



improperly considered a factor in aggravation that was inherent in the offense and failed to consider a mitigating factor. We affirm.

¶ 3

### BACKGROUND

¶ 4 In August through November 2009, the victim, Brittany, was 12 years old and lived with her mother, Tammy. During this time, Brittany babysat her older sister Ashley's children, sometimes during the day, sometimes during evening hours, and sometimes overnight. In addition, she often visited Ashley's trailer when she was not babysitting. Ashley's husband, Shawn, was friends with the defendant, and the defendant moved in with Ashley and Shawn beginning the last week of August 2009 until approximately September 9, 2009. The defendant moved out of Ashley's trailer on September 9, 2009, after he and Ashley got into an argument. During the period of time in which the defendant lived with Ashley and Shawn, Brittany babysat for Ashley every weekend and sometimes through the week, often overnight.

¶ 5 Brittany told the jury about an occasion during this period of time when the defendant kissed her and she kissed him back. She told the jury of another occasion when she babysat Ashley's children in the evening when only the children and the defendant were present at the trailer. After the children had gone to bed, the defendant came out of the shower in only his "boxers." The defendant kissed Brittany and told her that he loved her and that she was sexy. She testified that she kissed him back, that he took her clothes off, and that they then had sexual intercourse. He told her not to tell anyone, and she agreed because she did not want to get into trouble.

¶ 6 At the trial, Brittany identified two letters that the defendant wrote to her shortly after the incident. After the defendant gave her the letters, she kept them in her purse so no one would find them. On the night before November 20, 2009, Brittany visited one of her father's neighbors and left her purse at the house. The neighbor, Linda, found the purse and

did not know who owned it because several people had visited that day. She looked through it to identify its owner and discovered the defendant's letters to Brittany. She gave the letters to Brittany's father, Richard. Richard testified that the letters appeared to have been written by the defendant as they had his signature on them. Richard knew the defendant "to a degree," but was not close to him. Richard did not know what to do, so he went to Tammy's house, showed Tammy the letters, and let Tammy speak to Brittany about the letters.

¶ 7 Tammy read the letters and testified that they appeared to be love letters from the defendant to Brittany. Tammy knew the defendant because he was friends with Ashley's husband. Tammy tried to talk to Brittany, but Brittany would not talk to her mother about the letters or talk about whether she had any relationship with the defendant. Brittany got upset and cried when Tammy asked her questions about the letters. Brittany's older sister, Amanda, also tried to talk to Brittany about the letters, but she would not talk to Amanda either.

¶ 8 Brittany was close to her sister Ashley, and Tammy called Ashley and asked her to speak with Brittany about the letters. The next day, Ashley came over and went for a walk with Brittany. During the walk, Brittany admitted to Ashley that she had a sexual encounter with the defendant. Brittany told her that the incident occurred over a weekend around the end of August or the beginning of September, 2009, when the defendant was living with her and Shawn. After the walk, Ashley told Tammy what Brittany told her. Tammy took Ashley and Brittany to the police department where they were interviewed by Officer Larry Binnion.

¶ 9 Officer Binnion testified that after he spoke with Tammy, Ashley, and Brittany on November 22, 2009, at the police station, he subsequently interviewed the defendant. The defendant admitted to being alone with Brittany on occasions when she came to Ashley's house to babysit but denied having any sexual contact with her. The officer showed the defendant the letters that were recovered from Brittany's purse, and he denied writing them.

He said that Ashley and Shawn were trying to set him up.

¶ 10 During the trial, the prosecution presented the testimony of Joshua Burgard, an inmate who was held in the Marion County jail at the same time that the defendant was in the jail. Burgard testified about an incident involving an argument between the defendant and another inmate, Steve Fernandez. During the course of the argument, the defendant called Fernandez a child molester. Fernandez responded that all he did was look at pictures, while the defendant actually touched a child. The defendant responded that it was not rape because it was consensual.

¶ 11 The evidence presented at the trial included the letters that were recovered from Brittany's purse. The first letter reads as follows:

"To:

All these thoughts running through my head.

All these emotions I feel right now.

I feel like a ticking time bomb waiting to explode.

I just don't know what to do I love you but yet I'm afraid.

I want to be with you but I'm scared.

I want to kiss you but I can't

I want to hold you but yet I'm worried you will leave me.

I want to love you but I don't know if you will love me back so I'm sitting here racking my brain trying to figure out all these emotions and thoughts.

I just wish I knew what to do cuz this is driving me crazy !!

From: William Shumate"

¶ 12 The second letter reads as follows:

"Hey Brittanie

9-5-09

I love you to and I still want to be with you, but I need you to be truthful with

me okay.

I don't want to date other people I want you that's all, but if you can't tell me the truth then I can't be with you okay.

I'm not messing around on you and I do think you are so far you be truthful to me. I love you with all my heart and I will do anything for you but I'm not going to get hurt in this okay.

I don't want to fight with you I just want you to stop playing games with me be with me or not okay !!

I know you love me and I hope you know I love you !! I don't want to be with someone else okay I want you. We just need to talk okay about us. I love you a lot to and I will always love no matter what I just want you to be mine okay. I miss you I hope to see you some. I love you with all my heart. Love Will. Your baby."

¶ 13 The defendant testified that he had known Brittany since she was seven years old. He admitted that during the period of time in which he lived in Ashley's trailer, Brittany came over frequently, but mostly when other people were around. According to the defendant, Brittany engaged in flirtatious behavior around him which he tried to avoid. He testified that it appeared to him that she had a crush on him. He denied ever being by himself with Brittany in the evenings.

¶ 14 The defendant identified the letters found in Brittany's purse and said that they were letters that he wrote to his son's mother. He denied writing them to Brittany. He testified that the first letter was a poem that he wrote when he was incarcerated in 2008. He also admitted writing the second letter but denied placing a date and "Brittanie" at the top of the letter. According to the defendant, neither letter was intended for Brittany. He testified that he placed both letters in a box containing his belongings and that he brought the box with him when he moved into Ashley's trailer. He told the jury that when Ashley kicked him out

of the trailer, he only took three changes of clothes and a pair of shoes with him. He stated that he left his box of belongings, including the letters, behind at Ashley's trailer. He told the jury that he had not seen them since he moved out. The defendant also told the jury that after he moved out of Ashley's trailer, he saw Brittany at a friend's house and that she "got up and huffed out."

¶ 15 With respect to the testimony of Burgard, the defendant explained the incident that occurred in the Marion County jail as follows:

"I turned around and \*\*\* called [Fernandez] a child molester and called him a whole bunch of other stuff like scum and I cursed him out pretty much. And he said I'm not the child molester, I'm not the one that fucked that little girl and that's exactly what he said. And I said she says it was consensual, so how is it rape."

¶ 16 During his testimony, he denied kissing Brittany or having any type of sexual contact with her.

¶ 17 The defendant presented the testimony of a document examiner, Steven McKasson, who performed a handwriting analysis on the second letter found in Brittany's purse. McKasson testified that he compared the handwriting on the letter with handwriting samples provided by the defendant. McKasson believed that there was "no indication" that the defendant wrote the date on top of the second letter. With respect to the word "Brittanie," he found several similarities with the defendant's handwriting, but he opined that the similarities were not sufficient to make an identification that the defendant wrote the word.

¶ 18 The defendant also presented the testimony of Ashley's husband, Shawn. At the time of the trial, Ashley and Shawn were separated and in the process of a divorce. Shawn testified that, during the time that the defendant lived with them, Brittany babysat for them overnight on weekends when he and Ashley went out for the evening, but the defendant usually went with them when they went out or he went out with other friends. He admitted,

however, that he did not "have good memory of times and dates" and that when the defendant went out with other friends, he would not have known if he went back to the trailer. He also corroborated the defendant's testimony that the defendant left a box of belongings behind at their trailer when he moved out. Shawn believed that they put the defendant's box in a storage unit, and he did not know what happened to the box after that.

¶ 19 At the conclusion of the evidence, the jury found the defendant guilty of predatory criminal sexual assault. At the sentencing hearing, the court found two mitigating factors: (1) that the defendant's criminal conduct neither caused nor threatened serious physical harm to another and (2) that the defendant did not contemplate that his criminal conduct would cause or threaten serious physical harm to another. 730 ILCS 5/5-5-3.1(a)(1), (a)(2) (West 2010). In aggravation, the court found that the defendant's conduct caused serious psychological harm, that the defendant has a prior history of criminal activity, that a sentence is necessary to deter others, and that he was on parole at the time of the offense. 730 ILCS 5/5-5-3.2(a)(1), (a)(3), (a)(7), (a)(12) (West 2010). After "[c]onsidering the totality of the circumstances," the court sentenced the defendant to 15 years in the Illinois Department of Corrections followed by a 3-year to life period of mandatory supervised release. The defendant now appeals his conviction and sentence.

¶ 20 DISCUSSION

¶ 21 I.

¶ 22 Impeachment With a Prior Felony Drug Possession Conviction

¶ 23 The first issue the defendant raises on appeal is that the circuit court improperly allowed the State to impeach his testimony with evidence that he had prior felony convictions. Specifically, the defendant notes that the circuit court allowed the State to impeach his testimony with prior felony convictions for theft and burglary. Therefore, the defendant argues, allowing the State to also impeach him for a drug offense (possession of

a controlled substance) was improper. We disagree.

¶ 24 The admission of a prior conviction to impeach the credibility of a witness is evaluated by the test established in *People v. Montgomery*, 47 Ill. 2d 510 (1971). Evidence of a prior conviction is admissible for impeachment purposes if: (1) the crime was punishable by death or imprisonment for more than one year, or the crime involved dishonesty or false statement regardless of the punishment; (2) less than 10 years have elapsed since either the conviction or the witness's release from confinement, whichever is later; and (3) the probative value of the conviction outweighs the danger of unfair prejudice. *Id.* at 516. In the present case, there is no dispute that the drug conviction used to impeach the defendant met the first and second *Montgomery* factors. The defendant's argument is based on the third factor.

¶ 25 The third *Montgomery* factor requires the trial court to perform a balancing test, taking into consideration factors such as whether the prior conviction is veracity-related, the recency of the prior conviction, the witness's age and other circumstances surrounding the prior conviction, the length of the witness's criminal record and his conduct subsequent to the prior conviction, the similarity of the prior offense to the instant offense thus increasing the danger of prejudice, the need for the witness's testimony and the likelihood he would forgo his opportunity to testify, and the importance of the witness's credibility in determining the truth. *People v. Medreno*, 99 Ill. App. 3d 449, 452 (1981). The circuit court's determination of whether a witness's prior conviction is admissible for impeachment purposes will not be reversed absent an abuse of the court's discretion. *People v. Sykes*, 341 Ill. App. 3d 950, 976-77 (2003). In the present case, the circuit court did not abuse its discretion in balancing the issues relevant to the third *Montgomery* factor.

¶ 26 In determining whether to admit the drug offense for impeachment purposes, the circuit court noted that the defendant was convicted of possession, not delivery, and that a

conviction for delivery would increase the "chance \*\*\* that the probative value might be substantially outweighed by the prejudicial effect." The circuit court then stated that it exercised the balancing test set forth in *Montgomery* and found "that all three prior felony convictions are admissible for purposes of impeachment if the defendant chooses to testify."

¶ 27 The defendant argues that the drug possession conviction was not probative of his truthfulness and was not needed to challenge his credibility because the two prior convictions for burglary and theft were admitted for impeachment purposes. The defendant argues that the cumulative effect of admitting all three prior convictions resulted in unfair prejudice. We disagree.

¶ 28 Merely because a conviction is not "intimately related to dishonesty or false statement does not mean the conviction lacks probative value for impeachment." *Medreno*, 99 Ill. App. 3d at 452. Illinois courts have held that convictions involving possession of controlled substances are the type of convictions which "would be probative of credibility and would afford a basis for impeaching credibility." *People v. Tribett*, 98 Ill. App. 3d 663, 675-76 (1981). The possession of a controlled substance indicates "a disposition to place the advancement of individual self-interest ahead of principle or the interest of society, and such proof may suggest a willingness to do so again on the witness stand." *People v. Nelson*, 31 Ill. App. 3d 934, 938 (1975). Also, we disagree with the defendant's argument that the admission of all three felony convictions resulted in an abuse of discretion. Illinois courts have frequently allowed the admission of multiple felony convictions for impeachment purposes. *People v. Blair*, 102 Ill. App. 3d 1018, 1026 (1981).

¶ 29 The record indicates that there were no special circumstances surrounding any of the three prior convictions that would mitigate their probative value. *People v. Redman*, 141 Ill. App. 3d 691, 701 (1986) (convictions for rape, deviate sexual assault, armed robbery, and theft were all related to defendant's veracity). Accordingly, the circuit court did not abuse

its discretion in admitting the defendant's prior drug conviction for impeachment purposes.

¶ 30

II.

¶ 31

### Sufficiency of the Evidence

¶ 32 The defendant next argues that the State presented insufficient evidence for the jury to find him guilty beyond a reasonable doubt. We disagree.

¶ 33 When challenging the sufficiency of the evidence, the standard of review is whether, when viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). When a trial court receives conflicting versions of the events from witnesses, the credibility of witnesses, the weight to be given to their testimony, and the reasonable inferences to be drawn from the evidence are matters within the province of the trier of fact. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). The testimony of a single witness is sufficient to convict, even when contradicted by the defendant, if the testimony is positive and the witness credible. *People v. Anderson*, 325 Ill. App. 3d 624, 634 (2001). The State does not have to corroborate a victim's testimony with physical or scientific evidence in order to convict a defendant. *People v. Willer*, 281 Ill. App. 3d 939, 948-49 (1996). A conviction will be reversed only where the evidence is so unreasonable, improbable, or unsatisfactory that a reasonable doubt of the defendant's guilt remains. *People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011).

¶ 34 The jury convicted the defendant of predatory criminal sexual assault. A defendant commits predatory criminal sexual assault of a child if "(1) the accused was 17 years of age or over and commits an act of sexual penetration with a victim who was under 13 years of age when the act was committed." 720 ILCS 5/12-14.1(a)(1) (West 2008). The State presented sufficient evidence for the jury to find that the defendant committed this crime.

¶ 35 Brittany told the jury about the specific occasion on which the defendant committed

an act of sexual penetration when she was 12 years old; she described the event in detail, including what happened, where it happened, and other surrounding circumstances. This testimony alone, if believed by the jury, was sufficient to find the defendant guilty.

¶ 36 Brittany's testimony was corroborated by letters that were written in the defendant's handwriting and in which he confesses his love for the 12-year-old. The letters were recovered from Brittany's purse, and she told the jury that the defendant gave them to her shortly after the sexual encounter. Although the defendant denied giving the letters to Brittany, the jury was not obligated to believe his testimony over Brittany's. In addition, Brittany's testimony about the offense was corroborated by the defendant's own statement during a jailhouse argument in which he insisted that his sexual encounter with the child was consensual and, therefore, was not rape. Again, although the defendant denied making this statement, the jury was not obligated to believe his testimony over the testimony presented by the State's witness.

¶ 37 The defendant attempts to discredit Brittany's testimony because she did not know the exact date on which the assault occurred. However, the date of the offense is not an element of predatory criminal sexual assault unless there is an issue concerning the statute of limitations. *People v. Letcher*, 386 Ill. App. 3d 327, 331 (2008). The evidence is sufficient if the victim describes the act committed with sufficient specificity to ensure that unlawful conduct has indeed occurred and the general time period in which the act occurred to assure the acts were committed within the applicable limitation period. *Id.* at 334. Brittany's testimony meets this specificity requirement. Additional information concerning the time, place, and circumstances of the assault may assist in assessing the victim's credibility but are not essential to sustain a conviction. *Id.* Although Brittany could not identify the specific date on which the assault occurred, she identified a specific period of time in which it occurred. She also identified the specific place and circumstances of the assault. Her

testimony was clear and convincing and was corroborated by other evidence, and the jury was entitled to believe her.

¶ 38 The defendant argues that the evidence established that he was never alone with Brittany, but Brittany's testimony contradicts this assertion. In addition, Ashley testified that Brittany babysat for them during the period of time in which the defendant lived in their trailer and that Brittany babysat for them when she and Shawn both had to be gone from the trailer. The defendant's own witness, Shawn, testified that the defendant usually, but not always, left with them when he and Ashley went out for the evening. On occasions when the defendant was out with other friends, Shawn had no knowledge of whether the defendant returned to the trailer.

¶ 39 The defendant's challenge to the sufficiency of the evidence has no merit. A rational trier of fact could have found the defendant guilty of the offense charged. His argument on appeal is based on alternative findings the jury could have made concerning witness credibility and inferences to be drawn from the evidence presented, but did not. Accordingly, we affirm the defendant's conviction.

¶ 40

### III.

¶ 41

### Sentencing

¶ 42 The defendant's final argument is that the circuit court improperly considered a factor in aggravation and failed to consider a factor in mitigation when it determined the defendant's sentence. We disagree.

¶ 43 "A trial court's sentencing decisions will not be altered on appeal absent an abuse of discretion." *People v. Cameron*, 2012 IL App (3d) 110020, ¶ 39. Additionally, "there is a strong presumption that the trial court based its sentencing determination on proper legal reasoning, and thus we review the trial court's sentencing decision with deference." *People v. Dowding*, 388 Ill. App. 3d 936, 942-43 (2009). However, the issue of whether the circuit

court relied on an improper factor in imposing the defendant's sentence presents a question of law, requiring a *de novo* review. *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 8.

¶ 44 Section 5-5-3.2(a)(1) of the Illinois Unified Code of Corrections provides that the sentencing court, in imposing a more severe sentence, can consider whether the defendant's conduct caused or threatened serious harm. 730 ILCS 5/5-5-3.2(a)(1) (West 2010). In the present case, the circuit court noted that the defendant's conduct caused serious psychological harm to Brittany and considered this to be an aggravating factor. The defendant argues that the circuit court's use of serious psychological harm as an aggravating factor was improper because serious psychological harm is a factor inherent in a sex offense against a child.

¶ 45 Generally, a factor implicit in an offense cannot be used as an aggravating factor in sentencing. *People v. Walker*, 392 Ill. App. 3d 277, 300 (2009). This is because it is reasonable to presume that the legislature already considered the factor in establishing the penalty for the offense. *People v. Conover*, 84 Ill. 2d 400, 404 (1981).

¶ 46 In the context of aggravated criminal sexual assault, Illinois courts have held that the sentencing court may look at the degree of harm as an aggravating factor, although "serious harm" is an element implicit in the crime. *People v. Smith*, 215 Ill. App. 3d 1029, 1038 (1991). In *People v. Saldivar*, 113 Ill. 2d 256, 269 (1986), the supreme court explained that the commission of any offense can have varying degrees of harm regardless of whether the offense itself deals with harm, and the legislature intended that "varying quantum of harm may constitute an aggravating factor." "While the classification of a crime determines the sentencing range, the severity of the sentence depends upon the *degree of harm* caused to the victim and as such may be considered as an aggravating factor in determining the exact length of a particular sentence \*\*\*." (Emphasis in original.) *Id.*

¶ 47 In *People v. Hardeman*, 203 Ill. App. 3d 482, 492 (1990), the sentencing court properly considered the serious harm caused by the defendant in sentencing a defendant for

criminal sexual assault. The court noted that "there are wide variances in the risk of harm to victims of sexual attacks, and the context of the trial court's statement demonstrates that the trial court considered in aggravation the degree of the 'threatened serious harm' to the victim, which is a proper factor to consider in aggravation." *Id.*

¶ 48 Likewise, in the present case, the circuit court could consider the degree of psychological harm caused by the defendant's conduct as a factor in aggravation. The context in which the circuit court discussed Brittany's psychological harm demonstrates that the court properly considered the degree of this harm in determining the severity of the defendant's sentence.

¶ 49 The defendant cites *People v. Calva*, 256 Ill. App. 3d 865, 875 (1993), in support of his argument that harm to a child is implicit in sex offenses and cannot be considered as a factor in aggravation. *Calva*, however, was based on the absence of any evidence of psychological harm. The *Calva* court stated, "[N]o evidence was offered to show any psychological harm to A.G." *Id.*

¶ 50 The present case is distinguishable from *Calva* because, in the present case, there is evidence of psychological harm. At the sentencing hearing, the circuit court considered a victim impact statement from Brittany in which she described the psychological harm she was experiencing as a result of the defendant's crime, including feelings of confusion, regret, guilt, bad dreams, and feeling "nasty." The court did not err in considering this harm as an aggravating factor. *People v. Leggans*, 253 Ill. App. 3d 724, 737 (1993) ("The trial court had ample evidence in the presentence report of the psychological damage caused to the two minor victims by the defendant's acts of sexually assaulting the children and had observed the demeanor of the children during their testimony at the trial. It properly considered harm as an aggravating factor.").

¶ 51 The defendant also argues that the circuit court failed to consider a mitigating factor

in his favor, *i.e.*, that the criminal conduct was the result of circumstances unlikely to recur. 730 ILCS 5/5-5-3.1(a)(8) (West 2010). We are not persuaded by the defendant's argument.

¶ 52 A trial court is presumed to have considered all the relevant evidence of mitigation before it. *People v. Robinson*, 299 Ill. App. 3d 426, 445 (1998). The defendant in the present case has not shown that the trial court failed to consider any mitigating evidence. Instead, the record shows that the circuit court did consider relevant mitigating factors, including that the defendant's conduct did not cause *physical* harm. A sentencing judge is not required to impose a minimum term or reduce a term because of the existence of mitigating factors. *People v. Madura*, 257 Ill. App. 3d 735, 741 (1994). In addition, the sentencing court is not required to enumerate and assign value to each factor it considered in arriving at the sentence. *People v. Mayoral*, 299 Ill. App. 3d 899, 913 (1998). The circuit court in the present case considered the presentencing report and the statutory sentencing factors and determined that the defendant should be sentenced to more than a minimum term of imprisonment. We cannot find that the court's determination was an abuse of discretion.

¶ 53 The determination of whether or not the sentence was improper must be made by considering the entire record as a whole. *Hardeman*, 203 Ill. App. 3d at 492. A conviction of predatory criminal sexual assault is a Class X felony "for which the person shall be sentenced to a term of imprisonment of not less than 6 years and not more than 60 years." 720 ILCS 5/12-14.1(b)(1) (West 2010). In the present case, the circuit court sentenced the defendant to 15 years in the Illinois Department of Corrections. The defendant's sentence, therefore, is within the permissible range and, in fact, is much closer to the minimum than the maximum sentence. After reviewing the entire record as a whole, we do not believe that the defendant's sentence of 15 years for his conviction of predatory criminal sexual assault was improper.

¶ 54

CONCLUSION

¶ 55 For the foregoing reasons, we affirm the defendant's conviction and sentence.

¶ 56 Affirmed.