a recording prior to the time charges are filed makes the statement less likely to be the product of suggestion or manipulation. *Id.* The State argues that a 6-year-old or 9-year-old is not expected to recall every detail of an offense against her, including dates, and defendant should not be able to use this to his advantage. The State maintains that N.Z.'s accusation against defendant is consistent through the taped interview and her trial testimony, and that there is no evidence that she was copying her sister's allegations. The State argues that questions about N.Z.'s credibility due to any inconsistent statements was a matter for the jury resolve, and her testimony was not discredited by the inconsistencies to the extent that it must be disregarded as a matter of law.

¶ 37 We conclude that, viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence to prove defendant guilty of aggravated criminal sexual abuse of N.Z. beyond a reasonable doubt. Although defendant cites the dates listed in the indictment and argues that he would have moved out of the house by then, giving him no opportunity to abuse N.Z. in the manner and frequency that she described, the date of an offense is not an essential

element in child sex offenses. *People v. Barlow*, 188 Ill. App. 3d 393, 402-03 (1989). Instead, the State needs only to establish that the offense was committed within the statute of limitations period and before the indictment's return. *Id.* at 402; see also *People v. Letcher*, 386 Ill. App. 3d 327, 334 (2008) ("The date of the crime is not an essential element of the offense when the statute of limitations is not questioned.").

¶ 38 N.Z.'s description of what occurred was consistent in her trial testimony and video-taped interview. N.Z. testified at trial and that when she was living in Addison and sleeping in Lisette's bed, on some mornings defendant would touch her "bladderal [*sic*] system" on top of her underwear. It tickled, and when N.Z. would wake up, defendant would say good morning. She testified that it happened more than three times but less than 100, and that she was afraid to tell Lisette what happened until after they moved to Texas. In the video-taped interview, N.Z. stated that when Lisette worked at night, defendant would sleep with N.Z. She said she would wake up to him touching her on top of her clothes on her "pee" with his finger, which tickled, and that he would then say, "Good morning." N.Z. said that this occurred more than three times but less than 100. N.Z. stated that she did not tell anyone before because she was afraid.

¶ 39 Inconsistencies within N.Z.'s own testimony regarding where she slept on a regular basis, and conflicts with other witnesses' testimony on this subject, were not paramount. Although Lisette recalled only one instance of N.Z. sleeping with her and defendant, when N.Z. was sick, Lisette "[could not] say specifically" if N.Z. slept with her and defendant, meaning that it could have happened multiple times. Significantly, defendant himself acknowledged being in bed alone with N.Z. on occasion if Lisette had to leave in the middle of the night for work.

¶ 40 The inconsistencies about when N.Z. first told of the incident also do not render the evidence insufficient, as it is undisputed that she first did so after learning of V.M.'s outcry.

Therefore, the jury had the opportunity to consider whether N.Z. was influenced to fabricate abuse or misinterpret benign conduct, as defendant postulates. Moreover, the inconsistent accounts of exactly when N.Z. first discussed the abuse, like the differing accounts of where she slept regularly, were conflicts in the evidence for the trier of fact to resolve, including their potential impact on N.Z.'s credibility. See *Washington*, 2012 IL 110283, ¶ 60. In the end, a rational trier of fact could have found defendant guilty beyond a reasonable doubt of the charges of aggravated criminal sexual abuse against N.Z.

¶ 41 B. Sentencing

¶ 42 Defendant next argues that his sentences should be reduced, or this cause should be remanded for resentencing, because the trial court (1) impermissibly considered its personal opinion of the offenses and (2) did not sufficiently consider his rehabilitative potential and other substantial evidence in mitigation. Regarding the first issue, defendant argues that the trial court did not merely comment upon the offenses' seriousness, but rather expressed its personal opinion that any adult man who commits a sex offense against a child deserves "the most severe of consequences" because such offenses are "ghastly," "abhorrent," "sick," "perverted," "unacceptable," "shameful," and "despicable" in the court's view.

¶ 43 A trial court has wide latitude in sentencing a defendant as long as it does not ignore relevant mitigating factors or consider improper aggravating factors. *People v. Higgins*, 2016 IL App (3d) 140112, ¶ 29. A trial court may not rely on its own opinion of the crime. *People v. Romero*, 2015 IL App (1st) 140205, ¶ 32. We will not disturb the trial court's determination of an appropriate sentence falling within the statutory range absent an abuse of discretion. *People v. Jones*, 2014 IL App (1st) 120927, ¶ 56. However, whether a trial court relied on an improper factor in sentencing a defendant is a question of law that we review *de novo*. *People v.*

Winchester, 2016 IL App (4th) 140781, ¶ 72; *People v. Mauricio*, 2014 IL App (2d) 121340, ¶ 15 (reviewing *de novo* whether the trial court improperly considered the victim's personal traits in imposing the sentence).

¶ 44 Defendant argues that the trial court's consideration of its personal opinion of the offense is similar to that of the trial court in *People v. Henry*, 254 Ill. App. 3d 899 (1993). There, the defendant was sentenced to concurrent terms of 25 years' and 5 years' imprisonment for armed robbery and aggravated battery. *Id.* at 900. The trial court stated, "This is really a disgusting crime. And that's why you are given this amount of time." *Id.* at 904. The appellate court held that "[b]ased upon the clarity of the trial court's statement, [it could not] say that the court did not rely upon its own opinion of the crime when it sentenced defendant." *Id.* at 905. It therefore remanded the case for resentencing "to ensure that [the] defendant's sentence [was] based only upon proper factors and not upon the trial court's subjective feelings." *Id.*

¶ 45 Defendant also analogizes this case to *People v. Bolyard*, 61 Ill. 2d 583 (1975). There, the defendant was convicted of indecent liberties with a child. *Id.* at 585. Probation was a statutorily-authorized sentence, but the trial court refused to consider probation based on its personal belief that individuals who commit sexual crimes should not receive probation. *Id.* at 586. The trial court stated that the crime was " 'the most sinful, reprehensible act of all offenses.' " *Id.* at 585. Our supreme court held that the trial court abused its discretion by arbitrarily refusing to consider probation just because the defendant "fell within the trial judge's category of disfavored offenders." *Id.* at 587. It remanded the cause for resentencing before a different trial judge. *Id.* at 589.

¶ 46 Defendant argues that as in *Henry* and *Bolyard*, the trial court here clearly expressed its personal distaste for the offenses of which he had been convicted. Defendant argues that his

basis for relief is actually stronger than in the other cases, as the trial court here used several more adjectives than the trial court in *Henry* and spoke with more vehemence than the trial court in *Bolyard*. Defendant maintains that the trial court additionally concluded by stating that his sentence would be based on what it viewed as "shameful and despicable" crimes. Defendant argues that he fell into a category of offenders which the trial court personally disfavored and generally believed should receive the harshest of sentences. Defendant argues that under the circumstances, we cannot exclude the possibility that the trial court's personal opinion of the crimes influenced its decision to impose an aggregate 46-year prison term.

¶ 47 The State argues that the record reveals that unlike *Bolyard*, the trial court considered all appropriate factors in aggravation and mitigation in fashioning defendant's sentences, rather than relying on its personal opinion. The State argues that even if the trial court made improper statements of personal opinion, the sentences themselves were based upon proper factors. Namely, the trial court emphasized the seriousness of the offenses, the most important factor to be considered, and also emphasized defendant's prior felony. The State argues that defendant was sentenced to 46 years' imprisonment even though his sentence could have been as high as 134 years.

¶ 48 We note that the State neglects to discuss *Henry*. One case that distinguished *Henry* is *People v. Walker*, 2012 IL App (1st) 083655. There, the trial court stated that the defendant was "a burglar, ** a home invader, ** a person that committed an aggravated criminal sexual assault on a dead or dying woman," and "a murderer." *Id.* ¶ 35. The appellate court stated that *Henry* was inapposite because the trial court there clearly stated that it was basing the defendant's sentence on the fact that it believed that the defendant had committed a disgusting crime. *Id.* ¶

36. It stated that, in contrast, the trial court in the case before it considered proper factors, and its comments merely reflected the evidence in the record. *Id.*

¶ 49 The *Walker* court cited *People v. Primm*, 319 Ill. App. 3d 411 (2000). There, the trial court stated that the defendant and a codefendant had " '[k]ill[ed] more black folks tha[n] the Ku Klux Klan ever will" and was "a lunatic, a raving animal." *Id.* at 425. It concluded by saying that "[c]onsidering only those matters before" it, defendant was sentenced to 50 years' imprisonment. *Id.* The appellate court stated that the trial court's remarks, "while perhaps ill-advised," did not require resentencing. *Id.* at 426. It stated that a trial court's inclusion of personal observations does not always rise to the level of an abuse of discretion, and that any additional comments or observations that it makes are of no consequence if the record shows that it otherwise considered proper sentencing factors. *Id.*

¶ 50 We believe that this situation is more analogous to *Henry* and *Bolyard* than to *Walker* and *Primm*. Whereas the trial court in *Walker* discussed just the evidence in the record, here the trial court directly stated that convictions of child abuse "merit[] the most severe of consequences," thereby improperly expressing its personal opinion on a class of offenses/category of offenders. This is similar to the *Bolyard* trial court stating that the crime was " 'the most sinful, reprehensible act of all offenses.' " *Bolyard*, 61 Ill. 2d at 585. The trial court here further labeled such offenses as "ghastly" and "abhorrent" and labeled child abusers as "sick" and "perverted." These comments also distinguish this situation from *Primm*, as the trial court there made some remarks directed at the defendant but not at an entire category of offenders or offenses. Also, the *Primm* trial court stated that it was "[c]onsidering only those matters before" it immediately before imposing the sentence. Here, in contrast, the trial court referenced "defendant's shameful and despicable conduct" immediately before announcing the sentence,

thereby reinforcing its earlier improper remarks. Although the State emphasizes that defendant's aggregate sentence was far below the maximum he could have received, it was also significantly above the minimum. See 720 ILCS 5/11-1.40(b) (West 2010) (sentencing range for predatory criminal sexual assault of a child is 6 to 60 years); 730 ILCS 5/5-4.5-35 (West 2010) (providing for 3 to 7 years' imprisonment for class 2 felonies and 7 to 14 years for extended-term class 2 felonies). As in *Henry*, the trial court's comments suggest that it may have based defendant's sentence on its own opinion of child abuse offenders. Therefore, we must remand the case for resentencing before a different circuit court judge "to ensure that defendant's sentence is based only upon proper factors and not upon the trial court's subjective feelings." *Henry*, 254 Ill. App. 3d at 905; see also *Bolyard* 61 Ill. 2d at 589 (remanding for resentencing by a different judge).

¶ 51 As defendant is to be resentenced on remand, we need not address defendant's alternative argument that the trial court did not sufficiently consider mitigating evidence when sentencing him. However, defendant further argues that the trial court exceeded its authority in imposing an extended-term sentence for one of the aggravated criminal sexual abuse convictions. As this issue is likely to arise again on remand, we address it as part of this appeal.

¶ 52 Defendant notes that because he was convicted of a felony within 10 years after a previous felony conviction, he was generally eligible for an extended term sentence. See 730 ILCS 5/5-5-3.2(b)(1) (West 2010). He further points out that under our supreme court's interpretation of section 5-8-2(a) of the Unified Code of Corrections (730 ILCS 5/5-8-2(a) (West 2010)), a defendant who is convicted of multiple offenses may be sentenced to an extended-term sentence only for the most serious class of offenses. *People v. Bell*, 196 Ill. 2d 343, 350 (2001). The trial court may impose extended-term sentences only for offenses that are separately charged, in a different class, and arise from an unrelated course of conduct. *Id.* Multiple

offenses are part of an unrelated course of conduct if there was a substantial change in the nature of the defendant's criminal objective. *Id.* at 354. Defendant argues that because he was convicted of predatory criminal sexual assault of a child, V.M., which was a class X offense, he should not have been sentenced to an extended term of 10 years for the aggravated criminal sexual abuse of V.M., as all of the acts were committed during the same course of conduct.

¶ 53 Defendant acknowledges that he did not raise this issue in his post-sentencing motion, but he argues that it can be reviewed for plain error. The plain error doctrine allows a reviewing court to consider an unpreserved error where a clear or obvious error occurred, and either (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, or (2) the error is so serious that it affected the fairness of the trial and challenged the integrity of the judicial process. *People v. Williams*, 2017 IL App (3d) 140841, ¶ 26. In applying the plain error test, the first step is to determine whether error occurred at all. *Id*. Additionally, forfeiture is not directly at issue here because we are remanding the case for resentencing, at which time defendant would be able to reassert this argument regardless.

¶ 54 The State argues that when there is more than one sex act against a victim during the course of a sexual assault, multiple convictions do not violate the one-act, one-crime doctrine. However, that doctrine is not at issue here. That is, the issue is not whether defendant could be convicted of multiple acts and sentenced on each of them, but rather whether he was eligible for an extended-term sentence for one of his convictions. See *People v. Peacock*, 359 Ill. App. 3d 326 (2005) (addressing one-act, one crime issue separately from question of extended-term sentence).

¶ 55 Whether a defendant's actions constitute a single course of conduct or is part of an unrelated course of conduct is a question of fact for the trial court, and we will not disturb its

finding unless it is against the manifest weight of the evidence. *People v. Robinson*, 2015 IL App (1st) 130837, ¶ 102. A factual finding is against the manifest weight of the evidence only where the opposite conclusion is readily apparent or the finding is unreasonable, arbitrary, or not based on the evidence. *Id.* Even where there is not an explicit finding regarding a defendant's course of conduct, there is a presumption that the trial court knows and applies the law. *Id.* ¶ 103. Therefore, we presume that the trial court found that there was a substantial change in the defendant's criminal objective in imposing the extended-term sentence. See *id.*

¶ 56 We conclude that it was against the manifest weight of the evidence for the trial court to find that there was a substantial change in the nature of defendant's criminal objective, presumably sexual gratification, between the acts constituting the predatory criminal sexual assault of V.M. (touching and licking her sex organ) and the act constituting the aggravated criminal sexual abuse (touching her chest), as they all occurred at the same time or in succession. *Cf. People v. Reese*, 2015 IL App (1st) 120654, ¶ 128 (convictions of vehicular invasion, attempted armed robber, and escape all arose from the defendant's escape attempt, so the court could impose extended term sentences on only the offenses within the most serious class of felony); *Robinson*, 2015 IL App (1st) 130837, ¶¶ 107-108 (residential burglary and aggravated battery were part of the same criminal objective of robbery); *Peacock*, 359 Ill. App. 3d at 337-38 (offenses of home invasion, aggravated battery, and domestic battery did not arise from unrelated courses of conduct, but rather the defendant's ultimate purpose was to dissuade the victim from breaking up with him). Accordingly, the trial court erred in imposing an extended-term sentence on the aggravated criminal sexual abuse conviction involving V.M., as it was a less serious class of offenses than the the predatory criminal sexual assault convictions. See *Bell*, 196 Ill. 2d at 350.

¶ 57 III. CONCLUSION

¶ 58 For the reasons stated, we affirm defendant's convictions of aggravated criminal sexual abuse against N.Z. We reverse defendant's sentences and remand for resentencing before a different trial judge.

¶ 59 Affirmed in part and reversed in part; cause remanded.