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FIFTH DIVISION
July 20, 2012

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 07 CR 19865
)	
DONALD TURNER,)	Honorable
)	Joseph M. Claps,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Epstein and Justice McBride concurred in the judgment.

O R D E R

¶ 1 *HELD:* Because defendant's contentions that defense counsel was ineffective for failing to present exculpatory evidence contained in the victim's DCFS report involve matters *dehors* the record, we find those contentions should be raised in a collateral postconviction proceeding and decline to address them in detail on direct appeal. We find that the evidence presented was sufficient to allow the trial court to find defendant guilty of criminal sexual assault beyond a reasonable doubt, and that counsel was not ineffective for failing to challenge in a pretrial motion to suppress A.T.'s lineup identification where he

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vigorously cross-examined the witness regarding her identification at trial. We also find defendant's sentence was not excessive given the seriousness of the offense.¹

¶ 2 Following a bench trial, defendant Donald Turner was convicted of criminal sexual assault on a 14 year-old minor, in violation of 720 ILCS 5/12-13(a)(4)(2005). He was sentenced to a seven-year prison term. On appeal, defendant contends: (1) the State's evidence did not prove his guilt beyond reasonable doubt; (2) he received ineffective assistance of counsel where his trial counsel failed to present an overwhelming amount of exculpatory evidence in discovery, and where his counsel failed to move to suppress a suggestive lineup identification; and (3) the seven-year sentence was excessive where there were no aggravating factors existing but substantial evidence was presented in mitigation.

¶ 3 For the reasons that follow, we affirm defendant's conviction and sentence.

¶ 4 BACKGROUND

¶ 5 In September 2007, 38 year-old Donald Turner, a third grade elementary school teacher at Alex Haley School in Chicago, Illinois, was indicted for criminal sexual assault, in violation of 720 ILCS 5/12-13(a)(4) (West 2006). The State alleged

¹Justice Joseph Gordon participated in this case at oral arguments. Following his demise, Presiding Justice Epstein has replaced him on the panel, and has reviewed the briefs and oral argument recordings.

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defendant had mouth to vaginal contact with a 14 year-old minor named U.S., an eighth grade student at Alex Haley School. Prior to the trial, the trial court held an *in camera* review of Department of Children and Family Services (DCFS) files relating to U.S., who was a foster child at the time of the incident. Both parties received a redacted copy of the record. The record reflects the only information redacted from the DCFS files were witnesses' and interviewees' names. The court informed defense counsel that it would release the redacted name of any relevant witness upon defendant's request. Defendant requested and received the name of U.S.'s DCFS caseworker Beverly Jackson, who stated in the report that she did not believe that "these things actually occurred" because of U.S.'s previous behavioral issues and since she was bipolar. U.S. testified that she was diagnosed with bipolar disorder in 2005 and was still on medication at the time of her testimony at trial.

¶ 6 The DCFS report indicates that when interviewed by DCFS, Vaida Williams, an Alex Haley school official, stated she had difficulty believing the allegations against defendant were true since U.S. had previously "cried rape and things did not pan out." Williams testified at trial that defendant was a third grade teacher at Alex Haley School. She was not questioned regarding her statement to DCFS about the incident. According to

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the DCFS report, Alex Haley Vice-Principal Michael Onofrio also told a DCFS investigator that he had "a hard time believing that this occurred as [the] minor has reported a similar thing about a boy in class and it turns out she fabricated the whole thing."

¶ 7 U.S. testified at trial that she lived with her foster mother of seven years, Patricia Thompson, Thompson's 12 year-old niece, B.T., and 15 year-old granddaughter, A.T. Thompson's 18 year-old foster daughter Darlene Morrow was also staying with them over the Christmas break. U.S. testified that she met defendant sometime in November 2005 when Thompson was picking up grades. He was not her teacher, but she knew that he taught third or fourth grade. She further testified that they exchanged notes and letters to each other during school hours when the hallway was clear. U.S. testified that she contacted defendant through a cell phone he had given her before Christmas break, while she was still in school. On cross-examination, she could not recall when defendant gave her the phone, but it was before or after Christmas, and may have been as late as after New Year's Eve. U.S. later testified that she recalled receiving the phone when defendant brought it to her house on Christmas Eve.

¶ 8 U.S. testified that she and defendant spoke frequently on the cell phone and they communicated back and forth by phone on Christmas Eve of 2005 after her foster mother had gone to sleep.

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Defendant told her he wanted to visit her. She stayed up until approximately 3 a.m. and watched him arrive in the backyard. U.S. said this was their first meeting outside of school. U.S. let defendant in through the backdoor and brought him to her bedroom, which she shared with B.T. When they arrived in the bedroom, U.S. turned on the light for a few minutes, which awakened B.T. who was sleeping on her bed. Defendant set down some greeting cards and told her that he wanted to perform oral sex on her.

¶ 9 U.S. testified that B.T. got up and hid behind her bed. U.S. then laid down and defendant performed oral sex on her. U.S. said defendant stayed in her room for around 30 minutes. According to U.S., B.T. stayed in the room the entire time. U.S. said she did not tell Thompson about what happened on Christmas Eve. U.S. said she had sex and phone contact with defendant for a couple of weeks, including one time that he took her to a hotel on 100th and Halsted around January 2nd or 3rd. On cross-examination, U.S. said she had told police about the second incident.

¶ 10 B.T. testified that she woke up when U.S. turned on the bedroom light. B.T. recognized defendant because she had seen him at school. B.T. said she hid behind her bed because she was scared, but was able to see U.S. and defendant kissing. B.T. saw

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U.S. take off her panties. Defendant then placed his head between U.S.'s legs. B.T. said that at the time, U.S. was only wearing her panties and a T-shirt. After around three to four minutes, A.T. came into the room. B.T. then followed A.T. out of the bedroom and went downstairs. Shortly after, both B.T. and A.T. returned to the bedroom with Morrow. Morrow told defendant to leave the house, while B.T. remained in the hallway. A.T. and Morrow then followed defendant out of the house.

¶ 11 A.T. testified that sometime around 3 a.m., she went upstairs to the attic bedroom where U.S. and B.T. slept and opened the door. In the darkness she could see U.S. lying on the bed with her underwear down "and a boy with his head between her legs." Startled by what she saw, she left the door cracked and went downstairs to get Morrow, who was in Thompson's bedroom. She did not tell her grandmother, but told Morrow to "come here *** to come upstairs and see what was going on." A.T. said that when Morrow entered the bedroom and turned on the light, the boy stood up and U.S. was startled. A.T. said Morrow then told defendant he had to leave. A.T., Morrow and U.S. then walked defendant out of the house. A.T. identified the boy as defendant in open court. However, she testified she could not remember what defendant was wearing that day. A.T. also testified that she identified defendant in a lineup in September 2007. She could

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not remember whether she had seen a photograph of defendant prior to the lineup. Both parties stipulated that A.T. viewed a photographic lineup on January 10, 2006, and that A.T. picked defendant out as the one in "all black." The record reflects that when the lineup was conducted, defendant was dressed in all black while the three other participants wore white T-shirts.

¶ 12 Morrow testified she was staying at Thompson's house over the holidays in December 2005. On Christmas morning, she and Thompson stayed up cooking until after midnight. Morrow testified that at around 1 a.m., A.T. called out for her. Morrow left Thompson's bedroom, while Thompson stayed behind asleep. Morrow followed A.T. upstairs to the attic bedroom. When she turned on the bedroom light, she saw U.S. on the bed and a "guy" on the floor. Morrow testified that she did not witness a sexual act, but did tell defendant that he had to leave. Morrow said that she, A.T., and U.S. then walked defendant out of the house. Morrow identified defendant in court as the "guy" she saw in the bedroom. She testified she did not know defendant at the time. Morrow could not recall what defendant was wearing that night, except that he put on a black pea coat when he left. Morrow testified that after defendant left, she went back upstairs and spoke with the three girls. U.S. told her that she did not have sex with the defendant. Morrow agreed not to tell Thompson or

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call the police. Morrow testified that she did not tell Thompson about the incident because Thompson was sick.

¶ 13 Thompson testified that she was in the kitchen on January 8, 2006, and could hear a man's voice coming from the attic. She walked quietly upstairs and opened the door and saw that B.T. and U.S. were sitting on the bed and talking to a man on speaker through a cell phone on the bed. When she walked into the bedroom, U.S. appeared startled and threw the phone. Thompson caught it. Thompson said she was upset because the girls were not supposed to have a phone. When she asked "where did you get this," U.S. told Thompson that she could not tell her because U.S. did not want Thompson to know. Thompson said U.S. later told her what had happened. Thompson then called the police. According to Thompson, the police spoke with U.S. and then took her and Thompson to the hospital. U.S. testified that at the hospital, she told the doctor that defendant only performed oral sex on her.

¶ 14 Shortly before the State rested, the trial court admitted "People's Exhibit #1," containing three cards signed "Donnie" in block writing and some typed notes. Defense counsel objected based on foundation and relevance, but the Court allowed its admission. The trial court also admitted into evidence a cell phone, U.S.'s birth certificate, and Turner's birth certificate.

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¶ 15 At the close of the State's case, defense counsel requested a directed finding on the basis of insufficient evidence, inconsistent, contradictory and unbelievable testimony, and a lack of testimony that defendant held a position of trust, authority or supervision over the victim. The trial court denied the motion. Defense counsel did not present any witnesses or evidence. Following closing arguments, the trial court found defendant guilty of criminal sexual assault.

¶ 16 During sentencing, the trial court noted defendant's position as a teacher would not be considered in aggravation since it had already been used to elevate the charge. Defendant was sentenced to seven years in prison. The trial court noted that in reaching its decision, it had considered the pre-sentence investigation report, factors in aggravation and mitigation, counsel's arguments and the fact that defendant had no criminal background. Defendant appeals.

¶ 17 ANALYSIS

¶ 18 I. Reasonable Doubt

¶ 19 Defendant contends the State failed to prove him guilty of criminal sexual assault beyond a reasonable doubt. Specifically, defendant contends the eyewitness testimony presented by the State was inconsistent, incredible and contrary to human experience. Additionally, defendant contends the victim, U.S.,

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had a motive to fabricate her story. Accordingly, defendant seeks reversal of his conviction.

¶ 20 The State counters that the evidence clearly establishes that defendant, a 38-year-old man, "groomed" the 14-year-old victim into believing they had a secret romantic relationship. The State highlights that defendant engaged in "classic seduction behavior" through his attention, affection, gifts, cards, letters and intimate cell phone conversations. The State also contends the eyewitness evidence establishing defendant engaged in oral sex with U.S. was sufficient to show defendant's guilt beyond a reasonable doubt.

¶ 21 In order to sustain a conviction, the State must prove a defendant's guilt beyond a reasonable doubt. *People v. Judge*, 221 Ill. App. 3d 753, 760 (1991). On review, we consider whether viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found defendant guilty beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004).

¶ 22 It is the responsibility of the trier of fact to determine the credibility of witnesses and the weight to be given their testimony, to resolve conflicts in the evidence, and to draw reasonable inferences from the evidence. *People v. Williams*, 193 Ill. 2d 306, 338 (2000). However, our supreme court has not

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hesitated to reverse a criminal conviction where the evidence is improbable, unconvincing, contrary to human experience or so unsatisfactory that it creates a reasonable doubt of defendant's guilt. *People v. Dawson*, 22 Ill. 2d 260, 265 (1961).

¶ 23 A person commits criminal sexual assault where he "commits an act of sexual penetration and *** is 17 years of age or over and holds a position of trust, authority, or supervision in relation to the victim, and the victim is at least 13 years of age but under 18 years of age." 720 ILCS 5/12-13(a)(4) (West 2006). Sexual penetration means any contact, however slight, between the sex organ or anus of one person and an object or the sex organ, mouth, or anus of another person, or any intrusion, however slight, of any part of the body of one person or of any animal or object into the sex organ or anus of another person, including, but not limited to, cunnilingus, fellatio, or anal penetration. 720 ILCS 5/12-12(f) (West 2006).

¶ 24 Here, we recognize some inconsistencies and contradictions existed between U.S.'s and the other witnesses' accounts of the incident. There were also contradictions in U.S.'s testimony regarding when she received the cell phone from defendant that she allegedly used to contact him with on the night of Christmas Eve.

¶ 25 For example, U.S. testified on direct examination that

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defendant contacted her several times before Christmas Eve by calling a cell phone he had given her on a previous occasion. Although she could not recall the exact date defendant brought her the phone, she "guessed he brought it" sometime before Christmas break while she was still in school. She explained defendant had brought the cell phone to her house one night. U.S. said that when she called defendant on Christmas Eve using the cell phone he provided her, defendant told her he wanted to come over.

¶ 26 On cross-examination, U.S. testified she started speaking with defendant by phone the week before Christmas break began. When asked when defendant gave her the phone, U.S. said she was not sure. She did not recall telling police that defendant had given her the phone after New Year's Eve of 2006. U.S. testified she had not had any personal meetings with defendant outside of school "until after Christmas." When asked by defense counsel whether it was possible she was not given the phone until after New Year's Eve of 2006, U.S. responded that "[i]t was either before or after Christmas." When defense counsel again asked on recross whether "it may have been after New Year's Eve that he gave you the phone, is that correct," U.S. responded "No. I am not sure." U.S. testified she could not remember the telephone number she used to contact defendant.

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¶ 27 U.S. also explained she started exchanging letters in the hallway at school with defendant prior to Christmas break. Earlier in her testimony, however, she explained she went to school in a separate building from where defendant worked as a teacher. Moreover, while U.S. testified that B.T. remained in the room the entire time defendant performed oral sex on her, which she estimated was around 30 minutes, B.T. testified at trial that she followed A.T. out of the room and downstairs to get Morrow around 3 or 4 minutes after defendant and U.S. first entered the bedroom.

¶ 28 When A.T. testified about what happened after she saw defendant and U.S. together in the bedroom, she made no mention of B.T. following her out of the bedroom and then downstairs to get Morrow. We note A.T. also described seeing "a boy" with his "head between [U.S.'s] legs" when she entered the bedroom, though the record reflects defendant was a 36-year-old man when the incident took place. Defendant suggests A.T.'s testimony that she saw U.S. with a "boy" in the bedroom indicates her identification of defendant is unreliable.

¶ 29 Defendant also suggests U.S. had a strong motive to lie and falsely accuse defendant; namely, to ensure she was viewed as a victim and not removed from her foster home after Thompson discovered U.S. was having sexual relations with someone inside

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the house.

¶ 30 After reviewing the record in this case, we cannot say the evidence presented was so unreasonable, improbable or unsatisfactory as to justify a reasonable doubt of defendant's guilt. While we agree with defendant that the witnesses' testimony regarding the incident in the bedroom and U.S.'s testimony regarding when she received the phone was less than perfect, we note all of those alleged imperfections and their impact on the witnesses' credibility were presented and argued to the trial court in detail by defense counsel during defendant's bench trial. Notwithstanding, the trial court determined the witnesses' testimony regarding the incident, mixed with the circumstantial evidence presented in the notes admitted into evidence that were allegedly given by defendant to the victim, supported a finding of guilt.

¶ 31 After viewing the evidence in the light most favorable to the State, we find a rational trier of fact could have found defendant guilty of criminal sexual assault beyond a reasonable doubt. Because it is ultimately the trier of fact's responsibility to determine the credibility of witnesses and the weight to be given their testimony, to resolve conflicts in the evidence and to draw reasonable inferences from the evidence, we

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are unwilling to reweigh the evidence on appeal and disturb the trial court's findings. See *Williams*, 193 Ill. 2d at 338.

¶ 32 II. Ineffective Assistance

¶ 33 Defendant contends he received ineffective assistance of trial counsel. Specifically, defendant contends that although trial counsel was tendered substantial exculpatory evidence within the victim's DCFS report during discovery, the record reflects he did not investigate or present the exculpatory evidence during defendant's trial. Defendant also contends his trial counsel was ineffective for failing to move to suppress A.T.'s lineup identification of defendant as unduly suggestive.

¶ 34 "The benchmark for judging an ineffectiveness claim must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Illinois adopted the *Strickland* test in *People v. Albanese*, 104 Ill. 2d. 504, 526 (1984). Under *Strickland*, a defendant must prove that: (1) counsel's performance was deficient and fell below the standard of reasonableness; and (2) the deficient performance prejudiced the defense. *Id.* at 686-88; *People v. Hooker*, 253 Ill. App. 3d 1075, 1088 (1993).

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¶ 35 Reasonableness requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment, and but for counsel's deficient performance, the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 687, 694. Prejudice requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial with reliable results. *Id.* at 687. Both prongs of the *Strickland* test must be satisfied before counsel is found ineffective. *Hooker*, 253 Ill. App. 3d at 1088.

¶ 36 In assessing an ineffective counsel claim, the court must give deference to counsel's conduct within the context of trial and without the benefit of hindsight. *People v. King*, 316 Ill. App. 3d 901, 913 (2000). Therefore, "a defendant must overcome the strong presumption that the challenged action or inaction of counsel was the product of *sound* trial strategy and not incompetence." *Id.* (Emphasis added). The defendant can overcome the strong presumption of a sound strategy if counsel's decision appears so irrational and unreasonable that no reasonably effective defense attorney facing similar circumstances would pursue the same strategy. *Id.* at 916.

¶ 37 In determining whether a defendant has been denied a right to the effective assistance of counsel the court uses a "fact

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sensitive analysis," which seeks to measure "the quality and impact of counsel's representation under circumstances of the individual case." *People v. Morris*, 335 Ill. App. 3d 70, 79 (2002). Strategic choices made by defense counsel after a thorough investigation of the law and facts, such as whether to present a particular witness, are "virtually unchallengeable." *King*, 316 Ill. App. 3d at 913. However, tactical decisions may be deemed "ineffective" when counsel fails to present exculpatory evidence which it is aware of, including failure to call witnesses whose testimony would otherwise support an uncorroborated defense. *Id.*

¶ 38 A. Failure to Present Exculpatory Evidence

¶ 39 Defendant contends the record supports a finding that defense counsel failed to investigate or introduce a substantial amount of mitigating and exculpatory evidence outlined in the victim's DCFS report. Specifically, defendant contends the DCFS report could have been used to impeach U.S.'s testimony regarding an alleged second sexual encounter between defendant and U.S. that U.S. said took place around January 2 or 3, 2006, at a hotel near 100th and Halsted. Defendant contends that because the DCFS report does not indicate U.S. told the DCFS investigator about the second encounter, defense counsel could have used the report to impeach her based on her failure to state a particular fact in

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a prior statement. See *People v. Henry*, 47 Ill. 2d 312, 320-22 (1970).

¶ 40 Defendant also contends the report defense counsel received indicated two potential witnesses -- the principal and the vice-principal of the school where defendant taught -- had told DCFS that they did not believe the allegations against defendant were true because U.S. allegedly previously fabricated an accusation of sexual assault. Defendant contends defense counsel failed to properly investigate and present the two potential witnesses whose testimony would have been relevant and admissible to attack U.S.'s credibility under *People v. Cookson*, 215 Ill. 2d 194, 214-18 (2005).

¶ 41 Lastly, defendant contends the DCFS report tendered to defense counsel indicated Beverly Jackson, U.S.'s case worker, had stated she did not believe U.S.'s allegations because U.S. was bipolar and had other behavioral problems. Defendant contends defense counsel was ineffective for failing to investigate Jackson as a witness and present her testimony to establish U.S.'s mental condition affected her credibility as a witness.

¶ 42 The State initially counters that the contents of the nonadmitted, unredacted DCFS report defendant refers to in the record is not properly part of the trial record before us. The State notes that because defendant has not included a copy of the

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redacted DCFS report defense counsel actually received, it is impossible for this court to know what information from the report counsel was actually aware of prior to defendant's trial. The State contends defendant has no right to examine and argue portions of a file excised after *in camera* review by the trial court. The State requests that the unredacted DCFS record be stricken from the record and returned to the trial court under seal. The State also requests any argument relating to the unredacted report be stricken as improper.

¶ 43 The record indicates that as part of discovery in this case, the State subpoenaed the victim's DCFS records. On January 7, 2009, defense counsel informed the court that the State had tendered "redacted DCFS records." The trial court ordered DCFS to appear and produce the unredacted records for an *in camera* inspection. During a hearing regarding the report on February 13, 2009, the trial court specifically noted "Well, you have the same report that I am looking at just that they don't identify the name." The court then indicated it would allow defense counsel to request the name of any witness the court found relevant to the case.

¶ 44 With regard to a specific portion of the DCFS record at issue here, the following colloquy took place during the hearing:

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"MR. WATKINS [Defense Counsel]: Pages 30 of 52.

Again, someone interviewed -- this person says she did not believe that -- he or she does not believe the report. I would like to interview this person to learn why they don't believe that [defendant] committed the crime.

THE COURT: Okay. Well, this is a DCFS caseworker.

You are entitled to know that person."

¶ 45 Contrary to the State's contention, we find the record of the *in camera* hearing clearly reflects the redacted version of the DCFS report defense counsel received prior to defendant's trial was substantially the same as the unredacted version made part of the record, minus the interviewed witnesses' names and the dates of the interviews being blacked out. Because the trial court made the unredacted DCFS report part of the record in this case, we see no reason why defendant may not rely on the those portions of the unredacted report the record reflects defense counsel was clearly aware of.

¶ 46 Notwithstanding, we agree with the State that the ineffective assistance of counsel claims defendant raises here involve matters *dehors* the record that are more appropriate for a postconviction proceeding. See *People v. Ligon*, 239 Ill. 2d 94, 105 (2010); *People v. Bew*, 228 Ill. 2d 122, 134-35 (2008).

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¶ 47 In reaching our conclusion, we note impeachment by omission of facts may be used where a witness had the opportunity to make a statement about the omitted facts and, under the circumstances, a reasonable person ordinarily would have included the facts. *People v. McWhite*, 399 Ill. App. 3d 637, 643 (2010). However, the mere introduction of contradictory evidence, without more, does not constitute an implied charge of fabrication or motive to lie. *Id.*

¶ 48 We also note a witness may also be impeached by a showing of bias, interest, or motive to testify falsely. *Cookson*, 215 Ill. 2d at 214. Though we recognize our supreme court has consistently cautioned that "the proper procedure for impeaching a witness' reputation for truthfulness is through the use of reputation evidence and not through opinion evidence or evidence of specific past instances of untruthfulness." *Id.* at 213.

¶ 49 In *Cookson*, for example, the defendant was convicted of sexual abuse of a minor. On appeal, the defendant contended the trial court improperly excluded evidence of an allegedly false prior sexual abuse allegation the victim made against a man named Aston. The defendant's proposed impeachment evidence consisted of: (1) a DCFS worker's testimony that the victim alleged she was sexually abused by Aston; (2) the reversal on administrative review of DCFS's original finding that the claimed abuse was

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indicated; and (3) Aston's proposed testimony that he did not abuse the victim and that he believed the victim made up the allegation because she was upset with him.

¶ 50 In finding the trial court did not err in excluding the evidence, this court first noted evidence relating to an abuse allegedly committed by Aston did not establish the victim's bias against this defendant. *Id.* at 216. Because the two men were not linked in any way to create a rational inference that irritation against Aston would motivate false claims against the defendant, the court held the speculative nature of the evidence made it inadmissible to show the victim's bias against the defendant. Next, the court held it did not believe the evidence properly showed the victim had an improper interest in this matter to lie about being abused by this defendant. The court noted "the only relevant inference a jury could draw from the evidence of the abuse allegation against Aston and his explanatory denial would be that [the victim] lied about being abused by defendant, but this court has already specifically rejected the use of evidence of specific past instances of untruthfulness to impeach a witness' truthfulness." *Id.*

¶ 51 Based on the rather limited record before us in this case, we cannot say with certainty that the allegedly exculpatory evidence outlined in the DCFS report would have ultimately been

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admitted at defendant's trial to impeach U.S.'s credibility. The record simply has not been developed to an adequate degree to allow us to explore defendant's ineffective assistance allegations in detail. Although we can determine from the record before us that defense counsel was aware of the contents of the victim's DCFS report, we have no insight into what additional steps counsel may or may not have taken outside of the *in camera* hearing to investigate and present the allegedly exculpatory evidence contained in the report prior to defendant's trial. Nor can we say with certainty that the information contained in the report would have necessarily led to potential witness testimony that would have been admissible at trial to impeach U.S.'s credibility.

¶ 52 In support of our conclusion, we note that, contrary to defendant's contentions, the record indicates defense counsel at least took some steps to investigate and develop witnesses based on the facts contained in the DCFS report. During the pretrial *in camera* review hearing, defense counsel specifically requested the redacted name of the school worker or administrator interviewed by DCFS regarding defendant. The court declined to release the name, noting counsel was "free to interview anybody at the school and find out what if anything they know. But all this stuff is, to me, looks like hearsay information that people

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have learned about the investigation." When defense counsel told the court he would like to interview the person who indicated in the DCFS report that they did not believe defendant had committed the crime, the trial court informed defense counsel that the person was the victim's DCFS caseworker, Beverly Johnson. The record does not indicate to what extent, if any, defense counsel followed up with either Johnson or the school officials after the *in camera* hearing.

¶ 53 Moreover, while defendant views the additional facts outlined in the DCFS report as clearly exculpatory and admissible evidence that defense counsel should have been presented at trial, the cases noted above -- especially *Cookson* -- suggest the admission at trial of the additional evidence outlined in the DCFS report to impeach U.S.'s credibility would not have been so cut and dry. Additionally, without knowing how either the State or the trial court would have responded to any testimony by Johnson regarding U.S.'s mental condition or any testimony regarding U.S.'s alleged failure to disclose the second incident to the DCFS investigators, we also cannot say with certainty that those additional pieces of allegedly exculpatory evidence ultimately would have been admitted at trial to impeach U.S.'s credibility. Consequently, we are unable to determine from the record whether defense counsel's apparent decision not to present

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additional witness testimony regarding the allegedly exculpatory evidence outlined in the DCFS report constituted a matter of valid trial strategy or was simply the result of counsel's incompetence.

¶ 54 " 'Where the disposition of a defendant's ineffective assistance of counsel claim requires consideration of matters beyond the record on direct appeal, it is more appropriate that the defendant's contentions be addressed in a proceeding for postconviction relief, and the appellate court may properly decline to adjudicate the defendant's claim in his direct appeal from his criminal conviction.' " *People v. Parker*, 344 Ill. App. 3d 728, 737 (2003) (quoting *People v. Burns*, 304 Ill. App. 3d 1, 11 (1999)).

¶ 55 Because we find the record is inadequate to resolve defendant's ineffective assistance allegations based on counsel's failure to impeach U.S. by omission with the DCFS report and counsel's failure to present evidence regarding an allegedly false prior allegation of sexual abuse to impeach U.S.'s credibility, we decline to decide those issues here. *Id.* In reaching our conclusion we in no way mean to suggest defendant's allegations lack merit; instead, we simply find the allegations would be more properly addressed in a proceeding for postconviction relief. *Id.*

¶ 56 B. Suggestive Identification

¶ 57 Defendant also contends defense counsel provided ineffective assistance by failing to file a motion to suppress A.T.'s identification of defendant during a pretrial lineup.

Defense counsel's decision as to whether to file a motion to suppress evidence is " 'generally a matter of trial strategy, which is entitled to great deference.' " *People v. Bew*, 228 Ill. 2d 122, 128 (2008) (quoting *People v. White*, 221 Ill. 2d 1, 21 (2006)). Counsel's failure to file such a motion will be considered below prevailing professional norms if the motion "stood a reasonable chance of success in suppressing the evidence at the time of trial." *Bew*, 228 Ill. 2d at 128.

¶ 58 The next step in the inquiry is to determine whether defendant was prejudiced by the alleged deficiency. " 'In order to establish prejudice resulting from failure to file a motion to suppress, a defendant must show a reasonable probability that: (1) the motion would have been granted, and (2) the outcome of the trial would have been different had the evidence been suppressed.' " *Bew*, 228 Ill. 2d at 128-29 (quoting *People v. Patterson*, 217 Ill. 2d 407, 438 (2005)); *People v. Rodriguez*, 312 Ill. App. 3d 920, 925 (2000).

"Only where a pretrial encounter resulting in an identification is 'unnecessarily suggestive' or

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'impermissibly suggestive' so as to produce 'a very substantial likelihood of irreparable misidentification' is evidence of that and any subsequent identification excluded by law under the due process clause of the 14th amendment." *People v. Moore*, 266 Ill. App. 3d 791, 796-97 (1994) (citing *Neil v. Biggers*, 409 U.S. 188, 196-97 (1972)).

¶ 59 This court has recognized participants in a lineup are not required to be physically identical. *People v. Saunders*, 220 Ill. App. 3d 647, 666 (1991). "Substantial differences in the age and appearance between the suspect and the other participants in a lineup do not, in themselves, establish that a lineup was unnecessarily suggestive." *Id.* (citing *People v. Johnson*, 104 Ill. App. 3d 572, 578-79 (1982) (identification procedures found not to be unduly suggestive even though the defendant was the only bald and bearded participant in the lineup)).

¶ 60 We do find the photograph of the lineup included in the record in this case troubling. Defendant is the only participant in the lineup dressed in professional attire. Moreover, he is the only participant dressed in a black shirt and pants, while the other participants are all wearing white shirts with either blue jeans or khaki pants. He is also the only person in the lineup without noticeable facial hair.

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¶ 61 Even if we were to find the identification procedures used here to be unduly suggestive, we note however, A.T. was the only eyewitness to the incident who viewed that pretrial lineup. Because three other eyewitnesses to the December 2005 incident -- U.S., B.T. and Morrow -- all positively identified defendant in court as the offender, we cannot say the outcome of the trial would have been different had A.T.'s pretrial identification been suppressed. See *People v. White*, 2011 IL 109689 ("Even if we were to assume, *arguendo*, there was an error in the admission of evidence concerning the lineup, the evidence against defendant is such that he cannot show prejudice for purposes of either analysis").

¶ 62 Additionally, we note defense counsel extensively cross-examined A.T. regarding her pretrial identification of defendant from the lineup. Defense counsel specifically elicited from A.T. that while defendant had on all black, the other participants in the lineup were all wearing white shirts. Defense counsel also attempted to get A.T. to admit that she had seen a picture of defendant before the lineup, and that she knew defendant was a teacher before the lineup. Defense counsel's decision to attack the credibility of A.T.'s lineup identification of defendant through cross-examination at trial, rather than by filing a motion to suppress the identification, can also be viewed as a

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valid trial strategy in this case. See *People v. Smith*, 265 Ill. App. 3d 981, 984 (1994) ("We believe defense counsel's decision to attack the credibility of the identification witness through cross-examination rather than to file a motion to suppress was strategic in nature and a reasonable exercise of judgment").

¶ 63 Accordingly, we find defendant's ineffective assistance of counsel claim based on defense counsel's failure to move to suppress A.T.'s pretrial identification lacks merit. *Id.*

¶ 64 III. Sentencing

¶ 65 Defendant contends his sentence is excessive in light of the mitigating evidence presented and lack of a prior criminal record. We disagree.

¶ 66 In determining an appropriate sentence, a trial court must analyze the acts constituting the crime and the defendant's credibility, demeanor, moral character, mentality, social environments, habits, and age. *People v. Lima*, 328 Ill. App. 3d 84, 100 (2002). Because the trial court is normally in a better position to determine the punishment to be imposed, its decision will not be overturned simply because we may have balanced the factors differently. *People v. Jones*, 168 Ill. 2d 367, 373 (1995); *People v. Cox*, 82 Ill. 2d 268, 280 (1980). If a sentence falls within the statutorily mandated guidelines, we presume it is proper and will not overturn it unless there is an affirmative

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showing that the sentence varies greatly from the purpose and the spirit of the law, or is manifestly disproportionate to the nature of the offense. *People v. Fern*, 189 Ill. 2d 48, 54 (1999).

¶ 67 The parties agree defendant's seven-year prison sentence is clearly within the statutorily mandated guidelines. Although defendant contends his background and personal history suggest a four-year minimum sentence would have been more appropriate in this case, the trial court was not required to give greater weight to defendant's lack of a criminal background and the mitigating factors presented than to the seriousness of the offense. See *Lima*, 328 Ill. App. 3d at 100. We see no reason to disturb the trial court's sentencing decision.

¶ 68 CONCLUSION

¶ 69 We affirm the trial court's judgment.

¶ 70 Affirmed.