2015 IL App (2d) 140892-U
No. 2-14-0892
Order filed December 1, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiff-Appellee,	)	
v.	)	No. 12-CF-1142
CORNELIUS LEE JONES, JR.,	)	Honorable Fernando Engelsma,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Burke and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The State proved defendant guilty beyond a reasonable doubt; his claims of error are rejected, and his conviction and sentence are affirmed.

¶ 2 Following a jury trial, defendant, Cornelius Lee Jones, Jr., was found guilty of three counts of predatory criminal sexual assault of a child (PCSA) (720 ILCS 5/12-14.1(a)(1) (West 2006) against his ex-girlfriend's young daughter, and sentenced to an aggregate 36-year term of imprisonment. He appeals his conviction and sentence. We affirm.

¶ 3 I. BACKGROUND

¶ 4 S.S. was born on February 5, 1998. When S.S. was 15, she disclosed that she had been sexually assaulted by defendant, who had previously dated S.S.'s mother, Melissa. Melissa and defendant had two daughters together, each younger than S.S.

¶ 5 The State filed a three-count indictment and each count charged defendant with PCSA in that he was over the age of 17 and committed an act of sexual penetration (penis to vagina) with S.S. when she was under the age of 13. Each of the three charges encompassed a period of time of one year following S.S.'s birthday. Thus, the State charged defendant with having committed the alleged act of sexual penetration with S.S. once when she was 10 (from February 5, 2006 to February 4, 2007), once when she was 11 (from February 5, 2007 to February 4, 2007), and once when she was 12 (from February 5, 2007 to February 4, 2008). Defendant was born in 1970 and would have been 36 years old when the abuse began.

¶ 6 Prior to trial, the State filed a motion *in limine* to exclude as hearsay statements that Melissa made to her friend, Dawn Smith. According to the motion, Smith could testify that Melissa made statements about "getting" defendant, and stated that she "needed Cornelius to be in jail." The State indicated that it did not intend to call Smith as a witness and the trial court reserved its ruling on the motion in the event the defense called Smith to testify.

¶ 7 At the beginning of jury selection, the trial court asked the prospective jurors whether they were familiar with the court, the attorneys, or any of the listed witnesses in the case. One of the prospective jurors, Kathryn Bachta, indicated that she was acquainted with one of the witnesses, pediatrician Dr. Raymond Davis. The trial court questioned Bachta before the venire. Bachta explained that she was a pediatric nurse and had worked with Davis "on the floor for child abuse cases when they would come in." Bachta stated that Davis was also her children's pediatrician. Bachta opined that Davis was a "very good doctor" and stated that she chose him as

her children's pediatrician "for a reason." Because Davis was a good doctor, she also said, "whatever he says, I'm probably going to go with [it]." The trial court responded that it was just about to ask Bachta about her ability to be impartial. The court then queried Bachta about evaluating Davis's credibility alongside other witnesses. In response, Bachta stated, "He'd be more credible in my book just because I know him." Bachta answered yes when asked if she could be fair and impartial. The trial court excused Bachta for cause.

¶ 8 Also during *voir dire*, before three separate panels of the venire, the State asked potential jurors whether they agreed that a witness would be nervous testifying before a "courtroom full of strangers" and whether they agreed might nevertheless "be telling the truth[.]" At no time did the defense object to the question.

¶ 9 At defendant's trial, Melissa testified that, including S.S., she has four daughters. Melissa met defendant in January 2000 and the two began dating. S.S. was almost four years old at the time. Over the next eight years, Melissa and defendant had an "on again, off again" relationship. Defendant primarily resided with Melissa and her daughters; they moved every year or two to different residences in Rockford. Melissa and defendant ended their relationship in July 2008. Melissa testified that defendant often shaved his pubic hair.

¶ 10 In August 2011, S.S. told Melissa that she saw defendant at a dollar store in Rockford and he hugged her. S.S. told Melissa that defendant's behavior toward her was "creepy." The following month, Melissa took S.S. to see a nurse.

¶ 11 S.S. testified that she met defendant when she was four, and that over the years defendant lived with her and her family at several different residences in Rockford. S.S. described an apartment that her family lived in when she was 10 years old. One day defendant called S.S. into the living room of the apartment. Defendant told S.S. to take her pants off and

lay on the couch. Defendant pulled his pants down and placed his penis in her vagina. S.S. testified that it hurt and that "it" went on for approximately 10 minutes. Defendant stopped when someone knocked on the apartment door. Defendant told S.S. to go to her room and "not to tell anybody" what had occurred.

¶ 12 S.S. also testified to events occurring in the apartment that her family lived in on Amherst Lane when she was 11 and 12. In this apartment, defendant sexually penetrated S.S.'s vagina with his penis "more than 20" times. S.S. testified about three distinct sexual assaults by defendant in the apartment on Amherst. First S.S. testified that one night, while she was asleep in her room, defendant "pulled [her] out of [her] bed" and "into the living room ***." Defendant told S.S. to take her pants and underwear off and lay down; then defendant "g[o]t on top of [her]" and placed his penis in her vagina. This incident occurred when S.S. was either 11 or 12.

¶ 13 S.S. also testified that when she was 11, defendant forced her to have sex in the living room; after defendant "was done," he stood up and S.S. saw his penis. S.S. saw that defendant had no hair in his pubic region. Finally, S.S. testified that "the last time" defendant sexually assaulted her was in the living room, when she was 12.

¶ 14 In all, S.S. testified that defendant engaged in sex with her more than 20 times when she was between the ages of 10 and 12. Each time lasted approximately 10 minutes. S.S. did not tell anyone about the abuse at the time because she was scared of defendant. When she was 15 years old, however, and defendant was no longer living with Melissa and the children, S.S. told her mother what had happened. S.S. testified that she did not make an outcry earlier because she did not want to "keep [her younger sisters] away from their dad."

¶ 15 On cross-examination, S.S. testified that, in 2011, she told the police that defendant did not put his fingers in her vagina; however, two days before defendant's trial, S.S. told an

assistant State's Attorney that defendant did put his fingers in her vagina. On redirect, S.S. testified that it hurt every time defendant penetrated her vagina, and that she did not experience any vaginal bleeding.

¶ 16 Pediatric nurse practitioner Lori Thompson testified that she is a member of Rockford Health System hospital's sexual-assault response team, which conducts examinations of suspected child victims of sexual abuse. In October 2011, Thompson spoke with S.S. and performed a physical examination of S.S. at the hospital. According to Thompson, S.S. reported that her "sister[s'] dad had raped her." Thompson described S.S.'s full statement as follows:

> "She had said that it began at age 10. The last time had been at age 12. And that it happened about every other month for two years. That he had removed her clothes, that he had removed his clothes, that it was always in the living room. It didn't matter if was daytime or nighttime, they were always alone. And that she said that he had put his penis into her vagina. And she said that it hurt afterwards."

S.S. also reported that she repeatedly had experienced vaginal pain and had not noticed any bleeding.

¶ 17 Thompson performed a physical examination of S.S. and testified that S.S.'s hymen was "annular," or smooth and circular with a small opening, which allowed for the passage of menstrual blood and other fluids. The result of the examination was "normal," which meant that there was no indication sexual abuse had occurred and that there was no indication sexual abuse had *not* occurred. Thompson testified that there was a significant range within the "normal variance" of a prepubescent girl's vaginal response to sexual intercourse and abuse. For example, Thompson testified, the hymen is often muscular and resilient; it can accommodate sexual penetration without necessarily resulting in the noticeable perforation of the hymenal membrane.

Thompson stated that an article entitled "It's Normal to be Normal" referenced a study wherein between 30 and 36 pregnant adolescents "had normal findings in their genital exam[s]." The article Thompson referenced was not introduced into evidence. Thompson also testified that during sexual penetration, "there's often no bleeding" or a "minute" amount of internal bleeding, which the victim might not notice.

¶ 18 The State rested, and the trial court denied defendant's motion for directed verdict. The court then admonished defendant about his right to testify; defendant stated that he understood the court's admonitions and did not wish to testify. Next, Dr. Stephen Eisinger, an obstetrician/gynecologist and clinical professor from Rochester, New York, testified for the defense. Eisinger reviewed the police reports in the case as well as Thompson's report of S.S.'s physical examination. Eisinger opined, based on Thompson's report, that there was a low probability that S.S. had engaged in sexual intercourse because the condition of S.S.'s hymen was reported as annular and normal. Eisinger further opined that a physical examination of the hymen "is not *** scientific or reliable in this regard. It's very hard to tell by examination, in the majority of cases, whether a young adolescent [girl] has had sexual intercourse or not."

¶ 19 On cross-examination, Eisinger acknowledged that his assessment was based on several assumptions about the depth of the sexual penetration involved, although "every scenario is different." Eisinger also stated that his assessment did not account for the legal definition of sexual penetration and that he did not physically examine the victim. Also, on cross-examination, the State asked Eisinger if he was familiar with the "McCann article" and its conclusion that hymenal injuries "can heal" in children and adolescents. Eisinger testified that he was familiar with the article, but that he believed the article "contradict[ed] itself." On redirect, the defense introduced the article into evidence. Eisinger testified that he believed the article "impl[ied]" that

hymenal injuries had completely healed, leaving no evidence of trauma, in 100% of the prepubertal girls examined.

¶ 20 The defense rested and, in rebuttal, the State called Dr. Raymond Davis, a pediatrician at Rockford Health System and a professor at the University of Illinois, College of Medicine. With respect to S.S.'s exam, Davis explained that there may be "no physical findings" on a young girl who is sexually active or has been sexually abused. Davis opined that there were two possible explanations for this result. First, there may have been no noticeable physical evidence of sexual penetration, which can occur without necessarily resulting in an injury to the hymen. The likelihood of this scenario is increased when sexual penetration takes place after a young girl begins puberty, around age 10, when the hymen becomes "estrogenized" and is significantly thickened. Second, physical evidence of sexual penetration may have healed. The likelihood of this scenario increases when the physical exam, and in particular the hymenal exam, occurs weeks or even years after the assault. Thus, a young girl that "was sexually abused may have a completely normal exam."

¶ 21 Davis also opined that he did not believe the McCann article was internally inconsistent as Dr. Eisinger did, although perhaps one of the statements in the article was inartfully worded. Davis explained that a study noted in the McCann article was conducted to determine how long hymenal injuries remained visible following penetration: the average was seven to ten days. According to Davis, the article reported that 59% of those studied had a completely smooth, scalloped-edged hymen and 88% "had a continuous contour" to the hymen. In passing, Davis referenced the 1994 "It's Normal to be Normal" article, mentioned earlier by nurse Thompson. Davis credited the article with generating interest in the field of hymenal injuries. Davis then referred to an article by Dr. Nancy Kellogg from 2004. According to Davis, Kellogg conducted a

study of 36 pregnant adolescents, ages 12 through 18 who had been referred to a sexual assault program; 34 of the 36 had normal exams and no "remaining notches or clefts *** or transections that would indicate[ ] a penetrating injury."

¶ 22 Finally, Davis noted another article by Dr. Kellogg from 2009. According to Davis, this was the first study that examined children who had been chronically sexually abused over a long period of time. Again according to Davis, 87% of the children had normal evaluations, "[s]o you would expect [to see signs of sexual trauma] maybe at most 13 percent [of the time]." Davis also stated that out of "a group of 22 teenagers that were *** sexually active besides being sexually abused" only one, or 4% of those examined, "had an abnormal hymenal examination." Then, Davis said that there was another study in the same article in which:

> "Out of the 53 girls—let's see ***. There were 53 girls that were actually [*sic*] had repeated sexual abuse, repeated sexual penetration greater than a year, over the course of a year. And out of those 53 girls, only 7 or [13%] had any findings that were indicative of a penetrating injury."

¶ 23 On cross-examination, Davis acknowledged that a conclusive finding of sexual abuse in a child is most likely when the child's physical exam is proximate to an acute sexual injury or sperm is present, or the child is pregnant or has a sexually transmitted disease.

¶ 24 The parties rested. At closing argument, the State asserted that S.S. had testified credibly; defendant argued that S.S. was not credible. The jury found defendant guilty on all charges. Defendant filed a motion for new trial. Subsequently, he discharged his trial attorney, hired new counsel, and filed a second posttrial motion, which alleged that his trial counsel was ineffective. A hearing was held on defendant's motion at which defendant, his mother Boria Blankenship, and his former trial counsel, Francis Martinez, all testified. After the hearing, the trial court

denied defendant's posttrial motion. The trial court sentenced defendant to three consecutive 12-year terms for each offense, or an aggregate 36-year term of imprisonment. The court denied defendant's postsentencing motion and defendant timely appealed.

¶ 25 II. ANALYSIS

¶ 26 We address defendant's contentions in turn, beginning with the sufficiency of the evidence.

¶ 27 Defendant's first contention is that the State's evidence was insufficient to prove each of the three charges beyond a reasonable doubt. He argues that S.S.'s testimony was unconvincing and that it "defies reality" that defendant, a grown man, could have sexually penetrated S.S. because her hymen remained "intact" and she did not notice any bleeding. Defendant also notes that S.S.'s outcry statement was not prompt and that she did not express any fear of defendant.

¶ 28 When a defendant challenges the sufficiency of the evidence, it is not the function of this court to retry him or her. *People v. Collins*, 106 Ill. 2d 237, 261 (1985) (adopting *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). Rather, we ask, taking *all* of the evidence, be it direct or circumstantial, in the light most favorable to the prosecution, whether *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* In making this determination, we will not substitute our judgment for that of the trier of fact, "who is responsible for weighing the evidence, assessing the credibility of witnesses, resolving conflicts in the evidence, and drawing reasonable inferences and conclusions from the evidence." *People v. Betance-Lopez*, 2015 IL App (2d) 130521, ¶ 40. We will reverse a conviction on grounds of insufficiency only if the evidence was "so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt." *Collins*, 106 Ill. 2d at 261.

¶ 29 All three counts in this case charged defendant with predatory criminal sexual assault of a child under section 12-14.1(a)(1) of the Criminal Code of 1961 (the Code) (720 ILCS 5/12-14.1(a)(1) (West 2006)). That section required the State to prove that defendant was 17 years of age or older and committed an act of sexual penetration with S.S., and that S.S. was under 13 years of age when the act was committed. See *id*. Defendant does not dispute the evidence concerning the ages—that S.S. was under 13 at the time of the charged offenses, and that he, born in 1970, was over the age of 17 at the time of S.S.'s tenth birthday in 2008. We turn then to the element of sexual penetration, which defendant does dispute.

¶ 30 The Code defines "sexual penetration," in pertinent part, as "any contact, however slight, between the sex organ or anus of one person by an object, the sex organ, mouth or anus of another person." (Emphasis added.) 720 ILCS 5/12-12(f) (West 2010). Whether sexual penetration occurred is a question of fact to be determined by the jury. *People v. Hillier*, 392 Ill. App. 3d 66, 69 (2009), *aff'd*, 237 Ill. 2d 539 (2010).

¶ 31 We conclude that a rational jury could have determined the State's evidence was sufficient to prove defendant committed sexual penetration of S.S. as charged beyond a reasonable doubt. Consistent with the charges and the State's theory of the case, S.S. described an instance of sexual penetration by defendant that occurred when she was 10 years old, an instance of sexual penetration by defendant that occurred when she was 11 years old, and an instance of sexual penetration by defendant that occurred when she was 12 years old. In all, S.S. testified that defendant placed his penis in her vagina more than 20 times. S.S. explained that it hurt each time defendant placed his penis in her vagina. She also testified that defendant's pubic area was shaved, a detail corroborated by Melissa. We note that the jury may reasonably conclude that an act of sexual penetration occurred based solely on the victim's testimony. *E.g.*,

Hillier, 392 Ill. App. 3d at 69 (affirming defendant's PCSA conviction based on victim's testimony concerning penetration); see also *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009) (noting that under the *Jackson-Collins* standard, "It remains the firm holding of this court that the testimony of a single witness, if positive and credible, is sufficient to convict, even though it is contradicted by the defendant").

¶ 32 Defendant asserts that we should reverse his conviction based upon his belief that it is unreasonable for S.S.'s hymen to be considered "normal" in light of her testimony concerning defendant's sexual penetration of her vagina. According to defendant, "[i]t defies reality—indeed all probabilities—that a grown man would forcibly penetrate a young girl's vagina dozens of times over the course of three years to the point where she admits [it] hurt each time, but her hymen is still intact and her genitalia show absolutely no evidence of sexual activity." Defendant emphasizes that S.S.'s testimony that she was sexually assaulted is inconsistent with her testimony that she "never bled," nor promptly reported defendant's abuse, nor showed any of the "classic indicia of sexual abuse" such as acting out in school, acting withdrawn, or acting seductively. Finally, defendant cites *People v. DuPree*, 161 Ill. App. 3d 951 (1987), and *People v. Rodriguez*, 58 Ill. App. 3d 775 (1978), for the proposition that S.S.'s testimony required additional corroboration or was subject to heightened scrutiny because this was a sexual abuse case.

¶ 33 As the State rightly points out, defendant's arguments are untenable under our standard of review. First, defendant's citations to *DuPree* and *Rodriguez* are inapposite because those cases predate the widespread adoption of the *Jackson-Collins* standard of reasonable doubt, as well as the abolition of the corroboration requirement in sex-offense cases. See *People v. Schott*, 145 Ill. 2d 188, 199 (1991) (calling the corroboration requirement "arbitrary, sexist, and inconsistent

with [*Collins*]") (internal quotation marks omitted). As we have recently stated, it is improper for a criminal defendant to attempt to rely on a sufficiency-of-the-evidence standard that has not been viable for at least 25 years. *People v. McCullough*, 2015 IL App (2d) 121364, ¶ 98 (quoting *People v. Pintos*, 133 Ill. 2d 286, 291 (1989)). So too with the corroboration requirement. We, therefore, apply the *Jackson-Collins* standard, which applies " 'in *all* criminal cases' " (emphasis added), including sex crimes, regardless of " 'whether the evidence is direct or circumstantial.' " *Id.* Under this standard, the victim's testimony did not require corroborative evidence and that defendant's convictions could be sustained on the victim's testimony alone. See *Siguenza-Brito*, 235 Ill. 2d at 228.

¶ 34 In addition, we decline to find S.S.'s testimony concerning her sexual penetration by defendant to have been improbable or unsatisfactory. As the State also correctly notes, the statutory definition of sexual penetration—*i.e.*, "any contact" with the victim's sex organ "however slight"—does not require proof of significant vaginal penetration or of hymenal perforation. See *People v. Moore*, 199 Ill. App. 3d 747, 773 (1990) ("Defendant repeatedly argued at trial that without evidence of trauma to the victim's vaginal area, and because her hymen was intact, there could have been no penetration. However, it is clear that the statutory definition does not require physical penetration but merely requires contact"). Consequently, we are not required to speculate, as defendant does, regarding the likelihood of trauma to the victim's genitals, or whether such trauma would be noticeable three years later. See *People v. Raymond*, 404 Ill. App. 3d 1028, 1040 (2010) ("the lack of *** trauma to the victim's genitals is not dispositive of the issue of penetration"). Moreover, we note that defendant's expert witness, Dr. Eisinger, testified that hymenal examinations and determinations regarding sexual activity are "not rigorous science."

¶ 35 Finally, we reject defendant's line of argument concerning S.S.'s behavior, that the lack of a prompt outcry to her mother and the absence of testimony that defendant "threatened" her rendered her testimony incredible. The jury quite reasonably could have credited S.S.'s testimony that she did not make an earlier outcry because to have done so would have prevented her younger sisters from seeing their father—a threat to S.S. and her family in its own right. All of this was argued to the jury and we find nothing unreasonable in the jury's decision to credit S.S.'s clear and unwavering testimony regarding the three charged assaults. See *Siguenza-Brito*, 235 Ill. 2d at 228 ("[a] reviewing court will not reverse a conviction simply because the evidence is contradictory or because the defendant claims that a witness was not credible"). Therefore, we determine that it was not unreasonable for the jury to conclude that the State's evidence was sufficient on all three counts beyond a reasonable doubt.

¶ 36 Having rejected defendant's sufficiency-of-the-evidence arguments, we now turn to his first claim of trial error. Defendant argues that his attorney was ineffective for failing to impeach the testimony of S.S.'s mother, Melissa. According to defendant, his trial counsel should have cross-examined Melissa concerning statements she made about defendant, which were overheard by her coworker, Dawn Smith. Further, defendant argues that if Melissa denied making the statements, counsel should have called Smith to testify. Again, per defendant's offer of proof, Smith would testify that she overheard Melissa say that she needed to "get[ ]" defendant and that she "needed [defendant] to be in jail." Defendant claims that this testimony regarding Melissa, however elicited, would have shown that S.S.'s "story" concerning the assaults "was a fabrication." We disagree.

¶ 37 As defendant notes, we apply the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), to determine whether his trial counsel rendered ineffective assistance. Under the

Strickland test, a defendant must show that both (1) counsel's performance was professionally unreasonable and (2) but for the error, there is a reasonable probability that the outcome of the proceedings would have been different. *Strickland*, 466 U.S. at 689-94. Further, in order to establish deficient performance, the defendant must overcome the strong presumption that the challenged action or inaction may have been the product of sound trial strategy. *People v. Manning*, 241 Ill. 2d 319, 327 (2011). Since both prongs of the *Strickland* test must be met, the failure to satisfy either prong precludes a finding of ineffective assistance of counsel. *People v. Theis*, 2011 IL App (2d) 091080, ¶ 39.

¶ 38 The decision whether to impeach a witness is generally considered a matter of sound trial strategy, and failure to impeach a witness is therefore not objectively unreasonable. See *People v. Ward*, 187 Ill. 2d 249, 261-62 (1999) (decisions of what evidence to present are matters of trial strategy and therefore normally immune from claims of ineffective assistance). We note that it would have been improper collateral impeachment for defendant's counsel to attempt to impeach *Melissa* with a showing of her bias for the speculative purpose of showing *S.S.'s* disposition toward defendant. See *People v. Rivera*, 145 Ill. App. 3d 609, 622 (1986) ("The fact that a party may explore a witness's bias, however, is not a license to engage in speculative attacks on that witness; the facts must be within the witness's knowledge, and cannot be so remote as to be mere conjecture"). Moreover, defendant concedes that, apart from their mother-daughter relationship, he has no specific evidence that would connect Melissa's bias against defendant to S.S. Therefore, we determine that defendant has failed to overcome the strong presumption that the counsel's failure to impeach Melissa was objectively reasonable trial strategy. See *Ward*, 187 Ill. 2d at 261-62.

¶ 39 Defendant's next argues that his trial counsel was ineffective for failing to object to Dr. Davis's testimony concerning the healing of hymenal injuries as inadmissible on grounds that it was irrelevant, lacked an adequate foundation, and had not been subjected to an evidentiary hearing under *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923) ("*Frye* hearing") in an Illinois court. As with the previous issue, counsel's failure to object to Davis's trial testimony was also a matter of trial strategy, which will typically not support a claim of deficient performance or ineffective representation. See *People v. Graham*, 206 Ill.2d 465, 478-79 (2003); *Ward*, 187 Ill. 2d 249, 261-62. That said, we note that none of the bases defendant offers for excluding Davis's testimony has merit. First, Davis's testimony was relevant to explain a fact at issue (see Ill. R. Evid. 401 (eff. Jan. 1, 2011)); *i.e.*, why Thompson's physical examination of S.S. could not exclude sexual abuse. Second, there was a proper foundation laid for Davis to testify concerning general explanations of relevant principles in the field. See *People v. Harmon*, 2013 IL App (2d) 120439, ¶ 42. Third and finally, defendant has not shown that the substance of Davis's testimony was new or novel, or further that it relied on principles that are not generally accepted in the relevant field, so as to warrant a *Frye* hearing. *Cf. In re Detention of New*, 2014 IL 116306, ¶¶ 33-39 (where defendant submitted nine articles tending to show significant disagreement in the psychiatric community as to whether a new psychiatric diagnosis was a sufficiently distinct mental condition). Therefore, because defendant has not shown that Davis's testimony was inadmissible, we reject defendant's contention that his trial counsel was ineffective for failing to object to it.

¶ 40 Next, defendant argues that his attorney was ineffective for failing to move for a mistrial after prospective-juror Bachta voiced a positive opinion on the credibility of Dr. Davis during *voir dire* before she was excluded for cause. In addition, defendant asserts that the jury was so

"irreparably corrupted" with Bachta's view of Davis that the trial court erred by not declaring a mistrial *sua sponte*. To prevail on his ineffective-assistance claim, defendant must show that had counsel moved for a mistrial, there was a reasonable probability that the motion would have been granted. See *People v. White*, 2011 IL App (1st) 092852, ¶ 76. Here, we dispose of defendant's ineffective-assistance argument under the prejudice prong because the success of such a motion would have been highly improbable. See *People v. Ivy*, 313 Ill. App. 3d 1011, 1018 (2000) ("[a]n attorney is not required to make futile motions to avoid charges of ineffective assistance of counsel").

¶ 41 Mistrials are rare, and occur only in instances of "manifest necessity"—*i.e.*, when a grave error "has infected the fundamental fairness of the trial, such that continuation of the proceeding would defeat the ends of justice." *People v. Bishop*, 218 Ill. 2d 232, 251 (2006); accord. *Illinois v. Somerville*, 410 U.S. 458, 464 (1973). A mistrial based on improper comments during jury selection should be declared only when it appears the jurors have been prejudiced to such an extent that they would not, or could not, be fair and impartial despite the court's admonitions and instructions. *People v. Clark*, 231 Ill. App. 3d 571, 574-75 (1992); see generally *People v. Cosmano*, 2011 IL App (1st) 101196, ¶ 119. This is plainly not such a case. The questioning of prospective juror Bachta was brief, consuming less than two transcribed pages out of approximately 260 pages of jury selection. Moreover, the substance of her comments was not so prejudicial that they would have interfered with the jurors' ability to fairly and impartially discharge their responsibility. In *Clark*, for example, the appellate court determined that the trial court correctly denied the defendant's motion for a mistrial where one of the prospective jurors, a police officer, stated that he could not be fair and impartial because he knew the defendant. *Clark*, 231 Ill. App. 3d at 573. Subsequently, two other potential jurors stated that they were

affected by the officer's assessment of the defendant, and were excluded. *Id*. The potential prejudice to defendant in this case, if any, was considerably less than what occurred in *Clark*. Accordingly, we determine that counsel was not ineffective for not seeking a mistrial and that there was no manifest necessity for the trial court to have declared a mistrial *sua sponte*.

¶ 42 Moreover, we express our continued skepticism of "the proposition that answers given by excluded veniremen during *voir dire* are items that improperly influence a jury." *People v. Torres*, 198 Ill. App. 3d 1066, 1073 (1990). In *People v. Nelson*, 235 Ill. 2d 386 (2009), our supreme court noted that misconduct by a *seated* juror is ordinarily cured by removing that juror from service prior to deliberations. *Id*. at 448. We know of no authority, and defendant cites none, for the proposition that the remedy of excluding a *prospective* juror is insufficient to redress whatever comments that prospective juror may have made before the venire. *Cf. People v. Del Vecchio*, 105 Ill. 2d 414, 429 (1985) (holding that trial court correctly exercised its discretion in a capital case by excluding prospective jurors who were aware of facts of the case through news stories).

¶ 43 Next, defendant contends that he was deprived of his constitutional right to an impartial jury when his trial counsel did not object to the State's questions to prospective jurors during *voir dire*. See U.S. Const. amend. VI; Ill. Const. 1970 art I., § 8. Defendant alleges that the State impermissibly used these questions to indoctrinate the venire. But the nature of defendant's argument is unclear. Defendant states that we should apply the same standard of review as his previous argument, presumably referring to the *Strickland* test as well as his *sua-sponte*-mistrial claim, but he also states that we should review this claim *de novo*. Failure-to-object claims are typically reviewed under *Strickland*, but in the related context of *Batson* claims (*Batson v. Kentucky*, 476 U.S. 79 (1986)), we review the trial court's actions as they pertain to the fairness

of the jury's composition *de novo*. See *People v. Rivera*, 227 Ill. 2d 1, 12 (2007) *aff'd sub nom. Rivera v. Illinois*, 556 U.S. 148 (2009). Under either standard of review, however, the result is the same. As our supreme court has said, both standards turn on whether the defendant can make a plausible showing of prejudicial error (*People v. White*, 2011 IL 109689, ¶ 134), and here, we find none.

¶ 44 Whether *voir dire* questions served to examine or impermissibly indoctrinate prospective jurors is not measured by a bright-line test, but on a continuum. *People v. Rinehart*, 2012 IL 111719, ¶ 17. Broad questions, such as whether a juror would be disinclined to find the defendant guilty based on circumstantial evidence, are permissible. *Id*. So, too, are questions that ask whether jurors could "think of some reasons why a sexual assault victim might not automatically come forward?" *Id*. ¶ 5. But pointed questions that both muddle the law and improperly preview the prosecution's case—such as asking jurors if they agree that "when you set up an armed robbery with other people and you get guns and masks and things you can be found responsible for the crime even though somebody else is the one who actually did the shooting?"—are flatly unacceptable. *People v. Mapp*, 283 Ill. App. 3d 979, 989 (1996).

¶ 45 In the case before us, the State asked prospective jurors whether they agreed that testifying "before a courtroom full of strangers *** would make a person nervous" and whether it was possible "to be nervous and [to] still be telling the truth?" Contrary to defendant's argument, these were not questions so prejudicial that they would cause jurors to ignore the trial court's instruction that they alone were the judges of a witness's believability. Ill. Pattern Jury Instructions-IPI Criminal 4th-No. 1.02. We determine that these questions are more like those found acceptable in *Rinehart—e.g.* "Can you think of some reasons why a sexual assault victim might not immediately report that? *** Can you tell me what some of those reasons would be?"

Rinehart, 2012 IL 111719, ¶ 5. In making this determination, we emphasize that here, too, the subject of a witness's potential nervousness "could have been raised more artfully" and perhaps phrased in terms of a venire member's bias or ability to put that bias aside. *Id.* ¶ 21. However, like the supreme court in *Rinehart*, we can say that the trial court did not err here, and we further cannot say that defendant's counsel was ineffective because defendant suffered no prejudice from the State's questions.

¶ 46 Next, defendant argues that his trial attorney was ineffective for failing to present an alibi defense on defendant's behalf. The indictment alleged that defendant committed one sex act per year with S.S., and span a three-year period from February 2006 to February 2009. Defendant notes that at his posttrial hearing, his mother, Boria Blankenship, testified that, prior to defendant's trial, she told attorney Martinez that defendant had lived with her in Rockford, and not with Melissa, for the majority of 2006, and all of 2008. Defendant's testimony at his posttrial hearing tended to corroborate his mother's account. Defendant also refers to a July 2007 police report, a copy of which has been appended to his appellate brief, which indicates that Melissa reported defendant's address as different from her own; however, we cannot consider the copy of the police report appended to defendant's appellate brief, as it is not part of the record and properly before this court. See *People v. Gacho*, 122 Ill. 2d 221, 254 (1988). Regardless, we find defendant's reliance on his and Blankenship's testimony unpersuasive.

¶ 47 Once again, defendant's trial counsel was not required to advance a futile position (*Ivy*, 313 Ill. App. 3d 1018), and, on this evidence, that is precisely what defendant's alibi defense would have been. "To establish an alibi, the accused must show that he was at another specified place at the time the crime was committed, thus making it *impossible* for him to have been at the scene of the crime." (Emphasis added.) *People v. Fritz*, 84 Ill. 2d 72, 76-77 (1981). A

defendant's putative alibi must cover "the whole time" of the commission of the crime; else it is not a viable alibi at all. *Id*. at 76; see, *e.g.*, *People v. Burton*, 201 Ill. App. 3d 116, 122 (1990) (finding no prejudice where defendant argued he "had a possible alibi" for some period of time during 33-month range charged in sexual assault indictment). Here, defendant's and Blankenship's testimony would not have established an alibi for defendant for any of the charges. We note that Blankenship was unlikely to have been a compelling witness for, in addition to being defendant's mother, she was unable to recall whether she had testified at defendant's trial a few months earlier, which she did not. See *People v. Smith*, 185 Ill. 2d 532, 544 (1999) (statements of witnesses and their relatives who have something to gain by providing false exculpatory testimony are self-serving and highly suspect). Defendant's own statements were also self serving. At any rate, taking Blankenship's and defendant's testimony as true, even if defendant resided with his mother for *all* of the time specified in the indictment, it would not have been impossible for defendant to have committed any of the offenses as charged. *Cf. Fritz*, 84 Ill. 2d at 76-77. Accordingly, defendant suffered no prejudice from his trial attorney's decision not to pursue an incomplete, and ultimately futile, alibi defense.

¶ 48 Defendant next contends he was denied his constitutional right to testify, despite the trial court having admonished him regarding that right. Specifically, defendant argues that his trial attorney was ineffective for failing to inform him that his "waiver" of his right to testify at the beginning of the defense's case in chief was not irrevocable; *i.e.*, that he could "later change his mind" and testify before the defense rested. According to defendant, his waiver was, in his mind, conditioned on his confidence in Eisinger's testimony as well as his belief that his trial attorney would call Blankenship and Dawn Smith to testify. When Eisinger's testimony failed to live up to defendant's expectations, and Blankenship and Smith were not called, defendant "was

distraught" and "would have [testified]." According to defendant, his attorney's failure to provide him with advice concerning the "full scope" of his right to testify demonstrates that his waiver was no longer knowingly and voluntarily made.

¶ 49 We note that unlike the formal admonishment-and-waiver process that accompanies, say, the waiver of a trial by jury or the decision to plead guilty and waive a trial altoghether, there is no requirement in this state that a criminal defendant be admonished of his right to testify. *People v. Smith*, 176 Ill. 2d 217, 235 (1997). This is considered to be an area of trial strategy that is fundamental to the attorney-client relationship, and with which courts ought not interfere. *Id*. at 233-35. Here, however, defendant was admonished concerning his right to testify by the trial court and told the court, unequivocally, that he understood that right. Our supreme court has stated that, in order to knowingly and voluntarily waive this right, "all [the defendant] needed to know was that the right existed." (Internal quotation marks omitted.) *Id*. at 236. Thus, we find the trial court's on-the-record admonition to defendant sufficient to inform of the existence of his right to testify. We hasten to add that there is nothing in the record that would cause us to think defendant's statement that he understood his right to testify should not be taken at face value. *Cf. Ward v. Sternes*, 334 F.3d 696, 705-06 (7th Cir. 2003) (finding equivocal waiver insufficient by defendant who suffered from severe brain injury and dementia).

¶ 50 Finally, defendant contends that the trial court abused its discretion in sentencing him to 12-year terms on each PCSA conviction, for an aggregate 36-year term of imprisonment. The trial court has considerable discretion to sentence a criminal defendant. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). So long as the defendant's sentence is within the statutory range, we will not alter the sentence unless it was manifestly disproportionate to the nature of the offense or the court relied on an improper factor at sentencing. *People v. Hauschild*, 226 Ill. 2d 63, 90 (2007)

¶ 51 We begin by noting that, at sentencing, the trial court stated that it had considered a number of factors. It recognized that defendant had an otherwise negligible criminal history, but found that fact in mitigation was offset by the seriousness of the offense and that defendant occupied a position of trust in S.S.'s life. Under the version of the PCSA statute applicable at the time, defendant's overall sentencing range for his three PCSA convictions was between 18 and 90 years. 720 ILCS 5/12-14.1(b)(1) (West 2006) (PCSA is punishable by 6 to 30 years' imprisonment). Thus, defendant's 36-year sentence was within the low to middle range of sentences the trial court could have issued and was presumptively proper. See *Hauschild*, 226 Ill. 2d at 90.

¶ 52 Nevertheless, defendant challenges his sentence on three grounds. Although the State claims these arguments were forfeited, we find they were sufficiently preserved in defendant's postsentencing motion for our review; however, we find that they lack merit.

¶ 53 First, defendant argues that, given his age of 44 years, and that he is an African-American male with an average life expectancy of 71.8 years, his 36-year sentence was a "veritable death sentence." In support of this argument, has appended to his brief an article published by the U.S. Department of Health and Human Services concerning the life expectancy of African-American males. This argument is not well taken. For one thing, the article defendant appended to his brief was not presented to the trial court, and as we have earlier stated, we will not consider information that has been improperly included in the brief's appendix. *Supra* ¶ 46. For another, the trial court is not required to give greater weight to a defendant's age—or for that matter, his life expectancy—than to the seriousness of the offense and there is no prohibition on criminal sentences that are tantamount to life imprisonment. See *People v. Cavazos*, 2015 IL App (2d) 120444, ¶ 87; *People v. Smith*, 241 Ill. App. 3d 446, 463 (1993).

¶ 54 Second, defendant argues that the trial court abused its discretion when it "merely assumed" that S.S. suffered either psychological or physical harm. This argument, too, is not well taken for it distorts the record. Here, in the course of sentencing defendant, the court stated that it "goes without saying that *** the position the State takes [is] that an offense like this is harmful to a child." In context, the court's comments demonstrate not that it was according any particular weight at sentencing to the harm S.S. suffered, but that it merely recognized that the State had argued that S.S. had suffered harm. At any rate, it is not improper for a sentencing court to consider "the harm [that is] implicit in any sexual assault against a child." *People v. Calva*, 256 Ill. App. 3d 865, 877 (1993).

¶ 55 Third, and finally, defendant argues there was insufficient evidence of the aggravating sentencing factor that he occupied a "position of trust or supervision" over S.S. 730 ILCS 5/5-5-3.2(a)(14) (West 2012). This argument is meritless. The position-of-trust factor includes, but is not limited to teachers, scout leaders, baby sitters, day care workers, household members, and stepparents. *Id.*; 720 ILCS 5/11-0.1 (West 2012). Defendant does not dispute that he lived with Melissa and S.S., met S.S. when she was four, and is the father of S.S.'s two younger sisters. Under such circumstances, we find that the trial court appropriately applied the position-of-trust factor in aggravation. See *People v. Landis*, 229 Ill. App. 3d 128, 137 (1992).

¶ 56 III. CONCLUSION

¶ 57 For the reasons stated, we affirm defendant's convictions and sentences for PCSA. As part of our judgment, we grant the State's request and assess defendant $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2012).

¶ 58 Affirmed.