2019 IL App (2d) 150761-U
No. 2-15-0761
Order filed March 26, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DONALD E. NUCKLES, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 13-CF-1697 Honorable George J. Bakalis, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Hutchinson and Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defendant failed to show that his counsel was ineffective, as the record did not show that counsel failed to investigate, expert medical testimony likely would not have aided defendant, the trial court was presumably aware of the inconsistencies in the complainants' testimony, State witnesses did not offer objectionable opinion testimony, and hearsay testimony was properly admitted under section 115-10; (2) the State proved defendant guilty beyond a reasonable doubt of various sex offenses: the State was not required to prove force, penetration, or bodily harm, the necessary intent could be inferred from his acts, the court properly found that he had the opportunity to commit the offenses and that the complainants had no reason to lie, and the inconsistencies in the complainants' testimony were insufficient to require reversal.

¶ 2 Defendant, Donald E. Nuckles, appeals from his convictions of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2010)); 720 ILCS 5/12-14.1 (West 2008)) and aggravated criminal sexual abuse (720 ILCS 5/11-1.60(c)(1)(i) (West 2010); 720 ILCS 5/12-16(c)(1)(i) (West 2008)). He asserts (1) that counsel was ineffective, (2) that the State failed to provide sufficient proof of some specific elements of the offenses, and (3) that the court shifted the burden of proof to him. The State asserts that, because counsel failed in his posttrial motion to raise his claims of ineffective assistance of counsel and burden shifting, he has forfeited those claims. It further disputes all three claims on their merits. We hold that defendant forfeited his third claim, but not his first and second claims. However, we conclude that his first and second claims fail on their merits, and we thus affirm his convictions.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged by indictment with 15 counts of sex offenses with two minor victims, twins with very similar names. In his brief, defendant refers to the victims by their full names. We discourage that practice even when, as here, some improvisation is necessary to distinguish the victims by initials. The indictments used the last letter of each girl's middle name to distinguish them. We refer to them as A.W. and I.W., using the initials of their nicknames to distinguish them. The charges were 5 counts of predatory criminal sexual assault of a child—all against I.W.—and 10 counts of aggravated criminal sexual abuse—6 against A.W. and 4 against I.W. All counts alleged that the offenses occurred on or between May 1 and August 31, 2011.

¶ 5 The State moved for admission of hearsay statements by I.W. and A.W. pursuant to section 115-10 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10 (West 2014)). I.W. and A.W. made the statements to their mother (D.P.), two emergency room nurses (Katelyn Hinrichs and Katelyn Costigan), a physician's assistant (Jacquelyn Tran), an emergency

room physician (Brian Kern), and a State's Attorney's Office investigator (George Fencl). The court ruled that D.P., Hinrichs, and Fencl could testify to those statements.

¶ 6 Defendant had a bench trial.

¶ 7 D.P., the State's first witness, testified that defendant, her cousin, was born on September 24, 1972. From May 1 to August 31, 2011, defendant lived with D.P. and her six children, including A.W. and I.W., in a house that D.P. had rented in March 2011. D.P. agreed to allow defendant to live with them while he was dealing with "difficulties" with his father and was attempting to get custody of his children. D.P. gave defendant the twins' room with the idea that the twins, then first-graders, would sleep with her. However, they kept returning to their bedroom so that they were sharing it with defendant. She and defendant were on good terms when he left at the end of August 2011, and her children took turns visiting him in the house in Decatur to which he had moved. A.W. visited at least two times with some of her siblings. However, by March 2013, defendant was suggesting that he might need to move in with D.P. again.

¶ 8 On the evening of March 24, 2013, A.W. and I.W., then nine-year-olds, approached D.P. I.W. asked to speak to her in private, and she and both twins went into her bedroom. A.W. first told D.P. that defendant had asked her if she knew what sperm looks like and then told her to go look in the bathroom sink. I.W. then told her that, when defendant had supposedly paid her to wash his van, he had in fact paid her to "play with his privacy to make sperm come out." A.W. said that defendant had asked her to put his "privacy" in her mouth, but that she refused because it was "bumpy." Further, defendant had "tried to put it in her, and *** kept asking to put it in her." That attempt was painful to her. I.W. said that defendant had not tried to do something like that with her. D.P. asked when defendant had done these things. A.W. asked her if she

remembered "that day when [her] pee-pee hurt, when [she] was going potty[.] It hurt like someone was putting a nail in here." D.P. did remember; defendant had talked her out of taking A.W. to the emergency room. D.P. called the police on the morning of March 25, 2013, to report the incidents.

¶ 9 On cross-examination, D.P. agreed that the twins had "kind of argued about who was going to actually tell [her.]" A.W. had a learning disability such that, although she was a fifth grader at the time of the trial, she was "second grade level" and sometimes it was "hard" for her to "think about the consequences of things." (A.W. was also hard of hearing and used hearing aids.) Defense counsel cross-examined D.P. about both twins' ability to tell right from wrong. D.P. agreed that both sometimes could not, but gave as an example that I.W. would sometimes run carelessly toward the street. Counsel also asked her about a time when some of the children visited defendant in Decatur with the plan that they would stay for two weeks; defendant did not bring them back as scheduled, and they did not come back until D.P. went to get them four weeks later.

¶ 10 A.W. was the State's second witness. Her testimony was largely consistent with the out-of-court statements to which her mother testified. She testified that defendant had engaged her and I.W. in a game of Truth or Dare and had dared them "to play with his private until sperm came out." She said that she had done this and had touched his penis "[u]nder his clothes with a glove." They played Truth or Dare another time and defendant put money in his pants for them to grab. She agreed that defendant had offered her money if she let him put sperm in her mouth. A.W. answered many questions by saying that she did not know or that she did not understand the question. However, she also gave specific answers to where incidents occurred.

¶ 11 Defense counsel cross-examined A.W. at length. A.W. said that she was 11, that the assaults had happened when she was 6 or 7, but then immediately said that the assaults had taken place the previous year, in 2014. (The trial was in 2015.) She later admitted that the incidents might have been two or three years before. On the State's objection, the court ruled: "We've been through this. She's giving her best answer." A.W. said first that there had been one Truth or Dare game, but then said that there had been two: one in which she had touched defendant's privates with a glove and another in which he paid them. In response to defense counsel's questions, she said that, about three times in the week before she testified, she had watched a video recording of an interview that "Shawn" conducted.

¶ 12 I.W. was the State's third witness. She said that the family had been living in Glen Ellyn for two or four years before defendant started to live with them. She said that A.W. had been downstairs with her when defendant asked A.W. to touch his privates. She thought that she had been "seven or nine." She never saw defendant try to put "his private" in A.W.'s "private."

¶ 13 Fencl testified that he conducted "victim sensitive interview[s]" with A.W. and I.W. and authenticated video recordings of those interviews. Those recordings were largely consistent with A.W. and I.W.'s testimony, but the details and chronology were confusing.

¶ 14 Hinrichs testified that she had seen the twins at Adventist Glen Oaks Hospital on March 26, 2013. She testified to statements from A.W. and I.W. that were largely consistent with the statements that D.P. reported from the two.

¶ 15 Tran testified that she had met in the emergency room with D.P., A.W., and I.W. To her as well, A.W. and I.W. both made statements consistent with what they told D.P.

¶ 16 Lorne Sturdivant, a Decatur police officer and deputy United States Marshall, testified that a Decatur detective had directed him to arrest defendant. He found defendant at work at a

Menard's. Sturdivant informed him of the general nature of the charges he was facing, but not the victims' names. The ride was about 15 minutes. At the start, they "had a casual conversation about god [*sic*]"; Sturdivant was "shar[ing] his faith" with defendant. Defendant then spontaneously mentioned that he had played a game with his cousin in which they pulled each other's pants down. When his cousin pulled his pants down a second time, he told her that, because she had done that, she needed to "touch it." Defendant told Sturdivant that he knew at the time that he was being stupid.

¶ 17 The State rested in its case-in-chief after Sturdivant's testimony. Defense counsel moved for a directed finding, pointing to inconsistencies in the victims' testimony, particularly the testimony of A.W. The court immediately made directed findings of not guilty as to counts VIII, IX, and XV, but reserved ruling on the other counts. After its review, the court dismissed all counts except counts I, III, VI, X, and XII.

¶ 18 The defense presented five witnesses, including defendant. Defendant's daughter, Samantha Nuckles, who was 19 years old when she testified, was defendant's first witness. In 2011, she lived in Decatur with defendant. D.P.'s children, including A.W. and I.W., sometimes came to visit at the Decatur house in the fall of 2011, during spring break 2012, and during summer 2012. Only one of the twins, A.W., came in spring 2012. Because defendant worked 12-hour days at Menard's, Samantha served as the children's babysitter when they were visiting. She never saw any inappropriate behavior by defendant. However, she did see A.W. and I.W. engage in sexualized behavior, such as dancing "[l]ike a stripper" in the middle of the street and talking about "fingering other girls and about penises." Further, on one occasion, she and her boyfriend "were sitting on the porch and the twins decided they'd come up to [her] boyfriend and hump his leg like a dog." The twins had come to visit "[f]our or five times," but Samantha had

never seen defendant alone with them; either she or her sister was always present, including when the children were sleeping. She visited defendant once when he was living in Glen Ellyn. He had his own room in the basement; the night she was there, the twins slept in the living room.

¶ 19 Leslie Jarach was 23 and had known defendant since she was 7. Defendant was the brother of her mother's ex-boyfriend. He was "like an uncle" to her. She and her mother visited him in the summer of 2011 when he was living with D.P. in Glen Ellyn. Samantha and Deana (defendant's younger teenage daughter) were there "a couple times." She rarely saw D.P.'s children there. She knew who the twins were, but never saw defendant alone with them.

¶ 20 Michael Lee Braddock was a cousin of D.P.'s and defendant's. He testified that he lived across the street from defendant in Decatur. The "only behavior" he noticed from either of the twins was that one once came out onto the porch without any clothing on. She "squat[ted] down and pee[d] on the porch." Defendant came out and dragged or pulled her back into the house. He never saw defendant do anything inappropriate with the children.

¶ 21 Deana testified that she visited the house in Glen Ellyn several times when she was younger and several times when she lived with defendant in Decatur. Further, D.P.'s children had visited when she was living in Decatur. When they came, she had to stay with them constantly to babysit. Samantha also helped babysit, but she sometimes left. She saw the twins hump people's legs. She also saw them dance "like belly dancers dance, or strippers *** just with no pole." The twins liked to watch movies and television with "bad things in [them] that young kids shouldn't watch." Deana thought that the twins copied things that they saw on television. Defendant was never alone with D.P.'s children, and she never saw anything that concerned her in his interactions with them.

¶ 22 Defendant elected to testify. He had known D.P. since she was born. His mother had served as her foster mother when she was 17 years old, and he and she had shared an apartment when she was 18 or 19 years old. D.P. asked him to move in with her family in the summer of 2011. He was traveling regularly to Georgia at the time because his children had been living with his wife there but had been placed in foster care; he was trying to get custody of them.

¶ 23 When defendant moved in on June 6, 2011, D.P. had him sleep on a mattress in the twins' room. They were supposed to stay in that room, but they mostly slept with their mother. He never went to sleep with any of the children, but he would sometimes wake up with the twins, one of their older sisters, and their younger brother on the mattress with him.

¶ 24 While defendant lived there, he and a friend were working as contractors for "some of the Big Box chains" installing doors. They would work 6 to 12 hours a day, but usually took weekends off. He was alone with the children only for short periods, such as when D.P. went shopping. The children fought to spend time with him. One of the older daughters persuaded him to take her to work with him, and that was such a success that he had to agree to take all but the youngest child in turns.

¶ 25 Defendant testified that he had never paid the twins $20; he gave them $5 each for cleaning his van and later gave them $20 as birthday presents. They went to Walmart with him, and they both bought dolls with the money. He never played Truth or Dare, but D.P. did with one of the older girls.

¶ 26 Defendant had seen A.W. "hug a pillow with her butt in the air, saying do me like Justin Bieber." He "explained that to her mother one time and she blew [him] off." They would also walk in on him when he was showering. He fixed the basement shower because that bathroom had a door that would lock, but the twins still tried to get in through the window. They had also

made a game of pulling down his pants. He had never committed any sexual acts with the twins. He did roughhouse with them and kissed them to greet them.

¶ 27 D.P. kicked defendant out on August 15, 2011. She said that he was making her lazy and that the children were not listening to her, only to him. He stayed with a friend for a few weeks and then signed a lease for the house in Decatur. After he left, he saw D.P.'s children frequently both in Glen Ellyn and Decatur. He asked that A.W. visit him without I.W. one time because I.W. had just hit him in the eye with a bag of cereal and he "wanted to teach [her] a lesson." After he moved to Decatur, he started working 70 hours a week at Menard's. He thus was not in the house much, which made the children's visits chaotic. One of the children's trips to Decatur lasted about two weeks longer than planned. This happened because the transmission in his van failed, a cousin tried to fix it, and it failed again as soon as he got on the highway.

¶ 28 Defendant denied having shown either of the twins pornography; the only movie he played for A.W. was "Stewart Little." He never owned pornographic movies and never mentioned sperm to either twin. When he was arrested, he already knew the general allegations against him because a Department of Child and Family Services (DCFS) worker had come and had spoken to his children. He did say something to the extent that he believed that he was being accused because of the twins' making a game of pulling his pants down. The defense rested after defendant's testimony.

¶ 29 The State presented one witness in rebuttal. Kimberly J. Wilson, a child protection investigator with the Decatur DCFS office, testified that she interviewed defendant and his children after A.W. and I.W. made their abuse disclosures. Defendant agreed that he had been a "caretaker" for A.W. and I.W. a "couple of times." He admitted that he would sometimes sleep

with them when they could not get to sleep. He also described the sexualized behavior to which he testified. Neither Samantha nor Deana described that behavior, however.

¶ 30 In its closing argument, the State argued that A.W. and I.W. had no motive to lie and did not show any animus that might motivate false accusations. They were prepared to answer questions from the State with "no," and they appeared to be distressed by their disclosures. It argued that it was implausible that all of defendant's family members would notice the sexualized behavior by the twins but never mention that behavior to D.P. or the authorities during the investigation. It suggested that defendant's own testimony tended to incriminate him:

> "[T]he idea that these girls were attracted to him, that is his own guilty conscience coming through on the stand. That is his own guilty conscience trying to say there was a lot of sex tones [*sic*] in this house, *** a lot of knowledge of sex, a lot of acts going on. It was the girls, the nine- and ten-year-old girls talking about sex, to talk about humping things, to come in and see him while naked in the shower. It's absurd."

¶ 31 Defense counsel argued as follows:

> "So it's 1953. You've got a good job and somebody says you are a communist, and you have to go in front of a group, a body and prove that you are not a communist. Or it's 1692 and some girls come up and say, you're a witch. How do you prove that you are not a witch? How do you do that? How do you prove that you are not a communist? How does that happen? How does somebody prove a nullity, this didn't happen? How do you do that?"

¶ 32 Counsel stressed the lack of consistency in A.W.'s testimony:

> "Now, if you're trying to prove yourself innocent, then the best way that you can do that is to try and pin somebody down as to when these things are alleged to have

happened and see if you can present defenses for them, which, as I'm sure your Honor saw, was a virtual impossibility at the very least with [A.W.]."

¶ 33 Counsel argued that A.W.'s testimony suggested that she had "no concept of the difference between before and after" and thus "could not testify when things were before and when things were after." He closed by pointing out the case's reliance on eyewitness testimony:

"Finally that is what I want to get to, the tangible evidence, the things that we can actually look at and see. And what do we have? We don't have any of that, and that's understandable. The outcry is a year and a half later. What evidence would there be? They saw a nurse, they saw a doctor at the hospital. If there was any sort of indication of injury, they would have come in and testified. There is no proof of any sort of tangible evidence at all."

¶ 34 The court found defendant guilty on two of the three remaining counts, but found him not guilty of count I:

"At one point of her trial testimony [A.W.] is asked, when [defendant] used his hand, did he put his hand on your private, and she says, what do you mean on my private. The investigator says, did he put it in or did he put it on your private? Her response is, kind of, kind of. Like, kind of both. That is not going to be sufficient to prove guilt beyond a reasonable doubt for the defendant having intruded the sex organ of [A.W.] with his finger."

¶ 35 It found him guilty on counts III (predatory criminal sexual assault of a child, contact between his sex organ and A.W.'s sex organ), VI (A.W. "touched the sex organ of the defendant with her hand for the purpose of the sexual gratification or arousal of [A.W.] or the defendant"),

and XII (I.W. "touched the sex organ of the defendant for the purpose of the sexual gratification or arousal of [I.W.] or the defendant").

¶ 36 Defense counsel filed a posttrial motion asserting that the evidence was insufficient and that the court erred in granting the section 115-10 motion. The court denied it. At sentencing, A.W. and I.W.'s sister, who was known as L.W., testified that defendant had engaged in acts with her similar to those of which he was convicted.

¶ 37 On count III, predatory criminal sexual assault of a child, the court sentenced defendant to 12 years' imprisonment. On counts VI and XII, aggravated criminal sexual abuse, it sentenced him to 4-year terms of imprisonment concurrent to one another and consecutive to the 12-year term. After the court denied his motion to reconsider his sentence, defendant timely appealed.

¶ 38 II. ANALYSIS

¶ 39 On appeal, defendant moved for leave to discharge the appellate defender as appellate counsel; we granted his motion. In his *pro se* brief, defendant makes three claims of error. One, he asserts that trial counsel was ineffective. Two, he argues that the State failed to provide sufficient proof of some specific elements of the offenses. Three, he argues that the court erred in its reasoning—in particular, that its statements showed that it shifted the burden of proof to defendant. To the extent that defendant intends to raise other specific claims, we hold that he has forfeited them by failing to develop them sufficiently, provide reasoned argument for them, or support them with citations to appropriate authority. See Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) (the appellant's brief must contain "the contentions of the appellant and the reasons therefor"); see also *Elder v. Bryant*, 324 Ill. App. 3d 526, 533 (2001) ("Mere contentions, without argument or citation of authority, do not merit consideration on appeal.").

¶ 40 The State asserts that, because defense counsel did not raise the ineffective-assistance-of-counsel claim or the claim that the court's reasoning was improper in the posttrial motion, defendant has forfeited those claims. It further disputes all the claims on their merits.

¶ 41 We hold that defendant forfeited his third claim, but not his first and second claims. However, we conclude that his first and second claims fail on their merits. We thus affirm defendant's convictions.

¶ 42 At the outset, we reject the State's assertion that defendant forfeited his ineffective-assistance-of-counsel claim by failing to raise it in the trial court. Our supreme court has held that an "attorney cannot be expected to argue his own ineffectiveness" and that, as a consequence, "trial counsel's failure to assert his own ineffective representation in a posttrial motion does not waive the issue on appeal." *People v. Lawton*, 212 Ill. 2d 285, 296 (2004). (A claim that the evidence is insufficient may likewise be raised for the first time on appeal. *E.g.*, *People v. Martin*, 408 Ill. App. 3d 891, 893 (2011).)

¶ 43 On the other hand, we agree that defendant has forfeited any independent claim that the trial court erred in its reasoning when it found defendant guilty. "*Both* a trial objection *and* a written post-trial motion raising the issue are required for alleged errors that could have been raised during trial." (Emphases in original.) *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Any error that a defendant has not so raised is forfeited. *E.g.*, *People v. Bannister*, 232 Ill. 2d 52, 65 (2008). As the error defendant asserts came in the court's oral ruling, defendant could not contemporaneously object during trial as such. However, defendant could have raised the court's reasoning in his posttrial motion and thus forfeited it when he did not do so. That said, the court's reasoning has some bearing on our consideration of the sufficiency of the evidence, and we thus address defendant's argument to the extent that it bears on that matter.

¶ 44 We hold that defendant's ineffective-assistance claims are without merit. To succeed on a claim of ineffective assistance of counsel, a defendant must satisfy *both* prongs of the standard set out in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Thus, a defendant must show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. A court decides whether the performance of a defendant's attorney was deficient by using an objective standard of competence grounded in prevailing professional norms. *People v. Richardson*, 189 Ill. 2d 401, 411 (2000). To establish that counsel's performance was deficient, a defendant "must overcome the strong presumption that the challenged action or inaction might have been the product of sound trial strategy." *Richardson*, 189 Ill. 2d at 411. To establish prejudice, "[t]he 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 confidence in the outcome." *Strickland*, 466 U.S. at 694. Where appropriate, a reviewing court "may dispose of an ineffective assistance of counsel claim by proceeding directly to the prejudice prong without addressing counsel's performance." *People v. Hale*, 2013 IL 113140, ¶ 17.

¶ 45 Defendant raises five specific claims of counsel's ineffectiveness. One, he asserts that counsel failed to conduct an investigation to acquire evidence to impeach the State's key witnesses. Two, he asserts that counsel should have called an expert witness to establish that A.W. had not been subject to vaginal penetration. Three, he asserts that counsel failed to adequately point out the inconsistencies in the testimony to the court. Four, he asserts that counsel acted deficiently by failing to challenge the medical witnesses' qualifications as experts.

Five, he argues that counsel was ineffective for failing to object to Hinrichs's hearsay testimony. We address those claims in order.

¶ 46 Defendant first asserts that counsel failed to conduct an investigation to develop evidence to impeach the State's primary witnesses. The record here does not support this contention. The record does not show what investigation counsel conducted; defendant seems to imply that we can assume a lack of investigation from the absence of the sort of evidence that defendant suggests he expected. However, given "the strong presumption that the challenged action or inaction [was] the product of sound trial strategy" (*Richardson*, 189 Ill. 2d at 411), the burden is on defendant to show that counsel acted unreasonably. Here, that would mean showing that counsel's investigation was in fact inadequate. Moreover, to satisfy *Strickland*'s prejudice prong, "[t]he defendant must show that there is a reasonable probability" that, but for counsel's unprofessional failure to investigate, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Defendant has shown neither.

¶ 47 Defendant next asserts that defense counsel should have called Sangita Rangala, an emergency room physician whom the State had had under subpoena, to testify that, had the offenses occurred, physical evidence of sexual assault would have been present. In particular, he asserts that Rangala could have given an expert medical opinion that, had sexual penetration occurred, some evidence of that would have been found on examination. We first observe that the record contains no evidence that Rangala would have given this opinion. In any event, defendant's argument is based on a misunderstanding of the charges. Only one count of the indictment, count I, alleged any vaginal penetration: "defendant *** knowingly committed an act of sexual penetration with [A.W.] *** in that said defendant intruded the sex organ of [A.W.] with his finger." Count II alleged contact between defendant's sex organ and A.W.'s mouth.

The remaining predatory-criminal-sexual-assault-of-a-child counts, including count III, the count of which the court found him guilty, alleged "penetration *** in that said defendant made contact between his sex organ and the sex organ of [A.W.]" For these purposes, female "sex organs" include all the external genitalia, including the labia major and minor. *People v. Ikpoh*, 242 Ill. App. 3d 365, 381-82 (1993). Further, Illinois's statutory definition of "sexual penetration" is broader than the ordinary meaning. It includes "two broad categories of conduct" that include "*contact* between the sex organ *** of one person by *** the sex organ *** of another person" and "*intrusion* of any part of the body of one person *** into the sex organ *** of another person." (Emphases in original.) *People v. Maggette*, 195 Ill. 2d 336, 346-47 (2001). Further, where a defendant is charged with intrusion as such, it is sufficient that the State prove "any intrusion, *however slight*, *** into the sex organ or anus of another person." (Emphasis added.) 720 ILCS 5/11-0.1 (West 2010). Given this definition of "penetration," we do not accept defendant's position that it is obvious that, if the charged offenses occurred, medical evidence of them would exist. We thus hold that counsel's choice not to seek expert medical testimony was reasonable because such testimony would have been extremely unlikely to help defendant.

¶ 48 Third, defendant argues that counsel failed to "impeach" the "initial allegations" of the State's key witnesses and thus failed to subject the State's claims to meaningful adversarial testing. He asserts that counsel was over-reliant on cross-examination and failed to point out numerous inconsistencies in the testimony of A.W. and I.W. We first observe that, in his closing argument, counsel strenuously attacked A.W.'s testimony. In any event, we hold that defendant has failed to show that counsel's asserted deficient behavior prejudiced defendant. The inconsistencies at issue occurred in testimony in the State's case-in-chief. At the close of the State's case-in-chief, the court reserved judgment on defendant's motion for a directed finding

on multiple counts of the indictment; it did so to have time to review a transcript to assess the evidence supporting those counts. The court thus had an excellent opportunity—perhaps better than counsel's—to familiarize itself with all the evidence. Given the court's review of the transcript, we deem that further argument by counsel to point up inconsistencies would have been redundant. See People v. Hill, 408 Ill. App. 3d 23, 30 (2011) (the trial court is presumed to know the evidence).

¶ 49 Fourth, defendant argues that "[n]either medical 'Expert' that testified *** were [*sic*] qualified or had the experience to give medical testimony where pediatric or child sexual assault was indicated," so that counsel was ineffective for failing to object to that testimony. However, there was no such testimony to object to. Occurrence witnesses are witnesses who testify not because they are expected to "give a particular opinion on a disputed issue at trial, but because they witnessed or participated in the transactions or events that are part of the subject matter of the litigation." *Tzystuck v. Chicago Transit Authority*, 124 Ill. 2d 226, 234-35 (1988); see also *Aardvark Art, Inc. v. Lehigh/Steck-Warlick, Inc.*, 284 Ill. App. 3d 627, 635 (1996). Neither Hinrichs nor Tran rendered an opinion on any subject. Testimony about their background aside, their testimony merely concerned prior statements of A.W. and I.W.

¶ 50 Finally, defendant argues that defense counsel acted unreasonably by failing to object to the introduction of A.W.'s and I.W.'s out-of-court statements through the hearsay testimony of Hinrichs. He asserts that the testimony was not admissible under the hearsay exception for statements made for purposes of medical treatment. See Ill. R. Evid. 803(4) (eff. Apr. 26, 2012). This claim rests on a mistaken premise. The court ruled that Hinrichs's testimony was admissible under section 115-10 of the Code, which permits certain kinds of hearsay testimony in the "prosecution for a physical or sexual act perpetrated upon or against a child under the age

of 13" when "circumstances of the statement provide sufficient safeguards of reliability." 725 ILCS 5/115-10(a), (b)(1) (West 2010). Defendant does not suggest how the testimony was inadmissible under section 10-115.

¶ 51 Defendant next asserts that the evidence was insufficient to support his convictions. In particular, he asserts that the State failed to prove the use of force, penetration, bodily harm, or that the acts were committed for the purpose of sexual gratification or arousal of the victim or the accused. He also asserts that he was prejudiced by the sentencing testimony I.W. These claims are entirely without merit.

¶ 52 We review the sufficiency of the evidence under the standard of *Jackson v. Virginia*, 443 U.S. 307, 319 (1979), as adopted by *People v. Collins*, 106 Ill. 2d 237, 261 (1985): " 'the relevant question is 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.' " (Emphasis in original.) *Collins*, 106 Ill. 2d at 261 (quoting *Jackson*, 443 U.S. at 319). Because "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," we treat its evaluation of the witnesses' credibility with great deference. *People v. Richardson*, 234 Ill. 2d 233, 251 (2009). However, despite that deference, "a conviction based upon testimony that is 'improbable, unconvincing, and contrary to human experience requires reversal.' " *People v. Parker*, 2016 IL App (1st) 141597, ¶ 29 (quoting *People v. Vasquez*, 233 Ill. App. 3d 517, 527 (1992)).

¶ 53 First, neither use of force, nor penetration, nor bodily harm is necessarily an element of either predatory criminal sexual assault of a child or aggravated criminal sexual abuse. The

section of the predatory-criminal-sexual-assault-of-a-child provision under which defendant was charged states:

> "(a) A person commits predatory criminal sexual assault of a child if that person commits an act of sexual penetration, is 17 years of age or older, and:
>
> (1) the victim is under 13 years of age[.]" 720 ILCS 5/11-1.40(a)(1) (West 2010).

The section of the aggravated-criminal-sexual-abuse provision under which defendant was charged states:

> "(c) A person commits aggravated criminal sexual abuse if:
>
> (1) hat person is 17 years of age or over and: (i) commits an act of sexual conduct with a victim who is under 13 years of age[.]" 720 ILCS 5/11-1.60(c)(1)(i) (West 2010).

Section 11-0.1 of the Criminal Code of 1961 (which supplies most of the definitions applying to sex-offenses) defines "sexual conduct" as follows:

> " 'Sexual conduct' means any knowing touching or fondling by the victim or the accused, either directly or through clothing, of the sex organs, anus, or breast of the victim or the accused, or any part of the body of a child under 13 years of age, or any transfer or transmission of semen by the accused upon any part of the clothed or unclothed body of the victim, for the purpose of sexual gratification or arousal of the victim or the accused." 720 ILCS 5/11-0.1 (West 2010).

(The requirement that the "touching or fondling" be "knowing" was added by Public Act 96-1551, § 5 (eff. July 1, 2011).) Further, the indictment did not charge defendant with the use of

force, penetration, or bodily harm. Thus, as neither the use of force, nor penetration, nor bodily harm was in any way part of the charges, the State did not need to prove any of those things.

¶ 54 Defendant asserts that the State failed to prove that any act of his had the purpose of sexual gratification or arousal of the victim or the accused. He asserts that, because neither A.W. nor I.W. testified directly to his being in a state of sexual arousal, the proof was lacking. We do not agree. "The intent to arouse or satisfy sexual desires can be established by circumstantial evidence, and the trier of fact may infer a defendant's intent from his conduct." *People v. Burton*, 399 Ill. App. 3d 809, 813 (2010). Thus, in *Burton* for instance, the necessary intent could be inferred from the defendant's act of "reach[ing] under the shirt of a 15-year-old girl who was struggling to get away from him and touch[ing] her breast inside her bra." *Burton*, 399 Ill. App. 3d 809 at 813. The three counts of which the court found defendant guilty similarly permit an inference of the necessary intent. There does not exist any reasonable nonsexual explanation for the contact of which the court found defendant guilty.

¶ 55 Defendant suggests that I.W.'s testimony at sentencing was improper and in some way influenced the court's finding of guilt. We find this claim puzzling. I.W. did not testify until after the court denied defendant's motion for a new trial. Her testimony could not have influenced the court's reasoning as to defendant's guilt.

¶ 56 Finally, as part of our sufficiency-of-the-evidence analysis, we address defendant's claim that the court employed erroneous reasoning in finding defendant guilty. We detect nothing improper in the court's reasoning. Defendant argues that, because the court noted that he had the opportunity to commit the offenses and that A.W. and I.W. had no apparent reason to lie about his actions, the court shifted the burden to him to disprove his guilt. That is a misinterpretation of the court's reasoning. The court noted that defendant had opportunity because, had he not,

that could have outweighed the evidence of guilt. Similarly, the court mentioned that A.W. and I.W. had no apparent reason to lie because, if they had had a reason, the court would have likely deemed them not credible. This is not shifting the burden of proof; it is simply summarizing the evidence.

¶ 57 In his discussion of the court's allegedly erroneous reasoning, defendant argues that A.W.'s and I.W.'s statements and testimony contained multiple inconsistencies. Although we find defendant's argument extremely difficult to follow and note that it rests in large part on the misapprehension that the State needed to prove penetration and that he had an erection, we understand him to claim that A.W.'s and I.W.'s statements and testimony contained too many inconsistencies to support the convictions. We do not agree. First, if we understand defendant correctly, some of the inconsistencies he asserts are simply points on which A.W. and I.W. might have corroborated one another but did not. Further, certain of the "inconsistencies" to which defendant points are not inconsistencies at all. For instance, at one point, A.W. testified that he had put a blanket over himself and asked her to touch his "private," that she touched it, but that she did not "go under the blanket." Defendant argues that A.W. "impeach[ed] herself" with this testimony. But A.W. could have touched his penis indirectly without "go[ing] under" the blanket. See 720 ILCS 5/11-0.1 (West 2010). To be sure, neither I.W. nor A.W. was completely consistent in her testimony. However, their testimony and statements were not, taken as a whole, " 'improbable, unconvincing, and contrary to human experience.' " *Parker*, 2016 IL App (1st) 141597, ¶ 29 (quoting *Vasquez*, 233 Ill. App. 3d at 527. Given the complexities of the multiple incidents charged, the children's youth, and I.W.'s learning disabilities and possible difficulty hearing questions—one of her hearing aids was not working at trial—the existence of even significant inconsistencies would not necessarily make their testimony unconvincing.

¶ 58 III. CONCLUSION

¶ 59 For the reasons stated, we affirm defendant's convictions. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 60 Affirmed.