

NOTICE
Decision filed 01/03/18. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2018 IL App (5th) 130220-U

NO. 5-13-0220

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Saline County.
)	
v.)	No. 11-CF-176
)	
JAMES R. BRANCH,)	Honorable
)	Todd D. Lambert,
Defendant-Appellant.)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Justices Goldenhersh and Overstreet* concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant was denied a fair trial because of ineffective assistance of trial counsel.

¶ 2 Defendant, James R. Branch, was convicted after a jury trial of three counts of predatory criminal sexual assault of a child and was sentenced by the circuit court of Saline County to 15 years' imprisonment on each count, to be served consecutively. Defendant argues on appeal that the State failed to prove him guilty of one count of predatory criminal sexual assault in that there was no evidence of digital penetration. He

*Justice Schwarm was originally assigned to participate in this case. Justice Overstreet was substituted on the panel subsequent to Justice Schwarm's retirement. Justice Overstreet has read the briefs and listened to the recording of oral argument.

also asserts he was denied a fair trial because of prosecutorial misconduct and ineffective assistance of counsel. He further contends he is entitled to a *Krankel* hearing because he alleged in his prepared statement in allocution that he was denied effective assistance of trial counsel, but the court made no inquiry into the allegations. See *People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984). As a supplemental argument, defendant argues the court erred in failing to suppress a statement he allegedly made to a detective upon being advised he was under arrest. On August 1, 2017, this court issued an opinion affirming in part and remanding in part for a *Krankel* hearing. Defendant filed a petition for rehearing. The State was allowed to file an answer, and defendant his reply. We now allow defendant's petition for rehearing without oral argument. For the following reasons, we reverse and remand this cause for a new trial.

¶ 3 Between the dates of May 1, 2010, and May 4, 2011, L.M.D., the victim, was allegedly subjected to various sexual acts in a trailer, where defendant resided. At the time of the alleged incidents, L.M.D. was seven or eight years old. Defendant was ultimately charged with one count of performing an act of cunnilingus upon the victim, one count of placing his finger in her vagina, and one count of having the victim perform an act of fellatio on him.

¶ 4 On May 4, 2011, L.M.D. was removed from her parents' home because of the parents' drug usage, and because they were allowing a family member who was a registered sex offender to live in their home. DCFS placed L.M.D. in the home of a woman named Cheryl, who had previously lived with L.M.D.'s father for 18 years, but had never married him. Cheryl and L.M.D.'s father had a son, the victim's half-brother,

who was then 27 years old. Because of Cheryl's long-term relationship with the family, she had known L.M.D. since she was a baby. At the time L.M.D. was placed with Cheryl, she was married to another individual, and had two daughters close in age to L.M.D.

¶ 5 A couple of weeks after L.M.D. was placed with Cheryl, L.M.D. was taking a bath with one of Cheryl's daughters. L.M.D. told Cheryl's daughter that defendant made L.M.D. play with him, and had rubbed his thing against her. Cheryl overheard the conversation and stopped it. She then called L.M.D.'s caseworker. Cheryl reported that subsequent to Cheryl reporting the statements made by L.M.D., Cheryl also noticed that L.M.D. started acting out sexually with pillows and blankets. Prior to L.M.D. being placed in Cheryl's home, she also testified that she had seen L.M.D. and defendant around town together. Cheryl further related that defendant, on several occasions, had previously brought L.M.D. to Cheryl's house to play with her daughters. At no time did L.M.D. ever mention any abuse, and always seemed fine around defendant. Cheryl stated that defendant did for L.M.D. what her parents would not, and agreed that the living conditions in L.M.D.'s home were "pretty terrible."

¶ 6 After conducting several interviews with L.M.D., Department of Children and Family Services (DCFS) investigators believed L.M.D.'s statements were credible and consistent with the information obtained from Cheryl. L.M.D. testified that defendant often bought her toys, clothes, shoes, and food. He would come to her house, and they would ride bicycles to the park, the pool, fast food restaurants, and Wal-Mart. L.M.D. further testified that defendant also took her to his trailer, where they would watch "dirty

stuff" on television. She also related various sex acts he performed on her, or had her do to him, while they were at his trailer. She claimed that she told him to stop, but he would not do so, and that no one else touched her this way. There was no physical evidence corroborating L.M.D.'s allegations of sexual abuse.

¶ 7 Defendant denied the allegations against him, but admitted he had taken L.M.D. to various places around town. He confirmed that he bought things for her because he felt sorry for her, and because he was trying to take care of her. He related that he had known L.M.D. since she was two years old, and felt somewhat responsible for her. According to defendant, L.M.D.'s parents did not spend any money on her, and often came to him for food or money. The parents lived in a trailer near him, and they were the only people he socialized with other than his own family. He also admitted to having had a sexual relationship with both parents.

¶ 8 The detective and investigator who interviewed defendant claimed he admitted to having L.M.D. alone at his trailer. Defendant countered he never made such a statement to them or to anyone, and testified he never took L.M.D. alone to his trailer, in spite of what others said. Defendant further claimed L.M.D. could not have watched pornographic movies at his trailer because he had not had any electricity there since 2007. He did see L.M.D. watching pornographic movies at her own home, however, while her parents were present. He had also seen the sex offender who was living with them go into L.M.D.'s bedroom and close the door when she was inside the room. L.M.D., however, told investigators that when the offender moved in, she had to give up her bedroom to him and his girlfriend. L.M.D. was then forced to stay in the living room.

Defendant also claimed that he had called DCFS about the condition in L.M.D.'s home sometime in 2009, but nothing came of it. The investigator for DCFS had no record of any such contact from defendant. Defendant continued to assert he had never sexually assaulted L.M.D., nor had he done anything inappropriate with any child.

¶ 9 The jury chose to believe L.M.D., and returned guilty verdicts on all three counts. Defendant subsequently was sentenced to consecutive 15-year terms of imprisonment. Defendant appeals his conviction claiming several instances of prosecutorial misconduct, and ineffective assistance of counsel, which denied him a fair trial. He also contends one count of predatory criminal sexual assault should be reduced to aggravated criminal sexual abuse because the evidence failed to prove he digitally penetrated the victim's vagina. Defendant further finds fault with the court's denial of his motion to suppress, as well as with the court's failure to conduct a *Krankel* hearing.

¶ 10 ANALYSIS

¶ 11 Defendant argues on appeal that he was denied a fair trial because of prosecutorial misconduct and ineffective assistance of counsel. Specifically, defendant contends the prosecutor misled the jury, raised unsupported insinuations about defendant, and improperly bolstered the complaining witness's credibility, while defense counsel repeatedly failed to object, and failed to file a posttrial motion to preserve the issues for appeal. Defendant points out that the jury's assessment of the evidence came down to an assessment of the credibility of the witnesses, given that there was no physical evidence presented that a sexual assault had occurred. Consequently, defendant concludes that he was prejudiced as a result of improper arguments, comments and questions designed to

bolster the State's case, all of which denigrated his defense. For the reasons that follow, we conclude defendant was deprived of a fair trial because of the ineffective assistance of counsel.

¶ 12 A defendant is entitled to effective representation at trial and is denied such representation when counsel's performance falls below an objective standard of reasonableness, and the defendant is prejudiced thereby. *People v. Albanese*, 104 Ill. 2d 504, 525, 473 N.E.2d 1246, 1255 (1984). Prejudice is shown when there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Albanese*, 104 Ill. 2d at 525, 473 N.E.2d at 1255; *People v. Young*, 306 Ill. App. 3d 350, 355, 716 N.E.2d 312, 315 (1999). Defendant need only show that it is plausible that the result of the trial would have been different absent counsel's error. *People v. Fillyaw*, 409 Ill. App. 3d 302, 312, 948 N.E.2d 1116, 1127 (2011). We believe defendant has made that showing.

¶ 13 Defendant points out that the detective and investigator who conducted defendant's interview at the police station both testified that defendant admitted, during questioning, to taking L.M.D. to his trailer, alone. Defendant asserts he never made such an admission. The recording of defendant's interview reveals, in fact, that defendant only admitted to taking L.M.D. to the park, and to his niece's house, so she could play. Defendant did not mention his trailer. The recording of the interview, however, was not admitted at trial, and defense counsel did not object to the trial testimony of the investigator or the detective. No reason for the failure to introduce the recording is evident from the record. The recording was admitted at the suppression hearing, which

occurred some seven months earlier than the trial, but again was not introduced at trial. The prosecutor in her opening statement asserted that the detective who interviewed defendant would tell the jury that defendant admitted in that interview that defendant had taken the victim to Wal-Mart, and "even admitted taking her to his trailer where he had her alone and no one else was around." During direct examination of both the detective and the investigator, the prosecutor asked questions designed to elicit testimony regarding defendant's alleged admission of having the victim alone in his trailer. The prosecutor also used the alleged admission during her cross-examination of one of defendant's witnesses to improperly suggest that defendant took L.M.D. to his trailer alone even after the prosecutor knew that defendant had disclaimed this fact. Defense counsel failed to object to the prosecutor's opening statement and made no attempt to impeach either the investigator or detective on this matter. Defense counsel did tell the jury that while they would not see the videotape of the interview of defendant, defendant never admitted to anything and made no incriminating statements. We do not believe, however, that defense counsel's statement was sufficient enough to counter their testimony. By failing to introduce the videotape itself, the issue became purely one of witness credibility instead. The videotape demonstrated defendant's repeated and insistent denial of any improper conduct with the victim. It also showed defendant's concern for the victim's welfare, especially after her parents allowed a registered sex offender to live in their house, his shock of being accused of sexually abusing a child, and his willingness to submit a DNA sample. Defense counsel also failed to object when the prosecutor questioned the defense witness about defendant's supposed statement and how it

adversely impacted her view of defendant. The prosecutor essentially was allowed to undermine the credibility of a defense witness who testified to defendant's good character and appropriate interactions with children. We agree that defense counsel's failure to establish to the jury the indisputable falsity of defendant allegedly admitting to have taken the victim to his trailer alone denied defendant the effective assistance of counsel to which he was entitled. We fail to see any reasonable defense strategy for allowing false testimony of State witnesses to stand uncorrected. This was not simply a matter of defense counsel choosing not to object so as to not highlight objectionable testimony. The jury knowing the truth was an obligation owed to defendant, and defense counsel did not do all he could do to enlighten the jury of that truth.

¶ 14 Defense counsel also failed to file any posttrial motion to preserve any issues for review. In order to preserve an issue for appeal, it must be both raised by objection during trial and placed in the posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1130 (1988). By failing to properly preserve issues for direct appeal, defense counsel further impaired defendant's ability to challenge his convictions.

¶ 15 We conclude that defense counsel's representation fell below an objective standard of reasonableness and undermined confidence in the outcome of the trial. See *People v. Lee*, 185 Ill. App. 3d 420, 428, 541 N.E.2d 747, 751-52 (1989). Defendant was deprived of effective assistance of trial counsel. When a defendant has been deprived of effective assistance of counsel, but the evidence is nevertheless sufficient to convict, the proper remedy is to reverse that defendant's conviction and remand the matter for a new trial.

See *People v. Lofton*, 2015 IL App (2d) 130135, ¶ 37, 42 N.E.3d 885; *Young*, 306 Ill. App. 3d at 356, 716 N.E.2d at 316.

¶ 16 Here, the evidence admitted at trial was sufficient for a jury to conclude that defendant was guilty beyond a reasonable doubt of three counts of predatory criminal sexual assault of a child, including the act of sexual penetration by placing his finger in the victim's vagina (720 ILCS 5/12-14.1(a)(1) (West 2010)). This does not mean that we are making a finding as to defendant's guilt or innocence which will be binding on retrial, but rather, our consideration of the sufficiency of the evidence admitted at trial will protect defendant's constitutional right against double jeopardy. See *People v. Taylor*, 76 Ill. 2d 289, 309-10, 391 N.E.2d 366, 375 (1979).

¶ 17 Given our decision to remand this cause for a new trial, we need not address the other issues raised by defendant on appeal. We do address briefly two matters which may reoccur on retrial. First, we believe the prosecutor crossed the line in her questioning of a defense character witness when the prosecutor attempted to inquire into defendant's criminal record, which had already been ruled inadmissible in an earlier motion *in limine*. We agree the prosecutor's questions led the jury to believe defendant's criminal past involved other acts of sexual abuse as opposed to a burglary conviction. See *People v. Nieves*, 193 Ill. 2d 513, 533, 739 N.E.2d 1277, 1286 (2000). Second, we note that, based on what happened at defendant's first sentencing hearing, defendant would have been entitled to a *Krankel* hearing had we affirmed his convictions. The record reveals that at the sentencing hearing, the trial court allowed defendant to make a statement in allocution. The transcript of the statement reads that defendant's statement

of allocution was unintelligible, and was unable to be transcribed. The record then reveals that the court thanked defendant for his statement, and sentence was imposed. Given the state of the record presented to this court, our concern is whether the trial court conducted an adequate inquiry into defendant's allegations of ineffective assistance of counsel. We presume that this will not be an issue at defendant's next sentencing hearing should he once again be convicted upon retrial.

¶ 18 For the reasons stated, we reverse the judgment of the circuit court of Saline County and remand this cause for a new trial.

¶ 19 Reversed and remanded.