2015 IL App (4th) 130710-U

NO. 4-13-0710

FILED
August 12, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
ISAIAH M. STOKES,	)	No. 08CF352
Defendant-Appellant.	)	
	)	Honorable
	)	Charles M. Feeney,
	)	Judge Presiding.

PRESIDING JUSTICE POPE delivered the judgment of the court.
Justices Steigmann and Appleton concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in transferring defendant's case from juvenile to criminal court. Defendant was not prejudiced by his trial counsel's concession during closing argument. The trial court erred by increasing defendant's sentence on remand based on conduct for which he had already been sentenced.

¶ 2 In March 2013, defendant, Isaiah M. Stokes (born December 19, 1990), was found guilty of home invasion (720 ILCS 5/12-11(a)(2) (West 2006)) and attempt (criminal sexual assault) (720 ILCS 5/8-4 (West 2006)). On May 23, 2013, the trial court sentenced defendant to concurrent prison terms of 22 years for home invasion and 6 years for attempt (criminal sexual assault). Defendant appeals, making the following arguments: (1) his trial counsel was ineffective because he conceded defendant's guilt to home invasion during his closing argument; (2) the court erred in transferring him from juvenile court to criminal court; (3) his trial counsel was ineffective for failing to investigate and present evidence showing

defendant was eligible for placement in a residential treatment facility for juveniles; (4) the court violated section 5-5-4 of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-5-4(a) (West 2012)) by increasing his sentence on the home invasion charge from 20 years to 22 years; and (5) the court abused its discretion in imposing even a 20-year sentence for home invasion because of defendant's youth, rehabilitative potential, and mental health issues. We affirm defendant's transfer from juvenile court to criminal court and his conviction but vacate his sentence and remand with directions to reduce defendant's sentence to 20 years on the home invasion conviction.

¶ 3 I. BACKGROUND

¶ 4 On April 16, 2007, defendant pleaded guilty to a burglary charge contained in a petition for adjudication of wardship. Defendant was 16 years old. According to the factual basis for that charge, police apprehended defendant in the home of Ann Hahn on March 30, 2007. Police found a down jacket on the living room floor which contained several pairs of Hahn's daughter's underwear and a screwdriver. Hahn's daughter's bras and underwear had been scattered around her room. It also appeared someone might have ejaculated on a pillow, which was near the underpants and a picture of Hahn's daughter. Defendant was adjudicated delinquent. (The residential burglary charge was nol prossed.)

¶ 5 On May 22, 2007, defendant pleaded guilty to another burglary that occurred on March 23, 2007, also charged by way of juvenile petition. According to the factual basis for the charge, police officers stopped defendant at 2:40 a.m. after observing him drinking from a liquor bottle. Defendant possessed a hammer, a small pry bar, a shot glass, a compact disc, a lighter, women's underwear, and a photograph. Defendant also had identification belonging to Stephanie

Brown. The police contacted Brown about a burglary reported earlier that evening. She identified some of the items found on defendant as belonging to her.

¶ 6 The trial court sentenced defendant on both burglary charges. The State noted the disturbing nature and motivation for the burglaries. According to the State, Arrowhead Ranch, a juvenile facility, found defendant to be inappropriate for placement because of his history of sexually provocative behavior. The Peoria Youth Farm also declined placement for defendant because he was a flight risk and showed no insight into his current situation. Because the court found defendant's parents were unable to protect, care for, discipline, or train him and no alternative placement was appropriate, it was necessary to protect the public from the consequences of defendant's criminal activity by committing him to the Department of Juvenile Justice (DJJ). The court ordered a psychiatric evaluation and set a review hearing, which was held in August 2007. At the August hearing, the court vacated defendant's commitment and placed him on 60 months' intensive probation.

¶ 7 In January 2008, the State filed a second supplemental petition for adjudication of wardship, alleging, on or about March 1, 2007, defendant committed the following offenses: home invasion, residential burglary, attempt (criminal sexual assault), criminal trespass to a residence, and unlawful restraint. At a hearing on January 30, 2008, defense counsel noted the charged offenses allegedly occurred 11 months earlier. Defendant had been on intensive probation since his release from a DJJ facility and was doing relatively well on probation. Defense counsel asked the court to release defendant from custody so he could continue his intensive probation. The trial court ordered defendant to be detained given the nature of the charges and defendant's history.

¶ 8 That same month, the State filed a motion pursuant to section 5-805(2) of the Juvenile Court Act of 1987 (Juvenile Act) (705 ILCS 405/5-805(2) (West 2006)) for permission to prosecute defendant under the criminal laws of the state. The State alleged in the second supplemental petition defendant committed a Class X felony (home invasion). The motion also stated defendant was 17 at the time the motion was filed and was 16 at the time of the home invasion.

¶ 9 In February 2008, the State filed a third supplemental petition and motion to prosecute defendant as an adult. At a hearing that month, Bloomington police officer Richard Hirsch testified he was dispatched to 1510 Sigma Street in Bloomington on March 1, 2007, and made contact with Janet Wendt. Wendt told him she woke up and saw a dark shape near her bed. She reached to touch the object, and a man jumped on top of her. She tried to fight and scream, but the man grabbed a pillow and put it over her head. She told the man she had a heart condition and could not breathe. After the suspect took the pillow off of her face, she asked what he wanted and he replied, "sex." He also mentioned he had seen Wendt's daughter in another bedroom. Wendt was able to get free and ran to check on her daughter. When she came out of her daughter's room, the suspect was in the living room. The suspect identified himself as Lieutenant Banks and gave her wallet back to her, asked if she was okay, opened the front door without gloves, and walked out of the residence. She described the suspect as black and a little taller than her. Wendt told Kirsch she had her front porch light on, but the officer noted the light had been tampered with and was not working.

¶ 10 Bloomington police department detective Robert Kosack testified he met with Wendt and her neighbor, Ann Hahn, on April 3, 2007, about the home invasion. He spoke with

Hahn first. Hahn told him she had been having a series of break-ins at her trailer. Hahn stated her outside lightbulb had been removed from the light socket.

¶ 11 Kosack met with defendant on January 28, 2008, and defendant went with the detective to the police department. Kosack advised defendant of his *Miranda* rights (*Miranda v. Arizona*, 384 U.S. 436 (1966)), and they started talking about the break-in at Wendt's home. Defendant said he had been in Wendt's home on at least two occasions. On March 1, 2007, he entered the home sometime around midnight or 1 a.m. He walked around the residence for approximately 15 minutes before he went to the back bedroom, where a woman was sleeping. He bumped into a lamp, and the woman woke up. He jumped on the woman and put a pillow over her face to make her quiet because she was alarmed. The woman began screaming, kicking, and swinging her arms. He held her down for four or five minutes. She eventually calmed down, and he let her up. They had a short conversation, and he left through the front door. Defendant said he might have blurted out that he wanted sex, but that was not what he meant to say. Defendant said he was attempting to explain to Wendt he did not want sex.

¶ 12 The juvenile court found the State had introduced sufficient evidence to establish probable cause. The burden then shifted to defendant to rebut the presumption he should be transferred to criminal court. Rebecca Lawson, an intensive probation officer for McLean County, who had worked with defendant for around seven months, testified defendant had done well on probation for the offenses that had occurred after the alleged assault on Wendt. Prior to being detained for the incident involving Wendt, defendant was enrolled at the Regional Alternative School, had not missed a day, and was receiving passing grades. Defendant was working part-time at Arby's. Prior to being detained, he was taking Ritalin and Prozac. According to Lawson, things seemed to be going well for defendant. Defendant had not tested

positive for any illegal substances while on intensive probation. Lawson testified defendant's services would be reinitiated if he was released back into the community. She assumed he and his family would be cooperative with those services.

¶ 13 On cross-examination, Lawson testified the prior recommendations made for defendant were based on the offenses for which he had been adjudicated and not the incident involving Wendt. However, Lawson noted, "[w]e knew that he was a potential suspect" in that break-in. Lawson also testified defendant had gone through the Mental Health Juvenile Justice Initiative.

¶ 14 Carole Vern Buerkett, defendant's adoptive mother, testified her family and defendant were involved in Project Oz. According to Buerkett:

> "We were working with him to be more accountable and not slide by and think he's, you know, a cool kid or something at home especially. He seemed to do very well when Miss Lawson would say, you know, that's enough, and he would pull himself up and, you know, family things, accountability to the family, accountability to our neighbors, that kind of stuff[.]"

Buerkett testified defendant could continue his counseling with Project Oz if he was able to come back to the community.

¶ 15 Buerkett also testified defendant was doing well in school. She testified the principal said defendant was well liked and missed at school. Defendant had not missed a day of school before he was taken into custody. He was working at Arby's and his drug drops had come back clean. After his release from the juvenile detention center, she took defendant to the doctor, who prescribed Prozac for depression and Ritalin for impulse control. Buerkett testified:

"The other judge, whom I don't know his name, I believe he was lenient with [defendant]. But [defendant] performed, and I believe [defendant] showed that he can change and that he could grow up; and I believe the services have helped him. I know it's costly, but I think it's truly helped him mature; and I think he could be a benefit to society if he could continue."

¶ 16 The trial court noted it was required to consider the factors found in section 805(2)(b) of the Juvenile Act (705 ILCS 5/805(2)(b) (West 2006)) and determine whether defendant had presented clear and convincing evidence he "would be amenable to the care, treatment and training programs available through the facilities of the juvenile court." The court noted:

"The advantages to treatment within the juvenile justice system, well, my awareness of the treatment options in the juvenile justice system versus what would occur if the minor was adjudicated or found guilty in the criminal adult system are there is treatment available in the juvenile justice system. I'm—I am not clear on whether residential facilities would be willing to take this minor for an additional adjudication where there is evidence of violence and possible or potential sexual aggression indicated at least from the testimony the court heard from the victim. So I doubt whether there would be—I have serious doubts as to whether there would be any residential facility willing to take the minor

with an additional adjudication of a serious felony offense when they were unwilling to do so six months earlier.

And I am well aware that there is no treatment available in the adult court Department of Corrections. And the court is to consider the security of the public as well. And I recognize the minor while on probation had begun accepting the services through the juvenile court services office. And I am loath to place a minor in adult court who may benefit from services from a juvenile court system, but I just cannot find that the minor has met that requirement of clear and convincing evidence that maintaining the prosecution in the juvenile court would be appropriate, so I have to grant the State's petition."

¶ 17 In April 2008, defendant appealed the transfer of his case to adult court. In July 2008, the appellate court dismissed defendant's appeal on his motion. In March 2008, the State charged defendant with home invasion (720 ILCS 5/12-11(a)(2) (West 2006)), residential burglary (720 ILCS 5/19-3(a) (West 2006)), attempt (criminal sexual assault) (720 ILCS 5/8-4 (West 2006)), criminal trespass to a residence (720 ILCS 5/19-4(a)(2) (West 2006)), and unlawful restraint (720 ILCS 5/10-3 (West 2006)). In April 2008, a grand jury indicted defendant on these same charges.

¶ 18 A stipulated bench trial was held in November 2008 before Judge Charles Reynard. The State nol prossed three charges. The trial court found defendant guilty of home invasion and attempt (criminal sexual assault). In May 2009, the court sentenced defendant to

concurrent sentences of 20 years for home invasion and 6 years for attempt (criminal sexual assault). Defendant appealed.

¶ 19 This court reversed defendant's conviction because the trial court failed to properly admonish defendant pursuant to Illinois Supreme Court Rule 402 (eff. July 1, 1997) prior to his stipulated bench trial and remanded the case for further proceedings. *People v. Stokes*, 2012 IL App (4th) 100754-U, ¶¶ 27-28. According to this court, "The trial court should have admonished defendant pursuant to Rule 402 because his stipulated bench trial was in essence a guilty plea as his counsel stipulated to the State's entire case and offered no defense." *Id.* ¶ 24.

¶ 20 On March 14, 2013, defendant was retried in a bench trial on the home invasion and attempt (criminal sexual assault) charges before Judge Charles Feeney. The trial court entered a written order finding defendant guilty of both home invasion and attempt (criminal sexual assault). On May 23, 2013, the court sentenced defendant to concurrent sentences of 22 years for home invasion and 6 years for attempt (criminal sexual assault). In July 2013, the court denied defendant's motion to reconsider the sentence.

¶ 21 This appeal followed.

¶ 22 II. ANALYSIS

¶ 23 A. Transfer to Adult Criminal Court

¶ 24 We first address defendant's argument the trial court erred in transferring his case to adult court. We will only disturb a trial court's decision to transfer a juvenile to adult court if the trial court abused its discretion. *People v. Morgan*, 197 Ill. 2d 404, 422-23, 758 N.E.2d 813, 824 (2001).

¶ 25 The State petitioned and the trial court transferred the case to adult criminal court pursuant to section 5-805(2) of the Juvenile Act (705 ILCS 405/5-805(2) (West 2006)). Under section 5-805(2) of the Juvenile Act, at any time prior to the commencement of a minor's trial, the State can petition the juvenile court to permit prosecution of the minor under the criminal law if the petition alleges the commission of certain enumerated offenses by a minor who is 15 years of age or older. *Id.* In its petition, the State alleged defendant committed a Class X offense (home invasion) and was 17 years of age (16 when the alleged the home invasion occurred).

¶ 26 Defendant does not challenge his eligibility for transfer to adult court. Instead, defendant bases his argument on section 5-805(2)(b) of the Juvenile Act (705 ILCS 405/5-805(2)(b) (West 2006)). According to defendant, before a juvenile can be transferred to adult court, the juvenile court must consider the factors contained within subsection (2)(b), which include "the advantages of treatment within the juvenile justice system including whether there are facilities or programs, or both, particularly available in the juvenile system." *Id.* Defendant argues the record shows the trial court transferred him without considering placing him in the DJJ. Defendant contends we should remand this case for a new transfer hearing.

¶ 27 Defendant focuses on one small component of section 5-805(2)(b). This subsection reads in its entirety:

> "(b) The judge shall enter an order permitting prosecution under the criminal laws of Illinois unless the judge makes a finding based on clear and convincing evidence that the minor would be amenable to the care, treatment, and training programs available through the facilities of the juvenile court based on an evaluation of the following:

(i) the age of the minor;

(ii) the history of the minor, including:

(a) any previous delinquent or criminal history of the minor,

(b) any previous abuse or neglect history of the minor, and

(c) any mental health, physical or educational history of the minor or combination of these factors;

(iii) the circumstances of the offense, including:

(a) the seriousness of the offense,

(b) whether the minor is charged through accountability,

(c) whether there is evidence the offense was committed in an aggressive and premeditated manner,

(d) whether there is evidence the offense caused serious bodily harm,

(e) whether there is evidence the minor possessed a deadly weapon;

(iv) the advantages of treatment within the juvenile justice system including whether there are facilities or programs, or both, particularly available in the juvenile system;

(v) whether the security of the public requires sentencing under Chapter V of the Unified Code of Corrections:

(a) the minor's history of services, including the minor's willingness to participate meaningfully in available services;

(b) whether there is a reasonable likelihood that the minor can be rehabilitated before the expiration of the juvenile court's jurisdiction;

(c) the adequacy of the punishment or services.

In considering these factors, the court shall give greater weight to the seriousness of the alleged offense and the minor's prior record of delinquency than to the other factors listed in this subsection." (Emphasis added.) *Id.*

¶ 28 Although defendant failed to raise this issue in a posttrial motion, he argues the error should be reviewed under the second prong of plain error analysis because the error implicated the integrity of the judicial process. *People v. Piatkowski*, 225 Ill. 2d 551, 565, 820 N.E.2d 403, 410-11 (2007); Ill. S. Ct. Rule 615(a) (eff. Jan. 1, 1967). Regardless of forfeiture, we do not find the trial court erred.

¶ 29 According to defendant, the record does not indicate the trial court considered placing him at the Illinois Youth Center at Kewanee (Kewanee). The trial court was presented with no evidence regarding Kewanee. It is difficult to find the court erred in failing to consider evidence that was not presented to it.

¶ 30 The trial court did not make a rash decision to transfer defendant to adult court. While the court did not specifically consider Kewanee, it did note two residential facilities had denied defendant placement months earlier. Further, the court noted the possible advantages of

treatment in the juvenile justice system. As the court stated, "I am loath to place a minor in adult court who may benefit from services from a juvenile court system, but I just cannot find that the minor has met that requirement of clear and convincing evidence that maintaining the prosecution in the juvenile court would be appropriate."

¶ 31 Based on the evidence before the trial court, we do not find it erred in transferring defendant to adult court. The statute makes clear the court is to "give greater weight to the seriousness of the alleged offense and the minor's prior record of delinquency" as opposed to the other factors found in subsection 5-805(2)(b). 705 ILCS 405/5-805(2)(b) (West 2006). The alleged offense in this case was very serious. Defendant had been accused of unlawfully entering someone's home in the middle of the night and then attempting to sexually assault one of the residents. Further, this was not defendant's only serious offense. Defendant had already been adjudicated delinquent for two other burglaries, which occurred after the alleged home invasion and attempted sexual assault at issue here.

¶ 32 B. Ineffective Assistance of Counsel (Transfer to Adult Court)

¶ 33 Defendant next argues his trial counsel was ineffective because he failed to investigate and present evidence to show defendant was eligible for placement in a residential treatment facility instead of being transferred to adult court. A defendant is denied his right to the effective assistance of counsel if counsel's performance falls below an objective standard of reasonableness and the defendant is prejudiced as a result of the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *People v. Albanese*, 104 Ill. 2d 504, 526, 473 N.E.2d 1246, 1255 (1984).

¶ 34 Citing *People v. Beltran*, 327 Ill. App. 3d 685, 691, 765 N.E.2d 1071, 1076 (2d Dist. 2002), defendant argues section 5-805(2) of the Juvenile Act (705 ILCS 405/5-805(2)

(West 2008)) "invokes a mandatory, rebuttable presumption on the defendant to present evidence he should remain in juvenile court." According to defendant, his trial counsel had a duty to present evidence that he should remain in juvenile court.

¶ 35 Defense counsel presented evidence in support of defendant remaining in juvenile court instead of being transferred to adult court. Counsel demonstrated this offense occurred prior to the two break-ins for which defendant had previously been adjudicated. Further, the State knew defendant was a suspect in this burglary when it was proceeding with those earlier adjudications. Defendant had already been sent to DJJ as a result of those adjudications and had been released. According to testimony from [his probation officer], defendant had been doing well on probation. Defendant's adoptive mother also testified defendant was doing better since his release from DJJ.

¶ 36 It appears defense counsel's strategy was to show how well defendant was doing since his release from the DJJ facility while on intensive probation. This evidence related to whether the security of the public required sentencing defendant under Chapter V of the Unified Code (705 ILCS 405/5-805(2)(b)(v) (West 2006)). This was a viable strategy considering the probation officer's and defendant's mother's testimony. An attorney's strategic decisions are entitled to deference. *Strickland*, 466 U.S. at 689.

¶ 37 As for defendant's complaint his trial counsel was ineffective with regard to investigating residential facilities and the DJJ facility in Kewanee, the record in this case is not sufficient for this court to properly evaluate this claim. See *People v. Durgan*, 346 Ill. App. 3d 1121, 1143, 806 N.E.2d 1233, 1250 (2004). As the State points out in its brief, defense counsel might have investigated the residential facilities and the DJJ facility. Two residential facilities had rejected defendant just months prior to his transfer to criminal court. As the trial court noted

at the transfer hearing, it was unlikely these residential programs would accept defendant with an additional offense. Further, it is possible defendant could have instructed his attorney not to suggest he be sent to any of these facilities. As a result, there is insufficient information to review this claim.

¶ 38 C. Ineffective Assistance of Counsel (Bench Trial)

¶ 39 Defendant next argues his trial counsel was ineffective because he "inexplicably conceded during closing argument that [defendant's] statement to police 'amounts to a confession' that contained 'every element' of the offense of home invasion." Defendant also points to the fact defense counsel failed to make an opening statement and did not cross-examine Detective Kosack. We note it is not uncommon for a party to decline to give an opening statement during a bench trial. Further, defendant does not give any indication what could have been accomplished by cross-examining Kosack.

¶ 40 According to defendant, it appears his trial counsel's "strategy" was to concede defendant was guilty of home invasion, a Class X offense, and contest the attempt (criminal sexual assault) charge, a Class 2 offense. Defendant argues this was not a reasonable strategy because the trial court was left with no choice other than to convict defendant of home invasion. According to defendant, this concession is senseless, especially considering defendant told Kosack he placed the pillow over Wendt's head to calm her, not injure her. Defendant argues his counsel could have made a reasonable argument the State failed to prove he intended to injure Wendt.

¶ 41 Citing *People v. Hattery*, 109 Ill. 2d 449, 464, 488 N.E.2d 513, 518-19 (1985), defendant argues defense counsel failed to subject the State's case to "meaningful adversarial testing" and violated his sixth amendment right to counsel by conceding his guilt to home

invasion. Defendant points to conflicting evidence regarding his intent to injure Wendt, which was an element the State had to prove. 720 ILCS 5/12-11(a)(2) (West 2006). Wendt testified it was hard for her to breathe with the pillow over her mouth. She thought defendant was going to kill her. Defendant testified he put the pillow over Wendt's face to quiet her screaming. In his statement to police, defendant stated he had no intent to do anything to Wendt other than to calm her down.

¶ 42 In *Hattery*, 109 Ill. 2d at 461-62, 488 N.E.2d at 517, our supreme court stated in some circumstances prejudice will be presumed with regard to the objectively unreasonable conduct of an attorney. Citing the Supreme Court's opinion in *United States v. Cronic*, 466 U.S. 648 (1984), our supreme court stated: "[T]he sixth amendment requires, at a bare minimum, that defense counsel acts as a true advocate for the accused. Where 'counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.' " *Hattery*, 109 Ill. 2d at 461, 488 N.E.2d at 517. Our supreme court also quoted the following language from the 11th Circuit's opinion in *Francis v. Spraggins*, 720 F.2d 1190, 1194 (1983):

> " 'Where a capital defendant, by his testimony as well as his plea, seeks a verdict of not guilty, counsel, though faced with strong evidence against his client, may not concede the issue of guilt merely to avoid a somewhat hypocritical presentation during the sentencing phase and thereby maintain his credibility before the jury. Even though an adverse verdict would have the effect of precluding further argument on the issue of guilt, counsel does not have license to anticipate that effect and to concede the issue

> during the guilt/innocence phase simply because an adverse verdict appears likely.' " *Hattery*, 109 Ill. 2d at 462, 488 N.E.2d at 518 (quoting *Spraggins*, 720 F.2d at 1194).

In addition, the supreme court included the following quote from the 6th Circuit's opinion in *Wiley v. Sowders*, 647 F.2d 642 (1981):

> " 'Unquestionably, the constitutional right of a criminal defendant to plead "not guilty," *** entails the obligation of his attorney to structure the trial of the case around his client's plea. *** In those rare cases where counsel advises his client that the latter's guilt should be admitted, the client's knowing consent to such trial strategy must appear outside the presence of the jury on the trial record in the manner consistent with *Boykin* [*v. Alabama*, 395 U.S. 238 (1969)].
>
> Although statements made by attorneys in closing arguments are not evidence, nevertheless, for all practical purposes, counsel's admission of guilt on behalf of his client denied to petitioner his constitutional right to have his guilt or innocence decided by the jury. Petitioner, in pleading not guilty, was entitled to have the issue of his guilt or innocence presented to the jury as an adversarial issue.' " *Hattery*, 109 Ill. 2d at 463, 488 N.E.2d at 518 (quoting *Wiley*, 647 F.2d at 650).

In this case, the record does not reflect defendant consented to conceding his guilt to home invasion.

¶ 43 Since deciding *Hattery*, the supreme court has limited the scope of its holding. In *People v. Johnson*, 128 Ill. 2d 253, 269, 538 N.E.2d 1118, 1124 (1989), the court stated *Hattery* does not hold it is "*per se* ineffectiveness whenever the defense attorney concedes his client's guilt to offenses in which there is overwhelming evidence of that guilt but fails to show on the record consent by defendant." According to the court, "This would be especially true when counsel presents a strong defense to the other charges." *Id.* at 269, 538 N.E.2d at 1124-25. The court further noted the "rule in *Hattery* must be narrowly construed." *Id.* at 269, 538 N.E.2d at 1125. "Thus, if a concession of guilt is made, ineffectiveness may be established; however, the defendant faces a high burden before he can forsake the two-part *Strickland* test." *Id.* at 269-70, 538 N.E.2d at 1125. The court distinguished the situation in *Johnson* from *Hattery*.

¶ 44 In *Johnson*, defense counsel admitted the defendant killed one man, shot two others, and took personal property. However, two of the shooting victims could identify defendant as the shooter and defendant had given a confession. In *Johnson*, our supreme court found the facts in that case distinguishable from the situation present in *Hattery*. According to the court, defense counsel is likely to lose credibility with the trier of fact if he contests all charges when the State has presented overwhelming evidence of guilt and defendant has no defense. *Id.* at 270-71, 538 N.E.2d at 1125. Although defense counsel conceded defendant was guilty of murder, counsel was able to preserve matters which would have been waived by a guilty plea. *Id.* Defense counsel did not concede the defendant was guilty of attempted murder, felony murder, armed violence, aggravated battery, armed robbery, theft, and unlawful restraint, arguing the State did not meet its burden of proof on these charges. *Id.*

¶ 45 The supreme court noted, unlike in *Hattery*, defense counsel in *Johnson* asserted a defense to many of the charges and pursued the defense throughout the case. *Id.* Defense

counsel also contested the defendant's eligibility for the death penalty. *Id.* As a result, the court reviewed the defendant's claim of ineffective assistance of counsel pursuant to *Strickland,* not *Cronic.*

¶ 46 Our supreme court's reasoning in *Johnson* is supported by the United States Supreme Court's decision in *Bell v. Cone*, 535 U.S. 685 (2002), where the Court noted:

> "When we spoke in *Cronic* of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated the attorney's failure must be complete. We said 'if counsel *entirely* fails to subject the prosecution's case to meaningful adversarial testing.' [Citation.] Here, respondent's argument is not that his counsel failed to oppose the prosecution throughout the sentencing proceeding as a whole, but that his counsel failed to do so at specific points. For purposes of distinguishing between the rule of *Strickland* and that of *Cronic*, this difference is not of degree but of kind." (Emphasis in original.) *Id.* at 696-97.

After the Court decided *Bell*, the Seventh Circuit, in a footnote, interpreted *Bell* to stand for the proposition "*Cronic* only applies if counsel fails to contest *any* portion of the prosecution's case; if counsel mounts a partial defense, *Strickland* is the more appropriate test." (Emphasis in original.) *United States v. Holman*, 314 F.3d 837, 839 n.1 (2002).

¶ 47 In *People v. Adkins*, 239 Ill. 2d 1, 940 N.E.2d 11 (2010), our supreme court had to determine whether the situation in that case was closer to *Hattery* or *Johnson*. In *Adkins*, the defendant's attorney conceded in her opening the defendant committed a burglary but argued the

defendant did not kill a woman found dead inside the apartment defendant burglarized. *Id.* at 38, 940 N.E.2d at 32. The opinion noted defense counsel acknowledged the State had physical evidence placing the defendant at the scene of the murder but argued the State had no physical evidence connecting the defendant to the murder weapon or the victim's body. *Id.* In her closing argument, "defense counsel told the jury that 'a deliberate and dispassionate examination of the evidence' would show that '[the defendant] committed the residential burglary of [the woman's] home, but he did not see her, he did not come in contact with her, and he did not murder her." *Id.* at 39, 940 N.E.2d at 33. Defense counsel then repeatedly emphasized the lack of physical evidence connecting the defendant to either the murder victim or the murder weapon. *Id.* The supreme court found the situation in *Adkins* "more closely resembles *Johnson* than it does *Hattery*." *Id.* at 43, 940 N.E.2d at 35.

¶ 48 Although defense counsel in the case *sub judice* essentially conceded defendant was guilty of home invasion, we do not find the automatic presumption of prejudice established in *Cronic* applies in this case. Like in *Thompson* and *Adkins*, defense counsel did not fail to put the State's entire case to meaningful adversarial testing. Defense counsel argued the State had not established defendant's guilt of attempt (criminal sexual assault). As a result, we hold defendant's claim of ineffective assistance of counsel must be reviewed pursuant to *Strickland* and not *Cronic*.

¶ 49 The State argues "[d]efense counsel's strategy was geared at leveraging defendant's confession to the home invasion offense in order to bolster the credibility of arguments in favor of an acquittal on the sex offense charge." According to the State:

> "Defense counsel maintained that defendant answered questions truthfully in the police interrogation and that he

> consistently denied ever having had intent to commit a criminal sexual assault. *** Defense counsel juxtaposed defendant's steadfast denials of sexual intent against defendant's readiness to make dozens of 'damning admissions' in his statement. *** Defense counsel explained that defendant's conduct in jumping on the victim was not a 'rape attempt' but an effort to keep her from 'reaching for a weapon.' "

While defendant did not have a lot to gain from this "strategy," the evidence in this case against defendant was so overwhelming on both charges defense counsel did not have many options.

¶ 50 Based on the record in this case, we need not determine whether defense counsel's representation fell below an objective level of reasonableness because defendant cannot establish prejudice pursuant to *Strickland.* See *People v. Pitsonbarger*, 142 Ill. 2d 353, 397, 568 N.E.2d 783, 801-02 (1990) ("[a] court deciding a claim of ineffective assistance of counsel may advance directly to the second part of the *Strickland* test, and if it finds that the defendant was not prejudiced by the allegedly incompetent conduct of his attorney, the court may rule on the claim without first finding that the attorney's conduct constituted less than reasonably effective assistance"). The State had overwhelming evidence against defendant on both charges. Further, this was a bench trial, not a jury trial where counsel's concession would have been more damaging. Regardless of defense counsel's concession, the result in this case would have been the same.

¶ 51 D. Sentence

¶ 52 Defendant next argues the trial court erred in sentencing him after his retrial to 22 years for home invasion when he was originally sentenced to 20 years. He also argues even a 20 year sentence is excessive.

¶ 53 We first address defendant's excessive sentence argument. We apply an abuse of discretion standard when reviewing claims of excessive sentencing. *People v. Stacey*, 193 Ill. 2d 203, 209-10, 737 N.E.2d 626, 629 (2000). Because defendant was convicted of a Class X offense, the maximum prison sentence the trial court could have imposed on defendant was 30 years. 730 ILCS 5/5-8-1(a)(3) (West 2006). Both the original 20-year sentence and revised 22-year sentence were within the appropriate sentencing range for a Class X offense. Our supreme court has stated "a sentence within statutory limits will be deemed excessive and the result of an abuse of discretion by the trial court where the sentence is greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *Stacey*, 193 Ill. 2d at 210, 737 N.E.2d at 629. Based on the facts in this case, either a 20-year sentence or a 22-year sentence would not have been an abuse of discretion, especially considering defendant had committed two other burglaries after the home invasion at issue in the case *sub judice*.

¶ 54 However, we must address whether the trial court on remand erred in increasing defendant's sentence from 20 to 22 years in prison. Section 5-5-4(a) of the Unified Code (730 ILCS 5/5-5-4(a) (West 2012)) states:

> "(a) Where a conviction or sentence has been set aside on direct review or on collateral attack, the court shall not impose a new sentence for the same offense or for a different offense based on the same conduct which is more severe than the prior sentence less the portion of the prior sentence previously satisfied unless the

> more severe sentence is based upon conduct on the part of the defendant occurring after the original sentencing."

Defendant argues the record in this case shows the trial court's increased sentence was not based on anything that happened after he was originally sentenced.

¶ 55 However, the State argues defendant's harsher sentence did not violate section 5-5-4(a) because defendant had received various prison disciplinary tickets after he was initially sentenced. Citing *People v. Rivera*, 166 Ill. 2d 279, 295, 652 N.E.2d 307, 314 (1995), the State argues "defendant's 'prison record subsequent to the first trial' is 'the type of conduct that a court should take into account when imposing a new sentence.' "

¶ 56 We agree a defendant's postsentencing prison conduct can be considered when resentencing a defendant. However, the record does not reflect the trial court based its sentencing decision on anything that occurred after the original sentence. At the sentencing hearing on May 23, 2013, the court stated:

> "In looking at the information in the Juvenile Report, in looking at the evidence that's been presented from the neighbor's situation, particularly the sexual information, and then, most importantly, how this crime took place, the Court is of the opinion that the Defendant poses a grave risk to society.
>
> It is a very difficult case, Mr. Stokes, because I recognize fully that what I'm trying to deal with here are the actions of a 16-year-old, but they're sophisticated actions and they're actions that go to a really core aspect of our society, and that the reasonable belief

that we as human beings in our free society ought to be safe in certain places, and one of those places is in our home.

* * *

For 11 years I was a juvenile court judge *** and it was a very powerful thing, because if they screwed up, once you put them on probation, they made their own bed, and now they go to the Department of Corrections, the [DJJ] we now call it.

I don't have that liberty ***[.] I recognize your youthfulness at the time you committed the offense, but I also recognize the profound responsibility the court has to protect society from you as a predator, and I find that you were a predator. You had a predatory aspect of what you were doing.

***

I think it is incumbent upon the Court to recognize the great need to protect society from you.

I'm going to sentence you to 22 years in the Illinois Department of Corrections, and six years on Count—whatever the sexual assault is—was that Count 3? Attempted sexual assault will be six years on that count. That will be concurrent."

¶ 57 At the hearing on defendant's motion to reconsider his sentence, defendant argued, in part, the trial court erred in increasing his sentence for home invasion. The State argued:

"Now as far as the extension of the sentence that was originally given, I believe the statute under Resentence provides

that a sentence should not be more unless the more severe sentence is based upon conduct on the part of the Defendant occurring after the original sentencing.

There was information in the Presentence Investigation Report that was provided that in the time that Defendant was originally sentenced and sent to the Department of Corrections, there were infractions at the Department of Corrections. That, in and of itself, is enough for you to impose additional time, and we would be asking that the Defendant's motion be denied on that part as well. Thank you."

However, even when given an opportunity to clarify its reasoning in increasing defendant's sentence, the trial court's focus remained on the home invasion and attempted criminal sexual assault. The court stated in part:

"Well, it is my thinking that when a person commits very significant and heinous crimes that there's a necessity to—for—to protect the public, but also to send a message to the Defendant to help him in the corrective processes.

That takes time, and this Court should not and cannot err on the side of not protecting the public, but also in not sending a strong enough message to the Defendant, so that when the Defendant does get out, crimes of this magnitude will not even be on the Defendant's radar screen, because the Defendant will

understand the significance of these types of offenses and what can happen, and that's part of the justification for the sentencing.

***

And as far as me adjusting his sentence or sentencing him to something different, I don't know precisely what information Judge Reynard received when he sentenced the Defendant, but the case came back, and the Defendant was fully vested with all of his rights.

This case was back to Square 1, in my opinion, and, as such, inasmuch as the Defendant had the right to a jury trial, he chose to exercise his right to a bench trial, which is fine, but the information that comes to the Court via a bench trial, via listening to the evidence as opposed to a stipulation, which is different and can result in a different outcome, because the Court becomes more informed about the nature of the offense.

And in this case the Court was impressed by the fact that the Defendant was standing in the victim's bedroom, basically pausing over her and looking at her. If not for the hissing of a cat, we might have a very different case here, and so the Court was informed of that and concerned, and it made the predatory nature of this offense very clear to this Judge.

To what extent, if any, that was clear to Judge Reynard, I have no idea, but I listened to the testimony of the victim, I

> listened to all the testimony, and at Sentencing Hearing, of course, I considered all the information presented and still believe this is an appropriate sentence.
>
> The information presented at sentencing also did include subsequent infractions at the Department of Corrections, so, in the whole, the Court does not believe the sentence should be modified." (Emphasis added.)

As previously stated, the court clearly increased defendant's sentence based on defendant's actions, for which defendant had already been sentenced. The court's comment with regard to infractions at the Department of Corrections appears to be no more than an afterthought.

¶ 58 Because we hold the trial court did not comply with section 5-5-4(a) in sentencing defendant to 22 years in prison for home invasion, we vacate defendant's sentence and remand with directions to reduce defendant's sentence to 20 years on the home invasion conviction.

¶ 59 III. CONCLUSION

¶ 60 For the reasons stated above, we affirm defendant's transfer from juvenile court to criminal court and affirm his conviction, but we vacate defendant's sentence and remand for imposition of a 20-year sentence on the home invasion conviction. As part of our judgment, we award the State its $75 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2012).

¶ 61 Affirmed in part and vacated in part; cause remanded with directions.