2019 IL App (3d) 170172-U

Order filed July 1, 2019

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2019

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
	)	Peoria County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-17-0172
v.	)	Circuit No. 15-CF-687
	)	
DARIAN CHRISTOPHER THOMAS,	)	Honorable
	)	John P. Vespa,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Presiding Justice Schmidt concurred in the judgment.
Justice O'Brien dissented.

ORDER

¶ 1 *Held*: Defendant did not receive ineffective assistance of counsel where counsel stipulated to the admission of the State's evidence at trial. Defendant did not receive ineffective assistance of counsel where counsel submitted a letter written by defendant at the sentencing hearing. The trial court did not abuse its discretion in sentencing defendant to 25 years' imprisonment for predatory criminal sexual assault of a child.

¶ 2 Defendant, Darian Christopher Thomas, appeals his conviction for predatory criminal sexual assault of a child. First, defendant argues that he received ineffective assistance of counsel

where his trial counsel stipulated to the admission of the State's sole evidence at a bench trial—namely, video recordings of defendant's and the victim's interviews with a detective. Second, defendant argues that his counsel was ineffective for submitting a letter written by defendant at the sentencing hearing because the letter was detrimental to his case. Finally, defendant argues that his sentence of 25 years' imprisonment was excessive. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged with predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2014)) and aggravated criminal sexual abuse (*id.* § 11-1.60(c)(1)(i)). The indictment alleged that the offense occurred between August 20 and October 1, 2015.

¶ 5 At a pretrial hearing, defense counsel advised the court that he and the assistant State's attorney had discussed the possibility of the State's case proceeding via stipulation. Defense counsel indicated that he had discussed this possibility with defendant at "fairly long length" and that it was "reasonably likely" that the defense would be stipulating to the State's evidence. Defense counsel requested that the matter be set for review and stated: "I think we will be in a position to perhaps lessen the time frame of the trial by probably 75 percent."

¶ 6 At a later pretrial hearing, the parties agreed to enter into evidence two exhibits for the State—a video recording of the victim's interview with a detective and a video recording of defendant's interview with a detective. The parties agreed that the court would review these exhibits prior to the trial. The court advised defendant that the parties had agreed to introduce two exhibits for the court to review before the trial. The court asked defendant if this was "all right" with him, and defendant said yes.

¶ 7 The two exhibits introduced into evidence by stipulation are contained in the record on appeal. The first exhibit is a video recording of Z.T.'s interview with a detective. The time stamp

on the video indicates that the interview occurred on October 5, 2015. During the interview, Z.T. said she was seven years old. Z.T. wrote and drew on a paper board in the interview room while she answered the detective's questions. She also sat upside down in a chair and lay on the floor and in a chair during the interview.

¶ 8 Z.T. asked the detective if he had found defendant. The detective asked Z.T. why he would be looking for defendant. Z.T. said that defendant had tried to put his penis in her mouth. Z.T. then said that defendant put his penis in her mouth. The detective asked if defendant had actually put his penis in her mouth. Z.T. replied: "Yeah but, no but, I told him to don't do it but he just did it anyway." Z.T. said that defendant also put his penis in her "butt." Z.T. said that this happened while her mother was not home and defendant was watching her.

¶ 9 The detective asked Z.T. to explain what happened several more times. Z.T. gave inconsistent accounts as to whether defendant actually put his penis in her mouth and her "butt" or merely tried to do so. At one point, the detective asked Z.T. if defendant put his penis in her mouth, and Z.T. said yes. The detective then asked if defendant's penis actually went in Z.T.'s mouth, and she said no. Later in the interview, the detective asked Z.T. if defendant tried to touch her with his penis on her mouth and her "butt," and Z.T. said yes. The detective then asked Z.T. if he actually did it, and Z.T. said no. The detective asked Z.T. if she actually saw defendant's penis. Z.T. said yes. She said that defendant showed her a picture of his penis on his phone. Z.T. said that she also saw defendant's penis when he removed it from his pants.

¶ 10 The second exhibit was a video recording of defendant's interview with a detective regarding the incident. Defendant said that he was 18 years old. Defendant had been staying with his sister and his niece, Z.T. Initially, defendant denied that he touched Z.T. Defendant said that there was a picture of his penis on his phone, and he sent it to his sister's girlfriend when he was

drunk. Defendant said that Z.T. could not have seen it because he had a passcode on his phone. Defendant said that Z.T. might know about the picture because she may have overheard defendant and his sister arguing about it. The detective asked defendant if Z.T. was "fast," and defendant said yes.

¶ 11 At one point, defendant asked what would happen if he had not done anything to Z.T. but he said he did. The detective said that would be lying, and he wanted defendant to tell the truth. Defendant then said that a "little bit" happened. Defendant said that Z.T. had been flirting with him, "coming on" to him, and looking at him while he was showering. Z.T. asked defendant if she could suck his penis, and defendant asked her if she had done that before. Z.T. said she had done it to multiple people at school. Z.T. then removed defendant's penis from his shorts and sucked on it for a minute or two. Defendant said that he was high during the incident, and he felt bad that he let it happen.

¶ 12 The matter proceeded to a bench trial. The court stated that it had viewed the two videos previously submitted by the parties. The State indicated that it would not be providing further evidence. Defendant moved for a directed verdict, and the court denied the motion.

¶ 13 Defendant testified that prior to his arrest, he had been living with his sister and his niece, Z.T. Defendant testified that he told the truth at the beginning of his interview with the detective, but the detective did not believe him. Defendant then lied so that the detective would stop questioning him about the situation. Defendant said he did this because he was under "tremendous stress." Defendant testified that he did not have sexual contact with Z.T. Defense counsel asked defendant why he told the police that he did. Defendant replied: "I really don't know. It was the first thing that came to my mind. So I just said it."

¶ 14 Defendant testified that Z.T. was angry with him while he lived with her because defendant treated her differently than the other children. Defendant explained that the other children were younger, and defendant would fix them food and take them outside. Defendant did not do those things for Z.T. Defendant knew that Z.T. was angry because she frequently threw fits.

¶ 15 On cross-examination, the State asked defendant if it was true when he told the police that Z.T. was "fast," and defendant said yes. The State asked defendant how Z.T. was "fast." Defendant replied: "She do [*sic*] things that she don't [*sic*] supposed to be doing." Defendant said that Z.T. did not flirt with him, and she never asked him if she could suck his penis. Defendant admitted that there was a picture of his penis on his phone, and Z.T. saw it when she was playing games on his phone.

¶ 16 During closing argument, defense counsel argued that "[t]he problem with this case is no one knows what happened." Defense counsel noted that Z.T. was inconsistent regarding whether or not defendant had sexual contact with her. Defense counsel also noted that defendant's testimony was inconsistent with what he said during his interview with the detective. Defense counsel argued that reasonable doubt as to defendant's guilt existed due to the inconsistencies in both Z.T.'s and defendant's statements regarding the incident.

¶ 17 The court found defendant guilty of both charges. The court found defendant's trial testimony to be "totally unbelievable." The court stated that it was odd that defendant did not tell the detective during the interview that Z.T. was lying because she was angry with him. The court noted that the interview was only 50 minutes long and that defendant began to confess after 34 minutes. The court stated that it did not believe defendant lied to get the questioning to end after only 34 minutes.

¶ 18 The court stated: "[I]n watching both interviews on the DVDs, *** the interviewer, meaning detective, bent over backwards not to be coercive, not to be a bully. It is all recorded. I watched it. The detective's performance carrying out his job was superb." The court said that it held Z.T. to a different standard on being consistent than defendant because Z.T. was 7 years old at the time of her interview and defendant was 18 years old at the time of his interview.

¶ 19 A presentence investigation report (PSI) was prepared. The PSI included defendant's date of birth, and it stated that he had no known juvenile adjudications or adult criminal convictions. The PSI indicated that defendant dropped out of school when he was in tenth grade. Defendant reported that "he just wanted to quit, so he did." Defendant indicated that he had never had a job and that he had previously robbed and stolen to support himself. Defendant reported that he had been affiliated with a gang in the past. Defendant stated that he used marijuana daily. Defendant denied committing the offenses charged in the instant case.

¶ 20 A letter written by defendant appears in the record. The letter was filed on the date of defendant's sentencing hearing. The letter primarily contained defendant's musings on his family, his life, and God. The letter stated that most of defendant's family members never visited him or wrote him letters when he was in jail. Defendant claimed that he was innocent several times in the letter. At one point, defendant stated: "You make one little mistake and then a whole range of choices are made for you." Defendant also stated: "I think about all the talent and potential I have to live a successful life and I became upset with myself all over again because I know that it's by my words that I am in jail." Defendant wrote: "I think of my childhood and all the bad things I done [*sic*] as a kid: stealing from my family, lying to my mother, treating animals badly. [E]ven though I was just a kid I still cant [*sic*] find away [*sic*] to forgive my childhood." Defendant stated that he was in a gang when he was young, and he used and sold

drugs. Defendant said that he did not have a father. Defendant expressed a desire to change and repair his life.

¶ 21 A sentencing hearing was held. The court noted that it would only be sentencing defendant for predatory criminal sexual assault of a child because aggravated criminal sexual abuse was a lesser included offense. The court also noted that the PSI indicated that defendant had no prior felony convictions or juvenile adjudications.

¶ 22 The State argued that defendant should be sentenced to at least 17 years' imprisonment. The State indicated that it chose 17 years as its recommendation because defendant would not be released until Z.T. was 21 years old. The State noted that there were "predatory criminal sexual assaults that are much more serious than this particular offense." The State also noted that defendant used manipulation rather than violence to engage in sexual contact with Z.T. and that the sexual contact was of a short duration. For these reasons, the State indicated that it was not seeking a sentence near the maximum of 60 years' imprisonment.

¶ 23 Defense counsel argued that defendant should receive a sentence at or near the minimum of six years' imprisonment. Defense counsel argued that the "lengthy term" suggested by the State was inappropriate. Defense counsel noted that defendant was only 18 years old at the time of the offense. Defense counsel argued that the letter defendant submitted to the court showed that defendant came from a difficult background and had rehabilitative potential. Defense counsel stated: "I believe that a fair reading of the correspondence to the Court demonstrates a young man who is *** articulate, is relatively bright, and is capable of being a contributing member of society."

¶ 24 The court sentenced defendant to 25 years' imprisonment for predatory criminal sexual assault of a child. The court stated that it had considered the PSI, the arguments of the parties,

the statutory factors in aggravation and mitigation, the history and character of defendant, and the circumstances and nature of the offense. The court found that the following statutory factors in mitigation applied: (1) defendant's criminal conduct neither caused nor threatened serious physical harm to another, (2) defendant did not contemplate that his criminal conduct would cause or threaten serious physical harm to another, and (3) defendant had no history of criminal activity. Regarding the statutory factors in aggravation, the court found that the sentence was necessary to deter others from committing the same crime.

¶ 25 The court noted that defendant blamed Z.T. for the offense in his interview with the detective. The court also noted that defendant stated in his letter: "You make one, little mistake and then a whole range of choices are made for you." The court stated: "Sexually violating a seven-year-old girl that you're related to. Someone who would call that one, little mistake is a scary person to have out and about." The court also noted that defendant wrote in his letter that he stole from his family, lied to his mother, and treated animals badly when he was a child. The court also noted that defendant admitted to being in a gang earlier in his life and to paying for things by stealing from people. The court noted that defendant dropped out of school in tenth grade because he wanted to quit.

¶ 26 Defendant filed a motion to reconsider his sentence, arguing that his sentence was excessive, the court failed to properly apply and consider the factors in aggravation and mitigation, and the court failed to consider his rehabilitative potential. After a hearing, the court denied the motion. The court noted that the applicable sentencing range was 6 to 60 years' imprisonment. The court stated that the fact that defendant had no prior convictions weighed heavily in his decision to impose a sentence in the lower half of the range. The court noted that the State had recommended a sentence of 17 years' imprisonment so that defendant would not be

released until Z.T. turned 21, and the court did not take the State's recommendation. The court reasoned that no one really knew when, if ever, Z.T. would be "fine."

¶ 27 II. ANALYSIS

¶ 28 A. Ineffective Assistance of Counsel for Stipulating to the State's Evidence

¶ 29 Defendant argues that his counsel was ineffective for agreeing to stipulate to the State's evidence—namely, video recordings of Z.T.'s and defendant's interviews with a detective.

¶ 30 Claims of ineffective assistance of counsel are governed by the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Petrenko*, 237 Ill. 2d 490, 496 (2010). "To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant." *Id.* That is, "the defendant must demonstrate that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Id.* at 496-97 (quoting *Strickland*, 466 U.S. at 694).

¶ 31 Defendant's ineffective assistance of counsel argument is twofold. First, defendant argues that his trial counsel was ineffective for failing to request a hearing under section 115-10 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10 (West 2014)) to determine whether Z.T.'s interview was reliable. Defendant also argues that his counsel was ineffective for stipulating to the admission of the video recording of Z.T.'s interview because it denied defendant the right to confront his accuser. We address each argument in turn.

¶ 32 1. Failure to Request a Reliability Hearing

¶ 33 Defendant contends that his trial counsel provided ineffective assistance by failing to request a hearing under section 115-10 of the Code to determine whether Z.T.'s video-recorded interview with a detective was sufficiently reliable to be admitted into evidence. Under section 115-10(b)(1), certain hearsay statements of child victims of sexual offenses may be admitted only if "[t]he court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability." 725 ILCS 5/115-10(b)(1) (West 2014). Section 115-10(b)(2) provides that the child must testify at trial in order for the statement to be admissible unless the child is unavailable and there is corroborative evidence. *Id.* § 115-10(b)(2).

¶ 34 "The standard for assessing claimed deficiencies in an attorney's performance is that of 'reasonably effective assistance' which is within the range of 'competence demanded of attorneys in criminal cases.' " *People v. Caballero*, 126 Ill. 2d 248, 260 (1989) (quoting *Strickland*, 466 U.S. at 687). "The determination of reasonableness of trial counsel's actions must be evaluated from counsel's perspective at the time of the alleged error, without hindsight, in light of the totality of the circumstances and not just on the basis of isolated acts." *People v. Coleman*, 301 Ill. App. 3d 37, 46 (1998). "It is unequivocal that the use of stipulations, in and of itself, does not establish ineffective assistance of counsel." *Id.*

¶ 35 To show that counsel's performance was deficient, a defendant "must overcome the strong presumption that the challenged action or lack of action might be the product of ' "sound trial strategy." ' " *Caballero*, 126 Ill. 2d at 260 (quoting *Strickland*, 466 U.S. at 689, quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). "[E]ven if defense counsel makes a mistake in trial strategy or tactics or an error in judgment, this will not render representation constitutionally defective." *People v. Perry*, 224 Ill. 2d 312, 355 (2007). Rather, "[o]nly if counsel's trial strategy

is so unsound that he entirely fails to conduct meaningful adversarial testing of the State's case will ineffective assistance of counsel be found." *Id.* at 355-56.

¶ 36 In the instant case, defendant has not overcome the presumption that defense counsel's decision to stipulate to the admission of the video recording of Z.T.'s interview without requesting a reliability hearing was the result of sound trial strategy. Defense counsel's strategy was to argue that reasonable doubt existed as to defendant's guilt because both Z.T. and defendant gave inconsistent accounts of the incident. In the video recording of Z.T.'s interview, Z.T. was easily distracted, and she gave inconsistent accounts as to whether defendant actually placed his penis in her mouth or merely tried to do so. Defense counsel may have believed that the video recording made Z.T.'s credibility appear weak. Defense counsel may have believed it was preferable to stipulate to the admission of the recording rather than risk the possibility that Z.T. would have appeared more credible if she had testified at the trial and explained the inconsistencies in her statements. Under these circumstances, counsel's decision to stipulate to the admission of the recording of Z.T.'s rather than requesting a reliability hearing was within the realm of trial strategy. Even if this strategy appeared in retrospect to be erroneous, this would not render counsel's representation constitutionally deficient. *People v. Palmer*, 162 Ill. 2d 465, 479-80 (1994) ("Errors in judgment or trial strategy do not establish incompetence [citation], 'even if clearly wrong in retrospect.' " (quoting *United States v. Yancey*, 827 F.2d 83, 90 (7th Cir. 1987))).

¶ 37 Also, defendant has not shown that he was prejudiced by defense counsel's failure to request a reliability hearing pursuant to section 115-10 of the Code (725 ILCS 5/115-10 (West 2014)). That is, there is not a reasonable probability that Z.T.'s hearsay statements would have been excluded had a reliability hearing been held. Under section 115-10(b)(1), hearsay testimony

shall only be admitted if "[t]he court finds in a hearing conducted outside the presence of the jury that the time, content, and circumstances of the statement provide sufficient safeguards of reliability[.]" *Id.* § 115-10(b)(1).

> "When conducting a section 115-10 hearing, the trial court examines the totality of the circumstances surrounding the hearsay statements, including the following: (1) the child's spontaneity and consistent repetition of the incident, (2) the child's mental state, (3) use of terminology unexpected of a child of similar age, and (4) the lack of motive to fabricate." (Internal quotation marks omitted.) *People v. Lara*, 2011 IL App (4th) 080983-B, ¶ 38.

¶ 38 Here, Z.T.'s interview occurred within approximately two months of the incident. The detective asked open-ended questions during the interview and did not direct Z.T.'s answers. The trial court noted at the end of the bench trial that it believed the detective performance during both his interview with Z.T. and his interview with defendant was "superb" and that he "bent over backwards not to be coercive." Although Z.T. appeared to be easily distracted during the interview, the trial court found at the close of the bench trial that her behavior was typical for that of a seven-year-old. Z.T. had no apparent motive to fabricate the allegations. Although defendant testified at the bench trial that Z.T. was angry with him at the time she accused him of having sexual contact with her, the court questioned the credibility of this testimony. The court noted that defendant did not say these things during his interview with the detective. Z.T. demonstrated knowledge of matters that a child her age typically would not be familiar with when she said that defendant asked to put his penis in her mouth and "butt." We acknowledge that Z.T. gave inconsistent statements as to whether defendant actually did these things or merely

tried to do them. However, given the totality of the circumstances, it is not reasonably probable that the court would have excluded Z.T.'s video-recorded interview under section 115-10.

¶ 39 2. Violation of Defendant's Right to Confrontation

¶ 40 Defendant argues that his counsel was ineffective for stipulating to the admission of Z.T.'s video-recorded interview because the stipulation violated defendant's right to confront his accuser. Defendant contends that he did not waive his right to confront the witnesses against him. We find that defense counsel properly waived defendant's right to confrontation when he stipulated to the admission of the video recording, and, accordingly, the stipulation did not violate defendant's right to confrontation.

¶ 41 Our supreme court has recognized that there are some decisions in a criminal case that ultimately belong to defendant, including "(1) what plea to enter; (2) whether to waive a jury trial; (3) whether to testify in his own behalf; (4) whether to tender a lesser-included-offense instruction; and (5) whether to appeal." *People v. Phillips*, 217 Ill. 2d 270, 281 (2005). "Beyond those decisions, however, ' "trial counsel has the right to make the ultimate decision with respect to matters of tactics and strategy after consulting with his client." ' " *Id.* (quoting *People v. Campbell*, 208 Ill. 2d 203, 210 (2003), quoting *People v. Ramey*, 152 Ill. 2d 41, 54 (1992)).

¶ 42 Defense counsel may waive a defendant's right to confrontation by stipulating to evidence as long as defendant does not object and the decision to stipulate is matter of trial strategy. *Campbell*, 208 Ill. 2d at 217. However, "defense counsel cannot stipulate to facts which establish the guilt of the accused because the constitutional right implicated in that situation is the right of a defendant in a criminal case to plead not guilty." *Id.* at 219. Where a stipulation is tantamount to a guilty plea, a defendant must be personally admonished regarding the stipulation. *People v. Rowell*, 229 Ill. 2d 82, 102 (2008). A stipulation is tantamount to a guilty

plea such that a defendant must personally waive his right to confrontation where "the State's entire case is to be presented by stipulation and the defendant does not present or preserve a defense [citation], or where the stipulation includes a statement that the evidence is sufficient to convict the defendant." *Campbell*, 208 Ill. 2d at 218. See also *Rowell*, 229 Ill. 2d at 102. In cases where the State's entire case is presented by stipulation but defendant presents or preserves a defense, it is not necessary for defendant to be personally admonished regarding stipulation. *Rowell*, 229 Ill. 2d at 103.

¶ 43 In the instant case, the stipulation to the State's evidence was a matter of trial strategy. See *supra* ¶ 36. The record does not indicate that defendant objected to this strategy. Defense counsel indicated to the court at a pretrial hearing that he and defendant had discussed at "fairly long length" the possibility of stipulating to the State's evidence. At a later pretrial hearing, the court advised defendant that the parties had agreed to submit the video recordings into evidence for the court to review prior to trial. The court asked defendant if he was "all right" with this, and defendant said yes.

¶ 44 Also, the stipulation to the State's evidence was not tantamount to a guilty plea because defendant presented a defense at the trial. Specifically, defense counsel argued that reasonable doubt as to defendant's guilt existed because both defendant and Z.T. gave inconsistent statements concerning the incident. Thus, the court was not required to personally admonish defendant regarding the stipulation, and defendant was not required to personally waive his right to confrontation. See *Campbell*, 208 Ill. 2d at 217; *Rowell*, 229 Ill. 2d at 103.

¶ 45 Because defense counsel properly waived defendant's right to confrontation through the stipulation, defendant's right to confrontation was not violated. Accordingly, we reject

defendant's claim that defense counsel was ineffective on the basis that the stipulation violated defendant's right to confrontation.

¶ 46 B. Ineffective Assistance of Counsel for Submission of the Letter at Sentencing

¶ 47 Defendant argues that his counsel provided ineffective assistance at the sentencing hearing when he presented defendant's letter to the court. Defendant contends that the letter was detrimental to his case, and the court used it as a basis for sentencing him to 25 years' imprisonment. We find that counsel did not perform deficiently in submitting the letter.

¶ 48 When addressing a claim that an attorney's performance was deficient, we consider whether the attorney provided reasonably effective assistance. *Caballero*, 126 Ill. 2d at 260. "The determination of reasonableness of trial counsel's actions must be evaluated from counsel's perspective at the time of the alleged error, without hindsight, in light of the totality of the circumstances and not just on the basis of isolated acts." *Coleman*, 301 Ill. App. 3d at 46.

¶ 49 Viewing the matter from defense counsel's perspective at the time of the alleged error, the submission of the letter was reasonable. The majority of the letter consisted of defendant lamenting what had become of his life and expressing a desire to repair it. The letter also discussed defendant's background and lack of family support. Defense counsel could have reasonably believed that the letter would make the court more sympathetic toward defendant. Also, defense counsel's argument at the sentencing hearing showed that his strategy regarding the letter was to highlight defendant's difficult background and potential for rehabilitation. We note that "[e]rrors in judgment or trial strategy do not establish incompetence [citation], 'even if clearly wrong in retrospect.' " *Palmer*, 162 Ill. 2d at 479-80 (quoting *Yancey*, 827 F.2d at 90).

¶ 50 Contrary to defendant's assertions on appeal, defense counsel could not have necessarily foreseen the ways the court would use the letter against defendant. Defendant contends that trial counsel should have foreseen that the phrase "one little mistake" in the letter could easily be interpreted to refer to the sexual assault. However, the letter was ambiguous as to what "mistake" defendant was referencing. Because defendant stated that he was innocent several times in the letter, defense counsel may not have foreseen that the court would interpret the "mistake" as a reference to the sexual assault. Based on defendant's statement in the letter that he was in jail because of his own words, defense counsel could have reasonably believed that the "mistake" defendant referred to was falsely confessing to the offense.

¶ 51 Defendant also argues that defense counsel should not have submitted the letter because defendant "confessed to uncharged crimes" in the letter. Specifically, defendant notes that the letter said that he had stolen from his family, lied to his mother, treated animals badly, and used and sold drugs. However, the letter stated that defendant did these things when he was a child, and it indicated that defendant felt regret and remorse for these actions. Also, the misdeeds defendant mentioned in his letter were not nearly as serious as the offense charged in the instant case. Defense counsel could have reasonably believed that the court would find that defendant's childhood misdeeds were a result of his difficult background. Counsel could not have necessarily foreseen that the court would hold these things against defendant at sentencing.

¶ 52 C. Excessive Sentence

¶ 53 Defendant argues his sentence of 25 years' imprisonment was excessive given the nature of the offense, his lack of criminal history, his young age, and his rehabilitative potential. We find that the court did not abuse its discretion in sentencing defendant to 25 years' imprisonment.

¶ 54 Initially, we reject the State's argument that defendant has forfeited this issue. The State cites *People v. Hillier*, 237 Ill. 2d 539, 544 (2010) for the proposition that both a contemporaneous objection and a written postsentencing motion are required to preserve a claim of sentencing error. In the instant case, defendant filed a postsentencing motion arguing that the sentence was excessive. Also, defense counsel's argument at the sentencing hearing clearly stated defendant's position as to the proper length of the sentence. Defense counsel argued that defendant should receive a sentence at or near the minimum given his age, his potential for rehabilitation, and his lack of criminal history. Defense counsel also argued that the "lengthy term" of 17 years' imprisonment recommended by the State was unwarranted. Defense counsel was not required to explicitly object after the court imposed a sentence in excess of the one he had just argued was appropriate. Thus, defendant's excessive sentencing argument was properly preserved for review, and we proceed to address the merits of the argument.

¶ 55 The trial court has broad discretion in sentencing a criminal defendant, and the trial court's sentencing decisions are entitled to great deference. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000).

> "The trial court is granted such deference because the trial court is generally in a better position than the reviewing court to determine the appropriate sentence. The trial judge has the opportunity to weigh such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. [Citations.] Consequently, the reviewing court must not substitute its judgment for that of the trial court merely because it would have weighed these factors differently." *Id.*

We will not overturn a sentence on appeal absent an abuse of discretion by the trial court. *Id.* at 209-10. "[A] sentence within statutory limits will be deemed excessive and the result of an abuse of discretion by the trial court where the sentence is greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *Id.* at 210.

¶ 56 Here, defendant faced a possible sentencing range of 6 to 60 years' imprisonment for predatory criminal sexual assault of a child. 720 ILCS 5/11-1.40(b)(1) (West 2014). His sentence of 25 years' imprisonment fell within the middle of this range.

¶ 57 Defendant's mid-range sentence of 25 years' imprisonment was not "greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *Stacey*, 193 Ill. 2d at 210. The court was within its discretion in finding that the sentence was necessary to deter others from committing similar offenses. Also, defendant's conduct was very serious, and "the seriousness of the crime has been called the most important factor to consider when imposing a sentence." *People v. Rayburn*, 258 Ill. App. 3d 331, 334 (1994). The victim was defendant's seven-year-old niece, and she stated in her interview that defendant was babysitting her at the time of the offense. As the trial court noted, defendant attempted to blame Z.T. for the incident during his interview with the detective. Specifically, defendant said that Z.T. was "fast" and that she initiated the incident. Defendant indicated that he was merely a passive participant. Given the seriousness of the offense and the need for deterrence, the 25-year sentence imposed by the trial court was not an abuse of discretion.

¶ 58 We reject defendant's argument that his sentence was disproportionate to the nature of the offense. Defendant notes that the State argued at the sentencing hearing that defendant's conduct did not warrant a sentence close to the maximum because the offense was of short duration, defendant did not use violence, defendant had no criminal history, and there were

predatory criminal sexual assaults of children that were worse. The court apparently agreed that a sentence close to the maximum was inappropriate, as it imposed a sentence in the lower half of the sentencing range. Defendant notes that his 25-year sentence exceeded the State's recommendation of 17 years' imprisonment. However, the court explained at the hearing on the motion to reconsider sentence that it did not find the basis for this recommendation—namely, the victim's age at the time of defendant's release—to be compelling.

¶ 59 We also reject defendant's argument that the sentence was excessive given his lack of criminal history, young age, and potential for rehabilitation. The record indicates that the court extensively considered defendant's lack of criminal history. At the sentencing hearing, the court expressly found that defendant's lack of a criminal record was an applicable statutory factor in mitigation. At the hearing on defendant's motion to reconsider his sentence, the court stated that defendant's lack of criminal history weighed heavily in his decision to impose a sentence in the lower half of the sentencing range. The fact that the court also considered uncharged bad acts that defendant admitted to in his letter and in the PSI does not show that the court failed to consider defendant's lack of a criminal record.

¶ 60 Also, the record does not indicate that the court failed to consider defendant's young age and potential for rehabilitation. Defense counsel argued at the sentencing hearing that defendant had rehabilitative potential based on his letter. Defense counsel noted that defendant was only 18 years old at the time of the offense, and the PSI also contained defendant's age. The court indicated that it had read the PSI and considered the arguments of the parties in reaching its sentencing decision. Although the court did not expressly refer to defendant's young age and potential for rehabilitation in imposing the sentence, "[t]he trial court is not required to expressly indicate its consideration of all mitigating factors and what weight each factor should be

assigned." *People v. Kyse*, 220 Ill. App. 3d 971, 975 (1991). Rather, we presume that the court considered all relevant mitigating and aggravating factors absent evidence from the record that the court failed to do so. *People v. Halerewicz*, 2013 IL App (4th) 120388, ¶ 43. We also note that "[a] defendant's rehabilitative potential *** is not entitled to greater weight than the seriousness of the offense." *People v. Coleman*, 166 Ill. 2d 247, 261 (1995).

¶ 61 Thus, we find that the trial court adequately considered the relevant factors in aggravation and mitigation, and it is not our duty to reweigh these factors on review. *People v. Alexander*, 239 Ill. 2d 205, 214 (2010).

¶ 62 III. CONCLUSION

¶ 63 For the foregoing reasons, the judgment of the trial court is affirmed.

¶ 64 Affirmed.

¶ 65 JUSTICE O'BRIEN, dissenting:

¶ 66 I would find that defense counsel provided ineffective assistance in stipulating to the admission of Z.T.'s video-recorded interview without first subjecting Z.T.'s out-of-court statements to a reliability hearing under section 115-10 of the Code (725 ILCS 5/115-10 (West 2014)). I would reverse and remand for a new trial on this basis. Accordingly, I respectfully dissent.

¶ 67 As the majority set forth, in order to prevail on a claim of ineffective assistance of counsel, a defendant must show that (1) his counsel's performance was deficient, and (2) he was prejudiced by his counsel's deficient performance. *Petrenko*, 237 Ill. 2d at 496. Under section 115-10(b)(1) of the Code (725 ILCS 5/115-10(b)(1) (West 2014)), certain hearsay statements of child victims shall be admitted *only if* the trial court finds in a hearing that "the time, content, and circumstances of the statement provide sufficient safeguards of reliability."

¶ 68 I would find that defense counsel performed deficiently in stipulating to the admission of Z.T.'s video-recorded interview without first subjecting her out-of-court statements to the required reliability hearing under section 115-10. There was no reasonable strategic basis for defense counsel's failure to subject Z.T.'s out-of-court statements in the video-recorded interview to a reliability hearing. If a reliability hearing had been held and Z.T.'s out-of-court statements were not excluded, defense counsel would have still had the option of stipulating to the admission of the video recording. If Z.T.'s out-of-court statements were excluded following a reliability hearing, the State's case against defendant would have been much weaker. The only evidence the State presented at trial were the video recordings of Z.T.'s interview and defendant's interview. Defendant's confession alone was not sufficient evidence to sustain a conviction. See *People v. Sargent*, 239 Ill. 2d 166, 183 (2010). Accordingly, in order to proceed, the State would have had to present independent corroborating evidence other than Z.T.'s out-of-court statements. It is unclear from this record whether such evidence existed.

¶ 69 Also, I would find that defendant was prejudiced by defense counsel's deficient performance. "[T]o demonstrate prejudice, a defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *People v. Patterson*, 192 Ill. 2d 93, 122 (2000). The reasonable probability standard "does not require a defendant to demonstrate that counsel's conduct more likely than not altered the outcome in the case." *Id.* Rather, "a reasonable probability 'is a probability sufficient to undermine confidence in the outcome.' " *Id.* (quoting *Strickland*, 466 U.S. at 694).

¶ 70 In the instant case, defense counsel could have argued at a reliability hearing that the content and circumstances of Z.T.'s out-of-court statements failed to provide sufficient safeguards of reliability. See 725 ILCS 5/115-10 (West 2014). During the video-recorded

interview, Z.T. appeared to be distracted, and she gave inconsistent statements regarding whether defendant actually had sexual contact with her or merely attempted to. Under these circumstances, there is a reasonable probability that the court would have excluded Z.T.'s statements if a reliability hearing had been held.

¶ 71 If Z.T.'s video-recorded interview had been excluded, it would have affected the trial significantly. The only evidence the State presented at trial were the video recordings of Z.T.'s interview and defendant's interview. Since defendant's video-recorded confession alone was not sufficient evidence to prove him guilty (see *Sargent*, 239 Ill. 2d at 183), the State would have had to present corroborating evidence other than Z.T.'s interview in order to proceed with the prosecution. Thus, I would find that defense counsel's failure to subject Z.T.'s statements to a reliability hearing undermined confidence in the outcome of the trial.

¶ 72 Accordingly, I would reverse defendant's conviction for predatory criminal sexual assault of a child and remand the matter for a new trial.