2015 IL App (2d) 130834-U
No. 2-13-0834
Order filed May 27, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JOHN C. ARMBRUST, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 09-CF-873 Honorable Thomas J. Stanfa, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant was not deprived of the effective assistance of counsel; however, the trial court erred by considering at least one improper factor during sentencing. Therefore, we affirmed in part, reversed in part, and remanded for a new sentencing hearing.

¶ 2 Following a jury trial, defendant, John C. Armbrust, was found guilty of harassment by telephone, a Class 4 felony (720 ILCS 135/1-1(2) (West 2008)). In this direct appeal, defendant argues that his trial counsel rendered ineffective assistance of counsel. Alternatively, defendant argues that the trial court considered improper aggravating factors and unreliable hearsay, thereby entitling him to a new sentencing hearing. Because we agree with defendant's second

argument but not the first, we affirm in part, reverse in part, and remand the cause for a new sentencing hearing.

¶ 3 I. BACKGROUND

¶ 4 A. Pretrial Proceedings

¶ 5 In May 2009, defendant was charged by complaint with harassment by electronic communication (720 ILCS 135/1-2 (West 2008)). Later, on December 2, 2009, defendant was charged by indictment with harassment by telephone (720 ILCS 135/1-1(2) (West 2008))[1] for the same incident. The indictment alleged that on October 4, 2008, defendant called his estranged wife, Alexandria Contini-Armbrust (Contini), with the intent to abuse, threaten, or harass her, and, in the course of the offense, he threatened to kill her.

¶ 6 Defendant retained his own counsel and succeeded in excluding the content of the alleged harassing phone call on the basis that it was obtained in violation of the eavesdropping statute (720 ILCS 5/14-2 (West 2008)). However, the State appealed, and this court reversed and remanded the case. See *People v. Armbrust*, No. 2-10-0955 (2011) (unpublished order under Supreme Court Rule 23). On remand, defendant's attorney moved to withdraw, and a public defender was appointed.

¶ 7 Prior to trial, defense counsel filed a motion *in limine* to admit "other acts" by Contini for the purpose of showing a pattern of behavior towards defendant. Defense counsel sought to

[1] In 2013, the Harassing and Obscene Communications Act (720 ILCS 135/1 *et* seq. (West 2008)) was repealed, and the offense of telephone harassment was recodified under section 26.5-2 of the Criminal Code of 2012. See Pub. Act 097-1108 (eff. Jan. 1, 2013) (adding 720 ILCS 5/26.5-2).

introduce evidence of Contini's actions from the day before the telephone incident until the complaint was filed seven months later. The acts that defense counsel sought to admit included that Contini had called the police on October 3, 2008, the day before the October 4 telephone incident, to report that defendant had allegedly stolen items from the marital home. In addition, Contini had gone to the State's Attorney's Office on October 7, 2008, to pursue charges against defendant for both the stolen items and the telephone incident, but the State declined to charge defendant based in part on a lack of witnesses. Defense counsel argued that because no charges were filed against defendant after Contini reported the alleged theft and telephone incident, Contini realized that the charges were not provable without a corroborator. As a result, Contini's "good friend and neighbor" was interviewed in March 2009 and it became "the glue to make this [telephone] charge stick," leading to the May 2009 complaint filed against defendant.

¶ 8 Defense counsel further argued in her motion that despite Contini's claim that defendant had violated orders of protection by calling her, defendant's telephone log showed that Contini had repeatedly called him. Defense counsel argued that Contini called defendant "day and night, in essence harassing him and conducting herself in the exact manner for which she pursued charges against him." In particular, defendant alleged that Contini had called him at work and ordered the employee who answered the phone to " 'get my f**king husband on the phone now damnit.' "

¶ 9 During the hearing on defendant's motion *in limine*, defense counsel argued that "the jury should be allowed to know [Contini's] – well, as Officer Cebulski has put it, her lack of fear about [defendant] who she's claiming has threatened her in this 11-second [telephone] incident." Defense counsel further argued that Contini was unresponsive to Officer Cebulski's request for telephone records, which Officer Cebulski noted in his report. Defense counsel stated that

Officer Cebulski "showed that to us. He kept good notes on this case, as did these other officers." Defense counsel argued that Contini had filed multiple complaints against defendant, which resulted in multiple officers being involved.

¶ 10 The court ruled that the evidence of Contini's telephone calls to defendant, beginning the day before the incident (October 3, 2008) until the May 2009 complaint was filed, were admissible.

¶ 11 B. Trial

¶ 12 During opening argument, the State argued that defendant called Contini on October 4, 2008, while she was in her car with a friend. Contini put the call on speaker phone, and then Contini and her friend heard defendant threaten to kill Contini.

¶ 13 Defense counsel responded that Contini had called defendant numerous times both before and after the alleged telephone harassment. Defense counsel argued that the telephone records showed that Contini tried to contact defendant, not the other way around, and that Contini had called defendant's father's house 15 times.

¶ 14 The State's first witness was Contini, who testified as follows. She and defendant married in 2003 and divorced in 2010. On October 4, 2008, divorce proceedings had not yet commenced. Around 5:30 p.m. that day, Contini was in her car in her driveway with a neighbor, Tammy Cecchini; they were going to the movies. When asked if Cecchini was a friend, Contini answered "mildly." They had known each other since August 2008.

¶ 15 Contini's cell phone rang, and she recognized defendant as the caller. The call was from defendant's father's land line. Contini answered, and defendant was angry. Contini asked defendant if he planned to return the wedding rings that he had taken the day before, and he said no. Contini said that she was going to call the police and put him on speaker, and defendant said

"he didn't give a f**k" if she put him on speaker. Defendant was yelling and screaming so loudly that it hurt her ear. He said that he was going to "f**king kill" her; that she was a "f**king b*tch"; and that he was going to file false police reports and have her arrested. Contini told defendant that she had been calling him because she wanted "to let him know if [she] could go to the movies with" Cecchini. The call ended by Contini hanging up.

¶ 16 Cecchini called the police, and they came to Contini's house, which was located in Aurora. About 20 minutes later, while Contini talked to the police, she saw defendant drive into the cul-de-sac adjacent to their house and sit there. Defendant's father's house was about 20 minutes from their house. Contini denied having a key to defendant's father's house.

¶ 17 On cross-examination, Contini admitted calling the police on October 3, 2008, to report that defendant had stolen wedding rings from the house. However, Contini also admitted that defendant had called her on October 3, 2008, to say that he and his father would be coming by the house to get some of his things.

¶ 18 Contini also admitted that on the day of the incident (October 4), prior to defendant calling her, she had driven to the antiques mall, where defendant's father worked, to locate defendant. She further admitted that on the day of the incident, defendant was not returning her calls. She tried calling defendant at different telephone numbers, including defendant's father's house, possibly beginning at 7:55 a.m. that day. When asked if she continually called defendant on October 4, "on and off all day and night long," Contini answered "possibly."

¶ 19 Contini admitted that it was "possible" that she called defendant on his cell phone at 5:02 p.m., 5:03 p.m., twice at 5:05 p.m., 5:14 p.m., and 5:21 p.m. It was also "possible" that Contini called defendant's father's house at 5:22 p.m. After defendant called Contini at 5:27 p.m. and threatened her, it was "possible" that she called defendant's father's house at 5:28 p.m., 5:29

p.m., and 6:28 p.m. Likewise, it was "possible" that she called defendant's cell phone later that night at 8:11 p.m. and 8:12 p.m.; she called defendant's father's house at 8:18 p.m.; and she called defendant's cell phone at 8:19 p.m., 8:20 p.m., 8:31 p.m., and 11:16 p.m. Finally, it was "possible" that Contini called defendant's father's house at 11:18 p.m. and 11:26 p.m.

¶ 20 On October 5, 2008, it was "possible" that Contini called defendant twice on his cell phone at 12:42 a.m. Contini admitted it was "possible" that she continually called defendant's cell phone and defendant's father's house throughout the morning on October 5.

¶ 21 Defense counsel then asked Contini whether she was scared during defendant's call to her; whether she was frightened of defendant; and whether she felt he was controlling of her. Contini responded affirmatively, stating that she did not make a move without letting defendant know where she was.

¶ 22 Defense counsel questioned Contini regarding her testimony that after the police came, she saw defendant sitting in his car in the cul-de-sac adjacent to their house. Contini admitted that the police did not arrest defendant or even go speak to him at that time. Contini denied being upset that defendant had not been arrested after she accused him of stealing her wedding rings from the house.

¶ 23 Defense counsel asked why Contini called defendant 15 times or more on the day of the incident. Contini replied that whenever defendant came home, she needed to prepare herself because she never knew what kind of mood he would be in. Sometimes, defendant was calm, and sometimes, he was very angry and volatile.

¶ 24 When defense counsel questioned Contini about her relationship with Cecchini, Contini testified that they "got along as neighbors do." They had long conversations on the phone in a "neighbor capacity."

¶ 25 Defense counsel further questioned Contini about calling defendant's work places in January and February of 2009. Contini initially denied and then was "unsure" whether she called defendant's work place repeatedly on January 30, 2009, and February 19 and 20, 2009. Contini denied calling over and over; she said that she would wait for him to call her back. Contini denied telling the employee who answered the phone to "get [her] f**king husband on the phone." Contini said that she did not "speak like that."

¶ 26 On redirect, Contini explained why she called defendant multiple times. She testified that she did not go anywhere without permission from him because he got upset when she just left. Also, she needed to prepare herself for what state of mind he was in because he would switch from nice and giddy to volatile and angry. Contini testified that defendant would take "it out on" her and that he had been seeing "another or various females."

¶ 27 The State's next witness, Cecchini, testified consistently with Contini. On October 4, 2008, when Contini answered defendant's call and put it on speaker phone, defendant said that he did not " 'give a f**k what' " she did. Defendant told Contini that he was going to kill her and that he would come into the house when she was sleeping. Defendant said that if Contini was going to make a false report, then he would come and get her when she was sleeping. Defendant was shouting and very angry.

¶ 28 Cecchini was frightened and called 911. Both she and Contini spoke with the police, and in the meantime, some neighbors had gathered around because they heard yelling. Cecchini thought she saw defendant's vehicle in the cul-de-sac, and she told this to the officer. The officer did not leave to question defendant because he was working on the written report. Later, in March 2009, Cecchini gave the police a recorded statement.

¶ 29 On cross-examination, Cecchini confirmed that before defendant called Contini and they were together in the car, Contini repeatedly called defendant. Contini wanted defendant to know that they were going to the movies.

¶ 30 Officer Parrish testified on behalf of the defense as follows. Parrish was a responding officer and was dispatched to Contini's residence. Contrary to Cecchini's testimony, he did not recall any neighbors being present. In addition, he was not told by either Cecchini or Contini that defendant was in the area in his car.

¶ 31 Defendant's father, Christopher Armbrust, testified next. In 2008, he and defendant worked together at Armbrust's antique booth in St. Charles on Saturdays, and the day of the incident, October 4, 2008, was a Saturday. Defendant was living with Armbrust at his house in Winfield at the time. The Saturday routine was that they would drive together to the antique mall, stay until closing, which was 5 p.m. or 5:10 p.m., and then eat at Steamers restaurant in Winfield, where they stayed for 45 minutes to 1 hour. There was nothing different about the routine on October 4, 2008. After they ate at Steamers, they went back to Armbrust's house. Armbrust had a land line but was not at home on October 4, 2008, around 5:25 p.m. or 5:30 p.m. Armbrust had given Contini a key to his house.

¶ 32 Armbrust's partner at the antique booth, Michael Frank, testified next. Frank testified that defendant worked at the booth every Saturday in 2008 and 2009. Defendant, Armbrust, and Frank would all be at the booth until between 5:00 p.m. and 5:10 p.m.

¶ 33 Detective John Cebulski testified next as follows. There were a couple of reports involving defendant and Contini, and other officers were involved. In early 2009, Cebulski received the file to pursue investigation. Cebulski could not remember how many times he had contacted Contini. When asked if there were problems contacting Contini, Cebulski responded

that Contini did not answer, and he would have to leave a message. Contini would then return his calls.

¶ 34 Cebulski decided to subpoena telephone records in May 2009. Cebulski's review of the telephone records revealed that Contini had called defendant 15 or 16 times on October 4, 2008. Cebulski admitted that he had not reviewed the telephone records prior to signing off on a "complaint synopsis" and charging defendant.

¶ 35 Officer Ochoa testified that he was assigned to investigate the instant case. When he contacted Contini, she did not have time to talk to him and said she would call back later. She never did, so Ochoa closed the case. In Ochoa's opinion, Contini was less than cooperative.

¶ 36 During closing argument, defense counsel focused on the telephone records. Defense counsel argued that Contini, a woman who claimed she was in fear, afraid, and threatened, called defendant back multiple times within seconds of his call and also called him multiple times throughout the evening. Positing the question "who called who," defense counsel showed the jury a summary of Contini's calls to defendant and went through them one by one. Defense counsel argued that the jury needed to put the circumstances in context; the jury needed to see who was stalking who, and who was abusing who. Defense counsel pointed out that defendant did not want Contini's attention, and the less contact he had with her, the better.

¶ 37 Defense counsel further argued that Contini and Cecchini were friends going to the movies, and Contini claimed she needed to call defendant to tell him where she was going. However, Contini could not find or locate defendant and was acting desperately to find him, so the two "cooked up" this scheme. As evidence of the scheme, defense counsel argued that, contrary to their version of events, Officer Parrish did not recall any neighbors being around when he responded to the incident, and he did not recall being told that defendant was in the

vicinity at the time, sitting in his car. Defense counsel argued that if defendant had really been present, the officer would have questioned him or called for assistance.

¶ 38 Finally, defense counsel argued that there was not enough time during an 11-second call for defendant and Contini to have a conversation, to put the call on speaker phone, and then for defendant to make all of the threats he allegedly made. According to defense counsel, all the evidence was about Contini controlling defendant, not the way other way around.

¶ 39 The jury found defendant guilty of the offense.

¶ 40 Defendant filed a motion for a new trial or motion for judgment notwithstanding the verdict. The trial court denied this motion and then conducted a sentencing hearing.

¶ 41 C. Sentencing

¶ 42 Contini was the first witness to testify at the sentencing hearing. She testified that after they got married in October 2003, defendant began verbally abusing her in November 2003. The verbal abuse continued throughout their marriage, the divorce proceedings, which culminated in 2010, and up to 2012. Defendant was also physically abusive on more than 10 occasions, including towards Contini's four children from past relationships. Contini specified three incidents. First, defendant pushed her down a spiral staircase. Second, defendant got into a fight with her son, who was about 17 years old, over a laptop. When Contini came home from work, her son had scratch marks on his neck. Third, defendant slammed the door and broke her daughter's foot, at a time that her daughter was pregnant.

¶ 43 Contini testified that every time she tried to leave defendant, he followed her, and she "always believed him that he wouldn't hit [her] or push [her] or follow [her] to [her] jobs, and so [she] went back to him." Contini testified that every time defendant did something to her, she

dropped the charges because she was afraid and had nowhere to go. However, after getting the divorce, she did not drop the charge and wanted the "chance to not be afraid anymore."

¶ 44 In addition, Contini testified that defendant's former girlfriend, Sandy, called Contini and said that she had experienced the same behavior from defendant when they were together. The State submitted a verified petition for order of protection, dated February 21, 1991, filed against defendant. The petitioner, Sandra Roberson (Sandy), alleged that defendant followed her, chased her, pushed her, hit her, cornered her, yelled awful things at her, and would not let her leave.

¶ 45 Sharon Armbrust Carraccio, defendant's sister, testified next on behalf of the defense. Carraccio testified that defendant was compassionate and would come to the aid of others at his own expense. She further testified that Contini often kicked defendant out of the home; that Contini left aggressive, threatening messages for Sharon wanting her to take Contini's side in an argument between Contini and defendant; that Contini scared Carraccio; and that Carraccio had never seen defendant be violent.

¶ 46 Timothy James Shamburg testified next. Shamburg had known defendant for 15 years; they were good friends. Shamburg worked with defendant at a restaurant where defendant worked security. Defendant prevented situations from escalating when people had too much alcohol; he took the higher road. For Shamburg's birthday in 2005, he and his wife met defendant at a bar. Contini was supposed to be there too but she got angry at defendant because she could not decide what to wear. Contini told defendant to go alone, and then she showed up at the bar and yelled obscenities at defendant. Defendant was embarrassed but did not respond. At this point, the court interjected by asking whether Shamburg had ever heard defendant raise his voice as a bouncer. Shamburg replied no.

¶ 47 Mike Frank, defendant's father's business partner at the antique booth, testified that he had had known defendant for 10 years. Defendant was a "big teddy bear"; he was jovial with the public and helpful in handling the items in the booth. Defendant was also very good to his father. Frank testified that Contini would park outside the antique mall, see that defendant was working, and then call and ask to speak to defendant. Defendant did not want to talk to her.

¶ 48 Frank's wife, Marjorie Louise Frank, offered consistent testimony. Defendant was a dependable, gentle man; she had never seen an angry side to him, even when Contini was calling him. When Contini called the antique booth looking for defendant, Marjorie would be honest if defendant were there but say that defendant did not want to talk to her. Contini would get very angry, and Marjorie would hang up the telephone.

¶ 49 Debra Armbrust Barrett, defendant's sister, testified that defendant was extremely shy and non-confrontational. Defendant had worked for Barrett's husband, who was a land surveyor. However, defendant stopped working for her husband because defendant was discouraged and embarrassed by Contini's phone calls; his phone was ringing off the hook. When defendant did answer the phone, Contini was "screaming and hollering" at him. When defendant would hang up his phone, Contini would then call Barrett's home phone.

¶ 50 The court then asked Barrett about defendant's prior girlfriends, including Sandy. Barrett said she had seen Sandy only once. When the court asked Barrett if there was anything unusual or bizarre about Sandy, Barrett replied that Sandy seemed shy. Barrett was living in Cary at that time and did not hear much about defendant's relationship with Sandy. Barrett was not aware of "something going on with that relationship"; Barrett thought it lasted one or two years.

¶ 51 Defendant's father, Christopher Armbrust, testified that defendant lived with him and was a huge help with his medical issues, the antique booth, and his other business. The court

asked Armbrust if he knew Sandy, and Armbrust said that he had heard of her but had never met her. Defendant had told Armbrust that he was going out with her and that was all that he had heard; defendant never said that Sandy was weird or crazy or anything like that.

¶ 52 Defendant was the final witness to testify. Defendant was questioned about the three incidents described by Contini in which he allegedly used physical force. Defendant provided different versions of events. First, he denied pushing Contini down the stairs. According to defendant, Contini walked behind him down the stairs and tried to kick him. When she missed, she slid down some of the stairs. Second, Contini's son went crazy when his laptop was taken away for not following the rules; he tried to hit defendant. Third, Contini's daughter hurt her foot when she slammed the door against defendant when he was leaving. The door ricocheted off of defendant's boot, flew back, and hit her in the foot. Defendant testified that Contini's daughter was not pregnant at the time.

¶ 53 Defendant testified that Contini's repeated phone calls caused him to lose his security job at the restaurant. Defendant was told by the management that Contini was "calling up and harassing" people. In addition, Contini filed numerous orders of protection against defendant. Despite being ordered to have no contact with her, Contini would still call him repeatedly and drive by the house repeatedly to check up on him.

¶ 54 Defendant testified regarding Sandy's verified petition for order of protection, dated February 21, 1991. Defendant explained that he had dated Sandy for five to six years and was never served with the 1991 petition for order of protection. The first time he saw the document was when Contini mailed out "a lot of things" to his father's customers to make them lose business. Also, Roberson was not Sandy's last name when he dated her; Roberson was her

married name, and Sandy got married after she and defendant broke up. Sandy claimed that she and defendant had a daughter together, but Sandy would not allow a paternity test.

¶ 55 During argument, the State asked the court to impose a period of incarceration, or, alternatively, the maximum probation period of 30 months. Defense counsel argued that defendant should receive 12 months' conditional discharge.

¶ 56 The court noted the following in fashioning defendant's sentence. Defendant's presentence report revealed that he had "some background in the past," but it was nominal and from a long time ago. Other noteworthy parts of the presentence report included defendant's refusal to provide a release of information from his high school and from his college (DeVry). The court did not know if the refusal to release this information meant anything, but it raised a red flag.

¶ 57 The other part that "stuck out with [the court] in the report initially [was] that defendant really [took] no responsibility for anything he [had] done here." Defendant saw himself as the victim; he was the one being harassed and stalked repeatedly by Contini. The court noted that although Contini may have been bugging him and calling him a lot, defendant appeared to believe that he was the victim of everything that had happened to him. The court stated that Sandy, also, was apparently a victim. According to the court, "the jury listened to the testimony, the jury judged the credibility of the witnesses, and having said that, I think the credibility of the witnesses in this whole case, I don't know who to believe."

¶ 58 The court discussed the aggravating factors (see 730 ILCS 5/5-5-3.2 (West 2008)), stating, "Number one, the defendant's conduct caused or threatened serious harm. It did. He said he was going to kill her, blow her up, so that's a factor in aggravation which the Court can take into consideration." A second aggravating factor was the need to deter others from

committing the same crime. According to the court, it was necessary to deter other people from telling people that they were going to kill them and blow their house up.

¶ 59 Turning to the mitigating factors, the court found one of them to be defendant's history of criminal activity. Although defendant did have prior criminal activity, he had led a law-abiding life for a substantial period of time before the commission of the present offense. Second, the circumstances were unlikely to recur because Contini would not be calling defendant, and he desired no contact with her. Third, the character and attitude of defendant indicated that he was unlikely to commit another crime. Fourth, defendant was likely to comply with a period of probation. Fifth, imprisonment would entail excessive hardship to his dependents because defendant took care of his father.

¶ 60 In addition, the court stated that it reviewed the divorce findings, in which the divorce court did not find either defendant or Contini to be credible. The court agreed with the divorce court that defendant's father, Armbrust, was credible.

¶ 61 Regarding Sandy's petition for an order of protection, the court noted that defendant's sister Barrett had said that she had met Sandy once. The court found Barrett's testimony "incredulous" based on defendant's testimony that the two had dated for five years. The court further noted that Barrett did not think Sandy was bizarre or crazy, and the verified petition for order of protection contained allegations that were "troubling to the court." However, the court noted:

> "Those are just allegations made. They happen all the time, but they swear under oath that they are true. It just seems odd to me that having a relationship with this person for apparently five years, the sister [Barrett] who came in to say that [defendant] was a

wonderful person and all of these things about him, [Barrett] didn't know [Sandy]. [Barrett] only met [Sandy] once."

¶ 62 The court further noted that all of the letters submitted on defendant's behalf had "the same type of feeling" that defendant was the most wonderful person they had ever met. None of the people testifying and/or submitting letters had ever witnessed defendant say a bad word about anyone, raise his voice, be harsh to anyone, or use physical force, which the court did not believe "for one second." According to the court, no one, including defendant, took any responsibility for defendant's actions in committing the offense. The court found it "important" that there was no doubt in the jury's mind that defendant committed this offense.

¶ 63 The court sentenced defendant to a period of 24 months' probation, fines of $500, and costs of $335.

¶ 64 Defendant filed a motion to reconsider his sentence, and the trial court denied his motion. Defendant timely appealed.

¶ 65 II. ANALYSIS

¶ 66 A. Ineffective Assistance of Counsel

¶ 67 Defendant first argues that defense counsel rendered ineffective assistance of counsel. Essentially, defendant argues that defense counsel failed to impeach Contini in three respects.

¶ 68 Under the familiar two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant must show that (1) counsel's performance was deficient in that it fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant in that, but for counsel's deficient performance, there is a reasonable probability that the result would have been different. *People v. Houston*, 226 Ill. 2d 135, 144 (2007). "In demonstrating, under the first *Strickland* prong, that his counsel's performance was deficient, a

defendant must overcome a strong presumption that, under the circumstances, counsel's conduct must be considered sound trial strategy." *Id.* Under the second prong, a reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome. *Id*. In order to establish ineffective assistance of counsel, a defendant must satisfy both the performance and prejudice prongs of *Strickland*. *Id*. at 144-45; see also *People v. Clendenin*, 238 Ill. 2d 302, 317-18 (2010) (because a defendant must satisfy both prongs of this test, the failure to establish either prong is fatal to the claim).

¶ 69 Furthermore, decisions concerning what evidence to present on the defendant's behalf ultimately rest with defense counsel. *People v. Cooper*, 2013 IL App (1st) 113030, ¶ 63. This type of decision is a matter of trial strategy, which is generally immune from a claim of ineffective assistance of counsel. *Id.* The right to effective assistance of counsel means competent, not perfect representation. *Id*.

¶ 70 First, defendant argues that defense counsel was ineffective for eliciting evidence that Contini was afraid of defendant, and then for failing to impeach her or to seek a limiting instruction. Defendant points out that on cross-examination, defense counsel opened the door to evidence that Contini was scared and frightened of defendant; that she felt that he was controlling of her; that she did not make a move without letting him know; and that she was unable to predict his mental state, as defendant oscillated from being calm to very angry and volatile. On redirect, the State elicited testimony from Contini that she did not go anywhere without defendant's permission because he got upset when she just left; that she needed to prepare herself for what state of mind he would be in; and that defendant had been seeing "another or various females."

¶ 71 Defendant argues that "no reasonably competent criminal defense attorney" would have intentionally elicited testimony that Contini was frightened of defendant unless that attorney was armed with information to impeach that testimony. According to defendant, defense counsel had such information, namely a report from Officer Cebulski indicating that Contini had told the officer that she had a lack of fear toward defendant, but she failed to use it.

¶ 72 The State's initial response regarding the impeaching police report is that defendant's argument is poorly supported by the record. We agree. A single statement by defense counsel forms the entire basis of defendant's argument. During the hearing on defendant's motion *in limine*, in which defense counsel sought to introduce evidence of Contini's behavior towards defendant, defense counsel argued that "the jury should be allowed to know [Contini's] – well, as Officer Cebulski has put it, her lack of fear about [defendant] who she's claiming has threatened her in this 11-second [telephone] incident." Defense counsel went on to say that Contini was unresponsive to Officer Cebulski's request for telephone records, which Officer Cebulski noted in his report. Defense counsel stated that Officer Cebulski "showed that to us. He kept good notes on this case, as did these other officers." Later, during the trial, Officer Cebulski testified that he completed a report. However, when defense counsel asked Officer Cebulski if he had the report with him at trial, he said "no."

¶ 73 Based on this record, it is clear that Officer Cebulski did create a police report. However, there is no indication what the police report contained, or that defense counsel's one reference to Contini's lack of fear of defendant, as Officer Cebulski "ha[d] put it," even stemmed from a police report. Defendant acknowledges that defense counsel never explicitly said that she had a report from Officer Cebulski indicating that Contini was not afraid of defendant. As a result, the

basis for defense counsel's statement is unknown. Nevertheless, defendant argues that defense counsel's statement *implied* that she was armed with such information to impeach Contini.

¶ 74 Defendant's argument is pure speculation. See *People v. Gosier*, 165 Ill. 2d 16, 24 (1995) (the defendant's claim was pure conjecture and speculation and cannot support an ineffective-assistance-of counsel claim). As stated, defense counsel called Officer Cebulski as a defense witness but did not pursue this line of inquiry. See *People v. Pecoraro*, 175 Ill. 2d 294, 326-27 (1997) (generally, the decision whether to impeach a witness is a matter of trial strategy and will not support a claim of ineffective assistance of counsel; the manner in which to cross-examine a particular witness involves the exercise of professional judgment which is entitled to substantial deference from a reviewing court). The presumption is that counsel's conduct was sound trial strategy, a burden that defendant must overcome. See *Houston*, 226 Ill. 2d at 144. Defendant's reliance on one, isolated comment by defense counsel to infer that she had impeaching evidence that she failed to use is not sufficient to overcome the presumption that defense counsel acted reasonably. Thus, defendant cannot show that defense counsel was deficient.

¶ 75 This brings us to defendant's next argument on this issue, which is that if defense counsel was not sure that she had such information to impeach Contini, then she was "unreasonably reckless" by eliciting evidence from Contini that she was afraid of defendant. Again, we disagree.

¶ 76 During opening argument, defense counsel pursued the theory that Contini was calling and harassing defendant, not the other way around. Consistent with this theory, defense counsel elicited testimony from Contini that she was afraid of defendant, which allowed her to then use Contini's repeated phone calls to defendant to discredit her testimony. Defense counsel

challenged Contini's supposed fear of defendant by pointing out how many times she had called defendant both before and after the telephone incident. Defense counsel then proved her theory by having Officer Cebulski testify as to the telephone records that he had subpoenaed. To this end, Officer Cebulski testified that Contini had called defendant 15 or 16 times on that day alone, with several of the calls occurring directly after defendant's one call. In addition, defense counsel used Officer Cebulski's testimony to show that Contini was not cooperative in the investigation.

¶ 77 During closing argument, defense counsel focused on the telephone records. Defense counsel argued that for a woman who claimed she was in fear, afraid, and threatened, Contini called defendant back multiple times within seconds of his call and also called him multiple times throughout the evening. According to defense counsel, the jury needed to put the circumstances in context and see who was stalking who; who was abusing who. Defense counsel's strategy was a reasonable one, given the evidence, and she was not deficient.

¶ 78 Likewise, defendant cannot establish how he was prejudiced, in that defense counsel used the telephone records and Contini's repeated calls to vigorously challenge Contini's claim that she was afraid of defendant. Regardless of whether the impeaching police report existed, and it is speculative that it did, defense counsel pursued the theory that Contini was not really afraid of defendant, and the police report would have been cumulative.

¶ 79 Defendant's final argument on this issue is that defense counsel was deficient for not requesting a limiting instruction. Defendant argues that defense counsel should have requested an instruction advising the jury that defendant's bad personality traits and unfaithfulness may only be used for some purpose other than to establish his criminal propensity. We agree with the State that defense counsel's decision not to request a limiting instruction was sound trial strategy.

Requesting such an instruction may have caused the jury to focus on Contini's unsupported allegations that defendant was volatile and unfaithful rather than the defense theory that it was Contini who was angry, desperate, and volatile in stalking defendant. See *People v. Logan*, 2011 IL App (1st) 093582, ¶ 51 (trial counsel made strategic decision not to tender the limiting instruction so as not to focus the jury's attention on certain evidence).

¶ 80 Second, defendant argues that defense counsel was ineffective for failing to impeach Contini's denial that she called defendant's work place and told the person who answered the phone to "get [her] f**king husband on the phone now damnit."

¶ 81 In defense counsel's motion *in limine*, filed in April 2013, she sought to admit evidence that after the October 2008 telephone incident, Contini continued to call defendant's work place in January and February 2009. Defense counsel argued in her motion that when Contini called defendant's work place, the employees felt harassed; Contini accused women of having affairs with defendant; and she ordered "the employee to 'get my f**king husband on the phone now damnit.' "

¶ 82 At trial, defense counsel questioned Contini about calling defendant's work places in January and February 2009. At first, Contini denied calling defendant's work place repeatedly on January 30, 2009, and February 19 and 20, 2009; then, she was "unsure." Contini denied calling over and over and denied telling an employee who answered the phone to "get [her] f**king husband on the phone." Later, during the sentencing hearing, defense counsel introduced a document signed by a particular employee at defendant's father's company, dated January 30, 2009, saying that Contini called defendant at least 10 to 12 times a day and had repeatedly started the conversation with "get my f**king husband on the phone now Damit [*sic*]."

¶ 83 Defendant argues that even if defense counsel did not have the January 2009 document when she filed the motion *in limine* four years later (April 2013), the fact that defense counsel referenced Contini's remark in the motion *in limine* suggests that she knew of witnesses who could support that allegation. Defendant argues that because she could not assume that Contini would admit to having made that statement, defense counsel had a duty to have an impeaching witness available.

¶ 84 Deciding what witnesses to call is a matter of trial strategy, and such decisions enjoy a strong presumption they are sound. *People v. Beard*, 356 Ill. App. 3d 236, 244 (2005). As a result, they are not usually found to be the basis for a finding of ineffective assistance of counsel. *Id*. Likewise, the decision whether or not to impeach a witness is a matter of trial strategy and cannot support a claim of ineffective assistance of counsel. *People v. Franklin*, 167 Ill. 2d 1, 22 (1995).

¶ 85 Regardless of whether defense counsel knew of an impeaching witness willing to testify as to Contini's remark, the impeaching evidence did not go to the heart of the issue, which is whether defendant called and threatened Contini's life on October 4, 2008. See *People v. Jimerson*, 127 Ill. 2d 12, 33 (1989) (the value of the potentially impeaching evidence must be placed in perspective). As previously stated, defense counsel went to great lengths to challenge Contini's testimony that she was afraid of defendant by focusing on Contini's repeated calls to defendant both before and immediately following the telephone incident. Conversely, Contini's January and February 2009 calls to defendant, months after the incident, were more remote in time. While defense counsel made sure that the jury was aware of this evidence, *i.e.*, that Contini was still making repeated calls to defendant months after the incident, despite her claim that she was afraid of him, defense counsel could have reasonably believed that further efforts to impeach

Contini about her abusive remark would not have significantly added to whatever damage had already been done to her credibility. See *Franklin*, 167 Ill. 2d at 22 (defense counsel could have reasonably believed that it was not necessary to impeach the witness further). Accordingly, defense counsel was not deficient for failing to call a witness to impeach Contini's testimony.

¶ 86 Third, defendant argues that defense counsel was ineffective for failing to impeach Contini when she denied being upset on the date of the telephone incident. Defendant argues that defense counsel should have impeached Contini about being upset about the fact that defendant had not been charged with stealing rings from the marital home the day before.

¶ 87 Going back to the motion *in limine*, defense counsel sought to admit evidence that Contini had called the police on October 3, 2008, the day before the telephone incident, to report that defendant had allegedly stolen items from the marital home. Defense counsel also sought to admit evidence that Contini went to the State's Attorney's Office on October 7, 2008, to pursue charges against defendant for both the October 3 theft and the October 4 telephone incident. The State declined to file charges, however, partly due to a lack of witnesses. Defense counsel argued in the motion *in limine* that because the State did not file charges against defendant, Contini realized that the charges were not provable without a corroborator, and that Cecchini, Contini's good friend and neighbor, became the glue that made the charge regarding the telephone incident stick.

¶ 88 At trial, defense counsel elicited testimony from Contini that she had called the police on October 3, 2008, to report that defendant had stolen wedding rings from the house. However, Contini denied being upset that defendant had not been arrested after she accused him of stealing the rings from the house. Defendant argues that evidence that Contini was upset because defendant had not been charged with the October 3 theft as of October 4, and that she later made

efforts to have defendant charged with the October 3 theft on October 7, would have established that she had a motive to falsely accuse defendant of threatening to kill her on October 4. According to defendant, this evidence would have allowed defense counsel to argue that Contini figured out that she needed a corroborator if she wanted to make a charge against defendant stick.

¶ 89 The State points out an obvious flaw in defendant's argument, which is that Contini did not go to the State's Attorney's Office to try to persuade the State to charge defendant until October 7, which was after the October 3 theft and October 4 telephone incident. Thus, the evidence did not prove that Contini's desire to have defendant charged with the October 3 theft gave her a reason to be upset on October 4. The same logic applies to defendant's argument that defense counsel was deficient for failing to argue that Contini learned that she needed a corroborator to make the charge stick. Contini would not have learned of the need for a corroborator until October 7, which was after she and Cecchini had reported the telephone incident to police on October 4.

¶ 90 Defendant responds to this point in his reply brief. According to defendant, Contini's desire on October 7 to have defendant charged with the October 3 theft supports an inference that she had the same desire when this offense allegedly occurred on October 4, and that Contini was therefore upset that defendant had not been charged with the alleged October 3 theft as of October 4.

¶ 91 Once again, defendant's argument is speculation. See *Gosier*, 165 Ill. 2d at 24 (the defendant's claim is pure conjecture and speculation and cannot support an ineffective-assistance-of-counsel claim). The fact that Contini tried to press charges against defendant, for both the theft and the telephone incident, *after* they occurred, does not lead to the conclusion that

one led to the other. In other words, it is nothing but speculation to argue that Contini was upset that defendant had not been charged with the initial theft and thus falsely accused him of the telephone incident. Rather than pursue this tenuous theory, it was reasonable for defense counsel to question Contini's credibility regarding both the theft and telephone incident.

¶ 92 At trial, defense counsel thoroughly cross-examined Contini about her allegation that defendant had stolen wedding rings and other items from the marital house the day before the telephone incident. Defense counsel succeeded in getting Contini to admit that some of the items taken actually belonged to defendant's father, and that defendant had previously told Contini that he would be coming by the house to pick up certain items. Likewise, defense counsel challenged Contini's and Cecchini's versions of events following the telephone incident, in which they both testified that defendant had showed up in the neighborhood cul-de-sac in his car. Contrary to their testimony, defense counsel elicited testimony from the responding officer, Officer Parrish, who denied that either Contini or Cecchini had said that defendant was in the area in his car. Defense counsel highlighted the fact that defendant, who supposedly appeared at the scene, was not arrested, despite the recent telephone incident and theft incident the day before. Defense counsel's strategy was reasonable given the evidence, and defendant cannot show that defense counsel was deficient.

¶ 93 Finally, defendant argues that defense counsel's unreasonable acts and omissions, when considered together, are sufficiently prejudicial to establish ineffective assistance of counsel. Because we have determined that defense counsel did not err, however, there can be no cumulative error. See *People v. Garmon*, 394 Ill. App. 3d 977, 991 (2000) (to show cumulative error, there must first be a showing of individual error).

¶ 94 B. Sentencing Errors

¶ 95 Defendant's second argument, in the alternative, is that the trial court erred when imposing a sentence. Defendant challenges his sentence in three respects. First, defendant argues that the trial court improperly considered a factor inherent in the enhancing element of the offense, namely that his conduct caused or threatened serious harm in that he threatened to kill Contini, as an aggravating factor. Second, he argues that the trial court wrongly considered his refusal to admit guilt as an aggravating factor. Third, he argues that the trial court improperly relied on the allegations in Sandy's verified petition for order of protection. According to defendant, the petition should not have been relied on because it was old (filed in 1991, 22 years before the sentencing hearing) and was unreliable hearsay.

¶ 96 We begin with defendant's argument that the trial court improperly considered a factor inherent in the sentencing-enhancing element of the offense as an aggravating factor. At the outset, defendant concedes that he failed to raise this issue at the sentencing hearing or in his motion to reconsider sentence. Nevertheless, he argues that the issue may be reviewed under the plain-error doctrine. "Unpreserved errors may be reviewed if (1) the evidence was so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error; or (2) the error was so fundamental and of such magnitude that it affected the fairness of the hearing and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Morrow*, 2014 IL App (2d) 130718, ¶ 11. The first inquiry under plain-error review is to determine whether error actually occurred. *Id.*

¶ 97 It is normally within a trial court's discretion to impose a sentence, and there is a strong presumption that the trial court based its sentencing determination on proper legal reasoning. *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 8. However, it is well-established that a factor

inherent in the offense should not be considered as a factor in aggravation at sentencing. *People v. Dowding*, 388 Ill. App. 3d 936, 942 (2009). In other words, a single factor cannot be used both as an element of an offense and as a basis for imposing a harsher sentence that might otherwise have been imposed. *Abdelhadi*, 2012 IL App (2d) 111053, ¶ 9. The prohibition against such "double enhancements" is based on the rationale that the legislature has already considered such a fact when setting the range of penalties, meaning it would be improper to consider it once again as a justification for imposing a greater penalty. *Id.*

¶ 98 It is the defendant's burden to affirmatively show that the sentence was based on improper considerations. *Dowding*, 388 Ill. App. 3d at 943. In analyzing whether the trial court fashioned a sentence on proper aggravating and mitigating factors, a reviewing court should consider the record as a whole, rather than focusing on a few words or statements by the trial court. *Id.* The question of whether a court relied on an improper factor in imposing a sentence is a question of law that this court reviews *de novo*. *Abdelhadi*, 2012 IL App (2d) 111053, ¶ 8.

¶ 99 The State does not dispute that defendant's threatening to kill Contini was a sentencing-enhancing element that elevated the instant offense to a Class 4 felony. See 720 ILCS 135/2(b)(4) (West 2008). Rather, the State argues that the court merely "mentioned" that defendant's conduct threatened harm "in the context of reciting" the applicable aggravating factors. The State points out that this was not the sole aggravating factor considered by the court and also that a court is not required to refrain from any mention of factors that constitute elements of an offense (see *People v. Barney*, 111 Ill. App. 3d 669, 679 (1982)). According to the State, the record shows that the court did not improperly focus on the threat of harm in crafting a proper sentence; thus, defendant has failed to affirmatively demonstrate that the trial court erred. We disagree with the State's position.

¶ 100 It is clear from the record that the trial court improperly considered the threat of serious harm, namely that defendant threatened to kill Contini, as an aggravating factor. In reviewing the aggravating factors, the court stated, "Number one, the defendant's conduct caused or threatened serious harm. It did. He said he was going to kill her, blow her up, *so that's a factor in aggravation which the Court can take into consideration*." (Emphasis added.) The court then identified the need to deter others as a second aggravating factor. Based on the court's statements, the case at bar resembles this court's decisions in *Dowding* and *Abdelhadi*, where we determined that the trial court improperly relied on factors implicit in the offense as aggravating factors.

¶ 101 In *Dowding*, 388 Ill. App. 3d at 941, the trial court stated, " 'The factors in aggravation that I do find apply in this case are, Number 1, that the Defendant's conduct caused or threatened serious harm. No question, this Defendant's conduct in this offense caused the greatest harm there could be, that is the death of another person.' " In addition, the trial court identified two other aggravating factors, the defendant's criminal history and the need for deterrence. *Id*. This court noted that although a court may consider as an aggravating factor the *degree* of harm caused to a victim, even where serious bodily harm is arguably implicit in the offense, the trial court erred where it expressly stated that causing the victim's death was an aggravating factor upon which the sentence was based. *Id*. at 943-44.

¶ 102 Similarly, in *Abdelhadi*, 2012 IL App (2d) 111053, ¶ 4, the trial court considered all of the evidence presented, including the factors in aggravation and mitigation, and then stated, " 'Specifically in aggravation the Court has considered that the conduct caused by the defendant did, in fact, endanger the lives of individuals.' " In addition, the trial court considered the defendant's criminal history in aggravation. *Id*. On appeal, this court stated that the trial court's

reference to the defendant's threat of harm to others "did not amount to merely a mentioning within the 'nature and circumstances' of the crime"; instead, it revealed reliance by the trial court on the implicit factor. *Id*. ¶ 14.

¶ 103 As in *Dowding* and *Abdelhadi*, the trial court here did more than merely mention the threat of harm as part of the nature and circumstances of the crime. Rather, the trial court expressly relied on defendant's conduct in threatening serious harm by threatening to kill Contini as an aggravating factor. Also, the State's argument that this was not the sole aggravating factor relied on by the court misses the mark. As stated above, the trial courts in both *Dowding* and *Abdelhadi* relied on other aggravating factors as well. Accordingly, the State's argument does not affect our conclusion that the trial court erred by considering the threat of harm as an aggravating factor.

¶ 104 Having determined that the trial court improperly considered the threat of harm as an aggravating factor, defendant has shown an error occurred, and the next inquiry is whether a remand is required. When a court considers an improper factor in aggravation, we must remand the case unless it appears from the record that the weight placed upon the improper factor was so insignificant that it did not lead to a greater sentence. *Dowding*, 388 Ill. App. 3d at 945. "Courts of review have found the following considerations to be helpful in determining whether trial courts have afforded significant weight to improper factors such that remand would be required: (1) whether the trial court made any dismissive or emphatic comments in reciting its consideration of the improper factor; and (2) whether the sentence received was substantially less than the maximum." *Id*.

¶ 105 The State next argues that a remand is not required because the sentence of 24 months' probation was well below the three years' maximum imprisonment for a Class 4 felony. See 720

ILCS 5/5-4.5-45(a) (West 2008). Even so, defendant points out that the 24-month probation period was 80% as long as the maximum 30-month probation period. See 720 ILCS 5/5-4.5-45(d) (West 2008).

¶ 106 Again, both *Abdelhadi* and *Dowding* are instructive as to whether a remand is necessary in this case. In *Abdelhadi*, 2012 IL App (2d) 111053, ¶ 19, the sentence imposed was substantially below the maximum but four years above the minimum and thus did not allow this court to discern how much weight the trial court placed on the improper factor. Moreover, the trial court's short comments, which were neither dismissive nor emphatic, did not demonstrate how much weigh it placed on the improper factor. *Id*. Thus, this court remanded the case for a new sentencing hearing. *Id*. ¶ 20. Likewise, in *Dowding*, 388 Ill. App. 3d at 946, it was unclear how much weight the trial court placed on the improper factor. The sentence was four years short of the maximum sentence, and the trial court neither over nor underemphasized the improper factor. *Id*. Accordingly, this court remanded the case for a new sentencing hearing in *Dowding* as well. *Id*.

¶ 107 Here, as in *Abdelhadi* and *Dowding*, it is unclear how much weight the trial court placed on the improper factor. Therefore, we must remand the case for a new sentencing hearing. In this respect, we note that defendant has established plain error under the second prong if the plain-error doctrine. See *Morrow*, 2014 IL App (2d) 130718, ¶ 11 (the error was so fundamental and of such magnitude that it affected the fairness of the hearing and challenged the integrity of the judicial process, regardless of the closeness of the evidence).

¶ 108 Regarding defendant's other alleged sentencing errors, we find nothing improper in the court's consideration of Sandy's verified petition for order of protection. See *People v. Raney*, 2014 IL App (4th) 130551, ¶ 44 (the ordinary rules of evidence which apply at trial are relaxed at

a sentencing hearing, where the court has the ability to consider a variety of sources and types of information when determining a sentence). On the issue of whether the court wrongly considered defendant's refusal to admit guilt as a factor in aggravation, we reiterate that a more severe sentence may not be imposed merely because a defendant claims he is innocent at the time of sentencing. *People v. Speed*, 129 Ill. App. 3d 348, 349 (1984). Nevertheless, it is also well-established that the court may consider the lack of a penitent spirit in fashioning an appropriate sentence, because this is a factor which may have a bearing on the defendant's potential for rehabilitation. *Id.*

¶ 109 III. CONCLUSION

¶ 110 For the foregoing reasons, the judgment of the circuit court of Kane County is affirmed in part, reversed in part; the cause is remanded for a new sentencing hearing.

¶ 111 Affirmed in part and reversed in part; cause remanded.