2016 IL App (2d) 150515-U
No. 2-15-0515
Order filed September 6, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kendall County.
Plaintiff-Appellee,	)	
v.	)	No. 12-CF-228
SHAWN T. LIPSEY,	)	Honorable Timothy J. McCann,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Jorgensen and Spence concurred in the judgment.

ORDER

¶ 1 *Held:* The defendant's convictions of predatory criminal sexual assault of a child and aggravated criminal sexual abuse were affirmed. (1) The prosecutor represented to the trial court that he did not form the intent to introduce certain rebuttal evidence until defendant's wife testified, and it was not clear from the record that such representation was inaccurate. Even if the State committed a discovery violation, the trial court properly avoided undue prejudice to defendant. (2) The trial court did not err in admitting and relying on the defendant's wife's recorded statement to police. (3) The trial court did not err in revising its guilty finding on count II where both the court and the parties had initially overlooked that this count had been amended prior to trial to allege a different offense. (4) Defendant's sentence of 53-years' imprisonment was not excessive.

¶ 2 Following a bench trial, defendant, Shawn Lipsey, was found guilty of five counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a) (West 2010)) and one count of aggravated criminal sexual abuse (720 ILCS 5/12-16(b) (West 2010)). He was sentenced to a total of 53 years' imprisonment. On appeal, he argues that the court erred in admitting certain rebuttal evidence that was not disclosed to him until after his chief witness had testified. He also contends that the court erred in admitting the entirety of a witness's recorded statement to police to impeach only a few lines of her testimony, then using that witness's statements and demeanor on the recording to assess her credibility. Additionally, defendant argues that the court erred in revising one of its guilty findings. Finally, he challenges his sentence as being excessive. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Although we provide additional information in the analysis section to address defendant's specific arguments, the following is an overview of the nature of the case and the evidence presented at trial.

¶ 5 On July 3, 2012, defendant was charged by information with six counts of predatory criminal sexual assault of a child and two counts of indecent solicitation of a child (720 ILCS 5/11-6(a) (West 2010)). The charges pertained to the sexual abuse of defendant's daughter, M.L., who was born in 2000. The information alleged that the abuse occurred "[o]n or between September 2005 through September 2010." As later clarified by the State in response to a motion for a bill of particulars, the abuse occurred on multiple occasions. Specifically, in July or August 2010, as well as on Christmas Day 2007 or 2008, defendant placed his finger in M.L.'s vagina. During the Christmas Day alleged assault, defendant also placed his penis in M.L.'s anus. On another occasion prior to the Christmas Day assault, defendant placed his penis in

M.L.'s anus. Additionally, sometime prior to the Christmas Day incident, and again at another unknown time between September 2005 and September 2010, defendant placed his penis in M.L.'s mouth.

¶ 6 At the commencement of trial, the State amended count II of the information, which pertained to the Christmas Day incident, to allege aggravated criminal sexual abuse rather than predatory criminal sexual assault of a child. Instead of alleging that defendant placed his finger in M.L.'s vagina, the amended count II alleged that defendant "touched M.L.'s sex organ/vagina with his hand."

¶ 7 At trial, M.L. testified for the State and described four separate encounters during which her father sexually assaulted and abused her. One incident occurred in the basement on Christmas Day in 2007 or 2008. According to M.L., while everyone else was on the main floor watching TV and playing with toys, defendant told her to go to the basement with him. In the basement, defendant said to her: "now here is my Christmas present." Defendant turned her around, bent her over, pulled down her clothing, and stuck his penis inside her anus. When defendant stopped, he rubbed the outside of her vagina with his hands and fingers.

¶ 8 M.L. also recalled a time when she was brushing her hair in her mother's bathroom. Defendant came in, sat down on a towel bench, and told her to come over. He had her kneel down and perform oral sex on him. When that stopped, defendant led her to the toilet, bent her over, and stuck his penis in her anal cavity. She said that nobody else was in the house at the time.

¶ 9 M.L. described another time when she was watching TV in her mother's bedroom and her father called her into the bathroom. Defendant was kneeling or leaning against the toilet while squatting. Defendant had her perform oral sex on him, and he ejaculated on her face.

¶ 10 According to M.L., defendant last sexually abused her in August 2010. She was in her room in the basement when she awoke from a nightmare. She went upstairs to the living room where defendant was watching TV. After sitting there for 15 minutes, defendant approached her, pulled down his pants, and asked if she would like to perform sexual acts on him (she did not remember the exact words he used). She responded that she did not want to do so. As she was lying on a couch, defendant kneeled to the side of her and put his finger inside her vagina. He abruptly stopped and then went back to sleep on the couch.

¶ 11 M.L. testified that, prior to disclosing the abuse to a school counselor in April 2012, she did not tell police, teachers, or the Department of Children and Family Services about what was going on. She was afraid to tell anybody, because defendant had a very short temper and she feared him hurting her or the family. She explained that defendant once told her that "this was all a secret" and that she should not tell her mother, her brother, or the public. However, she said that she told her mother on multiple occasions about the abuse.

¶ 12 Dawn Auriene, a school social worker, also testified for the State. She explained that on April 20, 2012, M.L. came to talk to her about a bullying incident involving other students. During that conversation, M.L. described her father's temper and said that he had physically and sexually abused her. Later that day, M.L. went to the Children's Advocacy Center to speak with Michelle Hawley. Hawley's interview with M.L. was admitted into evidence pursuant to section 115-10 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10 (West 2014)).

¶ 13 Joseph Jasnosz, a detective with the Kendall County Sheriff's Office, also testified for the State. He interviewed defendant on April 20, 2012. During that interview, defendant told police that he had certain dreams involving sexual conduct with his daughter. This included touching her vagina with his hand and her holding his penis with her hand. He did not remember any

dreams involving intercourse. Although he did not admit to consciously acting out on his dreams, he said that "[i]t had to be reality" and that he did not think that M.L. was crazy or making this up. When an officer said during the interview "[w]e know some things have occurred," defendant responded: "Deep down, I think I know to [*sic*]." The court subsequently allowed the defense to introduce into evidence an earlier portion of defendant's police interview, in which he had repeatedly denied abusing M.L. During that earlier portion of the interview, when defendant was asked whether he could walk well without his cane, he responded: "Not too well but I can walk, yeah."

¶ 14 Raissa Lipsey, defendant's wife and M.L.'s mother, testified for the defense. Much of her testimony was intended to make M.L.'s allegations of abuse appear implausible. For example, to contradict M.L.'s testimony that she was sexually assaulted on a particular chair on Christmas Day 2007 or 2008, Raissa testified that they did not purchase the chair until 2010. As another example, Raissa said that the towel bench in the bathroom would break if someone tried to sit on it. Raissa also detailed various medical infirmities that affected defendant's mobility and ability to function sexually. According to Raissa, defendant could walk only two or three steps without using a cane. Raissa denied that M.L. ever told her about the sexual abuse.

¶ 15 Kyle Kozlowski, defendant's half-brother, also testified for the defense. He lived in the Lipsey home during the period when the abuse was alleged to have occurred. He testified that the walls in the house were "paper thin." With respect to the events of Christmas 2008, he remembered that the family was together the whole time watching movies. Similar to Raissa, Kozlowski described defendant's problems with mobility.

¶ 16 In rebuttal, the State introduced the transcript and audio recording of Raissa's April 20, 2012, interview with police. Also in rebuttal, Kellie Vanderlei, a probation officer, testified that

on August 18, 2014 (six weeks before the start of trial), she happened to see defendant exiting a Wal-Mart shopping center without using a cane. The State also presented testimony from Thomas Hagerty, a detective with the Kendall County Sherriff's Office. Hagerty met with Leslie Miller, an asset protection associate at Wal-Mart, and they were able to assemble 20 video clips of defendant walking through the store without a cane.

¶ 17 In surrebuttal, Raissa testified that defendant sometimes chooses not to use his cane due to a right elbow injury that he sustained from using the cane for so many years.

¶ 18 At the conclusion of trial, the court found defendant guilty of six counts of predatory criminal sexual assault of a child, but not guilty of indecent solicitation of a child. On the date scheduled for argument on defendant's posttrial motion and sentencing, the State informed the court that count II of the indictment had previously been amended to allege aggravated criminal sexual abuse instead of predatory criminal sexual assault of a child. Without objection from defendant, the court revised its finding and found defendant guilty of aggravated criminal sexual abuse on count II. The court sentenced defendant to a total of 53 years' imprisonment.

¶ 19 Defendant timely appealed.

¶ 20 II. ANALYSIS

¶ 21 (A) Wal-Mart Rebuttal Evidence

¶ 22 Defendant first contends that the court erred in admitting rebuttal evidence that he claims was deliberately withheld from him until after his chief witness, Raissa, completed her testimony.

¶ 23 On December 6, 2013, defendant made disclosures to the prosecution in accordance with Illinois Supreme Court Rule 413(d) (eff. July 1, 1982). That rule requires a criminal defendant to provide certain information to the State about the defenses that he or she intends to raise at

trial. One of the defenses that defendant identified was the "physical impossibility of several of the alleged acts due to [his] physical infirmities." He continued:

> "Defendant has disclosed medical records of Defendant's surgeries and current medical condition, including nerve impairment and loss of sensation which render the Defendant impotent. Defendant will provide Category A witnesses who can testify that the actions alleged to have occurred by the complaining witness cannot have occurred as described."

Defendant identified himself as a "Category A" witness, along with four other individuals: Raissa, Kozlowski, Craig Walls (defendant's friend), and S.L. (defendant's minor son).

¶ 24 On March 31, 2014, the State filed two motions *in limine*, one of which addressed, in part, defendant's "Category A" witnesses. According to the State, the evidence that defendant had provided in discovery showed that he was suffering from, or had suffered from: "a possibly fractured first metacarpal bone"; spina bifida; urinary and fecal incontinence; a spinal cord injury; "a distal lipoma that resulted in what is called 'tethered cord' and was subjected to surgery"; cervical surgery; pain, loss of musculature/poor or abnormal gait; and "other related infirmities." However, the State argued that the medical records did not indicate that defendant was impotent or otherwise physically incapable of committing the charged acts. The State asked the court to order defendant to provide an expert's written opinion on these issues, together with the other documents required by Illinois Supreme Court Rules 413(c) and (d).

¶ 25 The court held a hearing on the State's motion *in limine* on June 5, 2014. During the hearing, the attorneys who represented defendant made it clear that they did not foresee hiring an expert. They also indicated that only defendant or Raissa would testify with respect to the issues of impotence and physical impossibility. Defendant's attorneys insisted that they had no obligation to tell the State about the nature of defendant's potential trial testimony. Furthermore,

they clarified that defendant's other "Category A" witnesses would testify not that is was physically impossible for the abuse to have occurred, but that, due to the witnesses' recollections of events, the abuse, as described by M.L., could not have occurred. The court's written order provided, in relevant part, that "Defendant's oral statement that only [defendant] and [his] wife will possibly testify as to defendant's erectile dysfunction obviates People's [motion *in limine*] in part."

¶ 26 On September 16, 2014, thirteen days before the start of trial, the state filed a motion for additional discovery. Although defendant had produced certain medical records, the State requested additional documents demonstrating that defendant presently suffered from those medical conditions. At the September 18, 2014, hearing on the motion, the State explained that it had identified four medical conditions at issue: sleepwalking, urination with erections, erectile dysfunction, and "some issue of paralysis." Defense counsel represented to the court that defendant had a progressively deteriorating medical condition. He also assured the court that the defense would not rely on any records that the State didn't have.

¶ 27 Trial began on September 29, 2014. As explained above, in the State's case-in-chief, M.L. detailed four separate encounters during which defendant sexually assaulted and abused her. She also described the physical positions that both she and defendant were in while the acts occurred. For example, according to M.L., on one occasion, defendant was kneeling on the floor as he put his finger inside her vagina; on another occasion, using a railing rather than his cane, defendant led her to the basement and bent her over a chair. On cross-examination, M.L. acknowledged that defendant had an operation on his back in 2006. She also said that defendant has had a little bit of trouble walking since the surgery, that he uses a cane most of the time, and

that his balance is off. When M.L. was asked by defense counsel, "And he can't stand very long without either sitting down or losing his balance?", she responded: "Some of the time, yes, sir."

¶ 28 On October 6, 2014, the fourth day of trial, Raissa testified for the defense. She testified that defendant's back seized up in June 2006. He had not been able to walk without a cane since then, and he underwent surgeries in October 2006 and February 2007. According to Raissa, defendant could walk two or three steps without a cane. She had not seen him walk down the stairs at their home without a cane; if he did, "he would experience great pain and he would have a very difficult time going down the stairs, possibly falling down them." Additionally, Raissa said that defendant could not stand up for very long without a cane, could not kneel down either with or without a cane, and could not bend over at the waist either while standing or kneeling.

¶ 29 On cross-examination, Raissa testified that over time defendant's mobility had decreased while his pain had increased. According to Raissa, it was "physically impossible for him to walk without a cane." Asked whether defendant has "ever gotten to the point where he can walk without a cane at all," she responded: "[o]nly a few steps." The following colloquy then occurred:

"Q. It's your belief that these things could not have happened that he's accused of being on trial today?

A. That is my belief, correct.

Q. Because of his physical capacity?

A. Correct.

Q. He just can't do it?

A. Correct.

Q. And it's the same now as it was a month ago, as it was almost ten years ago, 2006?

A. 2006 he's been in – yes, the same situation physically."

¶ 30 Kozlowski, defendant's half-brother, also testified for the defense. He similarly described defendant's difficulty ambulating:

"Q. Did you observe your brother walk without a cane in 2006, 2007?

A. If he ever does, it's for a very short length and he struggles.

Q. Did you ever see him walk down the stairs of your house without a cane?

A. If he ever walked down without a cane, he would have to be holding onto the railing the entire time, and even then, that would only be to the bottom of the stairs."

¶ 31 When defendant rested his case on the fourth day of trial, the State, for the first time, indicated that it intended to call two rebuttal witnesses. The State would call Vanderlei to testify that on August 18, 2014, she observed defendant and Raissa exiting Wal-Mart and that defendant was "walking freely" and "without a cane and without any support." The State also wanted to call Miller, a Wal-Mart employee, to lay the foundation for certain video footage captured on August 18. The Assistant State's Attorney insisted that he "only determined to present that evidence once [Raissa] took the stand today and testified as to that this [*sic*] inability to walk is currently tied to the defendant's inability to have committed these offenses."

¶ 32 Before soliciting a response from defense counsel, the court addressed scheduling matters and continued the case until October 29, 2014. During the colloquy regarding scheduling, the Assistant State's Attorney demonstrated his familiarity with one of the newly-disclosed witness's availability for trial.

¶ 33 Defense counsel then objected that he had previously requested all discoverable materials, but that the State had only tendered the Wal-Mart footage to him that day. He argued that this was something that the defense should have had before trial, and he moved to "bar any of this evidence as a discovery sanction."

¶ 34 The State responded that this newly disclosed evidence "did not become a material issue in the case until [Raissa] testified as to the connection between the defendant's physical inabilities and the acts that are charged." The Assistant State's Attorney acknowledged that he had consulted with the elected State's Attorney and that they "decided to hold off disclosure of that until after the defendant's case in chief." The Assistant State's Attorney added that he "probably violated direct instruction[s]" by turning this information over to the defense as soon as Raissa departed from the stand rather than when defendant rested his case-in-chief.

¶ 35 The court denied defendant's motion to bar the evidence. Due to the late disclosure, at the next court date, the court would address whether surrebuttal testimony was necessary.

¶ 36 On October 29, 2014, Vanderlei testified in rebuttal that she was a probation officer and that she had prepared a presentence report with respect to defendant in a separate criminal case.[1] Vanderlei explained that she was at Wal-Mart on August 18, 2014, at around 6:40 p.m., when she saw defendant and Raissa exiting the store. Raissa was pushing a shopping cart and defendant was walking a few steps behind her without a cane. According to Vanderlei, defendant had always used a cane whenever she had seen him previously. The next day, Vanderlei told the Assistant State's Attorney what she had seen.

[1] The record reflects that in November 2013, defendant was found guilty of possession and production of cannabis as well as obstructing justice. He was sentenced to 30 months' probation.

¶ 37 The State also called Detective Hagerty as a rebuttal witness. He testified that he received information from the State's Attorney's Office that defendant had been observed at Wal-Mart. He then went to Wal-Mart and met with Miller, an asset protection associate. Hagerty and Miller located video footage of defendant.[2] Hagerty identified defendant and Raissa in 20 video clips. He explained that defendant was not using a cane in the footage. Nor did he use anything to rest or prop himself up, aside from using the cart once or twice "for a brief minute." Miller was the State's final rebuttal witness. He testified both about Wal-Mart's surveillance system generally and his experience assembling the footage of defendant from August 18, 2014. The court admitted the video clips into evidence over defendant's repeated objections.

¶ 38 Defendant called two surrebuttal witnesses. Hagerty testified that on August 11, 2014—seven days before the Wal-Mart sighting—he learned that the State's Attorney's Office wanted video footage of defendant's court-ordered visitation with his son at the Fox Valley Mall on August 12. Two detectives and two deputies watched defendant during that supervised visitation, and some of the officers took iPhone videos of defendant. Defendant was walking with a cane at all times that day.

¶ 39 Defendant also called Raissa as a surrebuttal witness. She explained that she had a chance to review the clips of defendant walking through Wal-Mart. According to Raissa, there are very few times when defendant does not use his cane. She said that he chooses not to use his cane "[b]ecause of his injury his right elbow has sustained from using the cane for so many years."

[2] The record is not clear as to exactly when Hagerty learned that defendant had been seen at Wal-Mart or when Hagerty and Miller assembled the footage.

¶ 40 On appeal, defendant argues that the trial court erred in admitting evidence that was deliberately withheld from him until after Raissa testified in his case-in-chief. According to defendant, "the record demonstrates that the State adopted a tactic of surprise knowing that the Defendant's maladies would be a central focus of the case." To that end, he contends that "the State focused its pre-trial discovery efforts on the issue of the Defendant's medical condition and its capacity to counter M.L.'s testimony of her father's alleged sexual misconduct." Defendant proposes that, contrary to the Assistant State's Attorney's assurance that he did not form the intent to introduce the rebuttal evidence until after Raissa testified, the State "deliberately prepared for this eventuality when initiating the effort to obtain the video clips after Ms. Vanderlie's disclosures." He emphasizes that the Assistant State's Attorney cross-examined Raissa regarding defendant's ability to walk, strategized with the elected State's Attorney as to when to make disclosures to the defense, and inquired about proposed-witness Miller's availability for subsequent court dates.

¶ 41 Defendant argues that he is entitled to a new trial as a result of the discovery violation. He reasons that the case hinges entirely on the credibility of the witnesses, that there were "a number of discrepancies and uncertainties" in M.L.'s testimony, and that the defense's theory of the case "was directly undermined by the Wal-Mart videos." According to defendant, it was inadequate for the court merely to grant him a continuance or an opportunity to interview the State's rebuttal witnesses, because "a continuance granted after-the-fact could not make evidence disappear that had already been presented via the only crucial defense witness." Nor, defendant argues, could a continuance "afford defense counsel the opportunity to re-think his strategy." Defendant submits that, had the State been deprived of this rebuttal evidence, "the credibility

battle would have presented a much closer case, with only the complainant's word and no corroborative evidence to carry the State's burden of proof."

¶ 42 The State argues that the trial court properly admitted the rebuttal evidence, because it was disclosed to the defense once the prosecution formed the intent to use it. According to the State, the three-week continuance ordered on October 6, 2014, afforded the defense adequate time to prepare its response. The State also contends that the trial court properly exercised its discretion by allowing defendant to introduce surrebuttal evidence rather than imposing the harsh sanction of excluding the State's evidence.

¶ 43 The purpose of rebuttal evidence is to explain, contradict, or disprove the evidence presented by the defense. *People v. Hood*, 213 Ill. 2d 244, 259 (2004). The State has a duty to disclose the identity of a rebuttal witness when it forms its intent to call that witness. *People v. Manley*, 19 Ill. App. 3d 365, 371 (1974). With respect to the issue of whether the State committed a discovery violation, the standard of review is *de novo* where "the facts giving rise to the alleged discovery violation are not in dispute." *Hood*, 213 Ill. 2d at 256. We review the trial court's decision regarding an appropriate sanction for a discovery violation for abuse of discretion. *People v. Schlott*, 2015 IL App (3d) 130725, ¶ 24. An abuse of discretion occurs when the court's order is "arbitrary, fanciful, or unreasonable, such that no reasonable person would take the view adopted by the trial court." *Schlott*, 2015 IL App (3d) 130725, ¶ 24.

¶ 44 The Assistant State's Attorney who prosecuted the case insisted that he did not form the intent to use the Wal-Mart rebuttal evidence until Raissa testified in defendant's case-in-chief. After thoroughly reviewing the record, we cannot conclude that this representation was inaccurate. The prosecutor's explanation to the trial court was plausible, and we are therefore unable to hold that the State committed a discovery violation. Additionally, even if there were a

discovery violation, it is not necessary to order a new trial, because the trial court properly avoided undue prejudice to defendant.

¶ 45 When defendant was questioned in April 2012, he told police that he could walk without a cane, but not too well. In the course of discovery, he informed the State that he intended to present a defense of physical impossibility based on his physical infirmities. However, he identified the problem as "nerve impairment and loss of sensation which render [him] impotent." Significantly, he did not say that his difficulty walking would have prevented him from committing the charged offenses. Nor did defendant give the State any indication during pre-trial motion practice that his difficulty walking was going to be part of his disclosed defense. Instead, the focus was always on defendant's purported impotence. Under these circumstances, it would have been reasonable for the State to have assumed prior to trial that defendant's disclosed defense of physical impossibility was related to the issue of his ability to function sexually.

¶ 46 Defendant was spotted walking without a cane at Wal-Mart in August 2014, almost four years after the last charged offense occurred. The fact that defendant walked without a cane in 2014, in and of itself, had no bearing on whether he had sexually abused his daughter from 2005-2010, and it would not have been admissible in the State's case-in-chief. Nevertheless, the State understandably took steps to obtain the Wal-Mart footage because it had potential impeaching value, depending on what evidence defendant introduced at trial. We say "potential" impeaching value, because the State may not introduce rebuttal evidence that contradicts the defense on matters that are merely collateral to the substantive issues. *People v. Buckner*, 121 Ill. App. 3d 391, 398-99 (1984). We reiterate that, by all objective measures, it appeared before trial that the physical impossibility defense would be limited to the issue of impotence. Accordingly, we

accept the Assistant State's Attorney's representation to the trial court that he formed the intent to use the Wal-Mart evidence once Raissa testified that defendant's inability to walk was tied to his inability to have committed the charged offenses. In light of the entire record, we are not convinced that there was a discovery violation.

¶ 47 Defendant notes that shortly after the State disclosed Miller as a rebuttal witness, the Assistant State's Attorney was already in a position to discuss Miller's schedule to testify. However, the record does not reflect when the Assistant State's Attorney learned of Miller's schedule. Moreover, even if the State spoke with Miller about his potential availability for trial before he was disclosed as a witness, that does not necessarily mean that the State had already formed its intent to call him as a witness.

¶ 48 Furthermore, even if the State committed a discovery violation, the trial court took appropriate steps to protect defendant from being unfairly prejudiced. Once defendant learned of the Wal-Mart evidence, he had the benefit of a 23-day continuance to take whatever measures he deemed appropriate to counter that evidence. He thus had ample opportunity to review the Wal-Mart footage and develop a strategy for cross-examining the State's rebuttal witnesses. The trial court also allowed defendant to call Raissa as a surrebuttal witness to clarify her earlier testimony that defendant was unable to walk more than two or three steps without a cane. Therefore, even assuming that there was a discovery violation, we could not conclude that the trial court abused its discretion in refusing to exclude the evidence. See *Schlott*, 2015 IL App (3d) 130725, ¶ 25 (Excluding testimony or evidence is appropriate in only the most extreme circumstances, because " 'it does not contribute to the goal of truth-seeking.' " (quoting *People v. Scott*, 339 Ill. App. 3d 565, 572-73 (2003))).

¶ 49 Nevertheless, defendant insists that the bell could not be unrung once Raissa testified in his case-in-chief about defendant's difficultly walking without a cane. Defendant overstates both the strength of the Wal-Mart evidence and the prejudice that he suffered. The evidence was introduced to negate Raissa's testimony that defendant could walk only two or three steps without using a cane. However, even M.L. acknowledged that defendant used a cane most of the time and that he had problems with his balance. Defendant's half-brother testified similarly. In light of the fact that the witnesses all agreed that defendant had difficulty walking, we cannot conclude that the defense suffered prejudice that could only be remedied by excluding the Wal-Mart evidence.

¶ 50 Although, upon close examination, we have determined that the record does not affirmatively contradict the State's representation about when it formed the intent to use rebuttal evidence, we feel compelled to reinforce the importance of timely disclosure. In *People v. Kunze*, 193 Ill. App. 3d 708, 723 (1990), the court explained that Illinois Supreme Court Rules 412 (eff. Mar. 1, 2001) and 413 (eff. July 1, 1982) were promulgated to "foster the truth-seeking nature of criminal trials by providing each side with the information in advance of trial that is necessary for each to prepare for trial." To that end, these rules seek to eliminate, where possible, "surprise, particularly with regard to documents and other tangible objects." *Kunze*, 193 Ill. App. 3d at 723. As explained above, the State's obligation to disclose rebuttal witnesses arises when the State forms its intent to call such witnesses. *Hood*, 213 Ill. 2d at 259. Determining whether there has been a discovery violation thus turns on the State's subjective intent. Evaluating subjective intent is inherently a difficult task. See *People v. Barrow*, 133 Ill. 2d 226, 268 (1989) (explaining that the issue of whether the State has improperly commented on a defendant's failure to testify depends on the prosecutor's intent, and that it is often not easy to

distinguish between permissible and impermissible comments). There may be times when it is less than clear whether the State's duty to disclose rebuttal evidence has been triggered. It is our expectation that the State will err on the side of disclosing sooner rather than later when confronted with such situations.

¶ 51 (B) Raissa's Police Interview

¶ 52 Defendant next argues that the trial court erred in admitting Raissa's 90-minute recorded statement to police to impeach only a few lines of her testimony, and then using her statements and demeanor on the recording to assess her credibility.

¶ 53 On direct examination by defense counsel, Raissa testified that her sexual relations with defendant had been almost nonexistent since June 2006. Due to the amount of pain that defendant was experiencing, they did not have sexual relations between June 2006, when defendant hurt his back, and February 2007, when he had his second surgery. They have attempted sexual relations since that second surgery, but never successfully. Raissa said that defendant has neither ejaculated nor achieved an erection since the surgery. According to Raissa, "if we attempt, as we have a few times, urine comes out."

¶ 54 On cross-examination, the State directed Raissa's attention to various statements that she made to Detective Mike DiSera and other officers during an interview on April 20, 2012. She testified that she recalled telling the detectives that defendant "does not function sexually in the way most people do" and that "[i]f he were to try to have sex, that he would usually just urinate." The State then asked Raissa if she remembered answering "[e]xcuse me?" when DiSera asked her whether her sexual relationship with her husband had been nonexistent. Raissa did not remember that exchange specifically, explaining that "[i]t was a long time ago." The State next asked Raissa about the following exchange from the April 2012 interview:

"DiSera: Has it been existent I mean these are questions that we normally ask (inaudible).

[Raissa]: Um on and off not like it was when we were teenagers but um…

[DiSera]: We have we have [*sic*] to ask because sometimes in these cases if there is an actual event or incident occurring that there is a um reduction or lack of uh sexual intimacy between the husband and wife or it is no [*sic*] transferred to the child."

Raissa said that she did not remember DiSera saying that, but added that she was "sure that's what he said if it's in the transcript." The State then asked Raissa about the following exchange from the April 2012 interview, a colloquy which occurred immediately after DiSera mentioned the transference of sexual intimacy to children:

"[Raissa]: Well no it's it's it's [*sic*] slowed down just because of his situation.

DiSera: But it still

[Raissa]: But it exists

DiSera: Exists and he can

[Raissa]: And sometimes he has difficulty

DiSera: But he can get an erection?

[Raissa:] Yes

DiSera: Ok he can uh ejaculate?

[Raissa:] Yes."

Asked by the State whether she remembered this line of questioning, Raissa said that she did not "remember a lot about that day," because she was very upset, under a lot of stress, and she did not "understand what was going on at the time."

¶ 55 Raissa thereafter acknowledged that she had looked at the transcript from her April 2012 interview, but said that she had not done so recently. The State asked Raissa whether, in reading the transcript, she remembered mentioning to the detectives "this issue of urination with an erection." Raissa responded: "Yes, I remember stating that my husband has a lot of trouble having sex and that it is not the same as it was before when he – before his surgery." The following colloquy then occurred in court between the State and Raissa:

"Q. In fact, all of the erection talk, so to speak, that you had with those detectives we just read into the record earlier, correct?

A. I guess so.

Q. At no point do you mention this urination issue, do you?

A. I don't remember if I did or not.

Q. That's something unusual, wouldn't you agree?

A. For someone to urinate during sex, yes, it is unusual."

The State later asked Raissa whether she had mentioned "the issue of ejaculation and urination in those specific phrases." She responded that she did not know whether she had. She admitted that she might have said during the April 2012 interview that defendant could ejaculate, but added that she did not remember, because it was 2 ½ years ago.

¶ 56 After defendant rested his case, the State told the court that, because of the way Raissa answered questions on cross-examination, the State had to prove a negative. Specifically, the State contended that Raissa indicated that she had told the detectives that defendant would urinate when he got an erection. However, the State did not believe that she had told detectives this. Accordingly, the State sought "[t]o present as rebuttal evidence the entire transcript of her interview wherein that is not indicated, where she does not say that."

¶ 57 Defense counsel objected on the basis that it was not a "proper proveup of impeachment." Although he agreed that the State was trying to prove a negative, he noted that the police never questioned Raissa about this issue. Furthermore, according to defense counsel's recollection of the State's cross-examination of Raissa, Raissa testified that she did not remember saying certain things to the detectives, not that she did or did not say them. Defense counsel suggested that it would have been appropriate for the State to have refreshed Raissa's recollection and then ask her whether she remembered saying those things. Defense counsel took the position that, by failing to refresh Raissa's recollection, there was "no impeachment to prove up." However, if the court overruled the objection, defense counsel "agreed to the foundation of the transcript and that the transcript can be read without us having to play anything or call the police officer."

¶ 58 The Court overruled defendant's objection and asked the State whether it planned to present both the transcript of the interview and the actual recording. The State indicated that it wanted to introduce both. Defense counsel responded:

> "Based upon my objection, I object as I told you, that's fine. We don't need to call the officer. I'll stipulate to the foundation. And, of course, I know the Court will ignore the irrelevant material."

The court admitted both the transcript and the recording into evidence. The parties agreed that the court could listen to the recording on its own rather than playing it in court.

¶ 59 After the parties submitted written closing arguments, the court announced its findings with respect to the charges against defendant. The court found M.L. to be credible, noting that she was very bright, she did not hesitate when answering questions, and her testimony was consistent. M.L. also "described events that most 12-year-olds wouldn't understand or

comprehend." In contrast, the court noted that Raissa was a convicted felon. The court further recalled that, although Raissa did not believe that defendant committed sex acts with M.L., she acknowledged having moved M.L.'s bedroom closer to hers after a previous DCFS investigation into allegations of abuse. Additionally, the court found Raissa's testimony that defendant could walk only two or three steps without a cane to be inconsistent with the Wal-Mart footage. Her testimony about defendant's inability to obtain an erection or ejaculate was also inconsistent with what she had previously told detectives. With respect to Raissa's statement to detectives, the court added:

> "I listened again to the statement [Raissa] made *** on April 20, 2012. I found her behavior to be at odds with someone who is confronted with an allegation that her husband had committed outrageous sexual acts with her daughter.
>
> I would describe [Raissa's] attitude during that interview to be, quote, dismissive, close quote, and by that she acts as if these allegations are totally ridiculous and not worthy of being believed.
>
> Her actions and statements during that interview were not credible. I think she was not surprised by these allegations and decided that rather than appear shocked or concerned, she should act as if this was so unbelievable as to not even being worthy of making her upset.
>
> Later her demeanor changes and she becomes rather dismissive, crying and tearful. She is simply not believable."

¶ 60 In his posttrial motion, defendant did not raise any issue with respect to Raissa being impeached with her prior statements to police.

¶ 61 On appeal, defendant argues that the court erred in admitting the entirety of Raissa's nearly 90-minute recorded statement to impeach only a few lines of her testimony, and then using her statements and demeanor on the recording as a significant factor in finding defendant guilty. Defendant recognizes that he forfeited this issue by failing to include it in his posttrial motion, and he asks us to review the matter for plain error.

¶ 62 "The plain-error doctrine allows a reviewing court to consider an unpreserved error when either: '(1) a clear or obvious error occurred and the evidence is 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) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.' " *People v. Burman*, 2013 IL App (2d) 110807, ¶ 33 (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)). Defendant argues that the error in this case warrants reversal under the first prong. In determining whether the plain-error doctrine applies, we must first ascertain whether any error occurred. *Burman*, 2013 IL App (2d) 110807, ¶ 33.

¶ 63 Defendant appears to advance two distinct arguments with respect to this evidence. His first contention is that it was improper for the court to admit the entirety of Raissa's April 20, 2012, interview into evidence. The other contention is that the court erred in relying on Raissa's demeanor on the recording to assess her credibility. We review the trial court's decision to admit or exclude evidence for abuse of discretion. *People v. Nixon*, 2016 IL App (2d) 130514, ¶ 36. "An abuse of discretion occurs only where the trial court's decision is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by the trial court." *Nixon*, 2016 IL App (2d) 130514, ¶ 36.

¶ 64 With respect to the issue of admissibility, defendant asserts: "[a]lthough the State failed to specify the rule of law permitting introduction of the entire statement of the witness ***, apparently the prosecutor intended to rely on the rule of completeness." Defendant then cites cases addressing the completeness doctrine. Contrary to what defendant suggests, the State did not invoke the completeness doctrine as a basis for admitting Raissa's April 20, 2012, interview. Nor does the State on appeal rely on the completeness doctrine to justify the trial court's decision to admit the entire interview.

¶ 65 Instead, the record reflects that the State intended to pursue two separate methods of impeaching Raissa: impeachment with her prior inconsistent statements and impeachment by omission. On direct examination, Raissa testified that defendant could not ejaculate or even get an erection. However, she had previously told detectives the exact opposite, and the State was entitled to confront her with those prior statements. See *People v. Deramus*, 2014 IL App (1st) 130995, ¶ 27. When the State did so, Raissa responded that she did not remember what she had previously told police. To perfect impeachment, the State was thus required to prove that Raissa made the prior statements. See Ill. R. Evid. 613(b) (eff. Oct. 15, 2015) ("Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is first afforded an opportunity to explain or deny the same and the opposing party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require."); Michael H. Graham, Graham's Handbook of Illinois Evidence § 613.3, at 671 (2016 Edition) (If a witness testifies that she cannot remember making the statements at issue, does not know if she made them, or gives an equivocal answer that does not amount to an admission, the prior statement must be proved).

¶ 66 The State also intended to impeach Raissa by demonstrating that she did not tell detectives during the April 20, 2012, interview that defendant would urinate if he attempted to get an erection. "The rule for impeachment by omission is that it is permissible to use prior silence to discredit a witness' testimony if: (1) it is shown that the witness had an opportunity to make a statement, and (2) under the circumstances, a person would normally have made the statement." *People v. Conley*, 187 Ill. App. 3d 234, 244 (1989). Raissa initially testified that she told detectives that defendant would urinate if he attempted to get an erection. She subsequently said that she did not remember whether she told police about this. In light of these answers, the State was in the position of having to prove a negative—*i.e.*, that Raissa did not tell police that defendant would urinate if he attempted to get an erection. See *People v. Little*, 223 Ill. App. 3d 264, 270-71 (1991) (in a case involving the robbery of a convenience store, where the defendant testified that he had told police that he was at home with his brother and several other individuals at the time the crime occurred, the State presented rebuttal testimony from a police officer explaining that defendant had not made that statement).

¶ 67 Defendant does not dispute on appeal that the State should have been allowed to perfect its impeachment of Raissa. Instead, he complains that "the absence of two or three comments from [her] statement to police could have been demonstrated without examination of her entire interview." Defendant does not tell us what procedure should have been followed to avoid the court having to consider the entire transcript and recorded statement. Of course, the State might have called one of the detectives who interviewed Raissa to testify that she did not tell them that defendant urinated when he attempted to have sex. However, defense counsel twice told the trial court that there was no need to call the detectives. Defendant should not be heard to complain on appeal that impeachment could have been perfected by other means. See *People v. Carter*, 208

Ill. 2d 309, 319 (2003) ("Under the doctrine of invited error, an accused may not request to proceed in one manner and then later contend on appeal that the course of action was in error.").

¶ 68 Defendant also notes that Raissa's police interview covered a wide range of topics apart from defendant's sexual function. While that is true, defendant fails to demonstrate that he was prejudiced by the admission of Raissa's entire statement to accomplish the impeachment. Contrary to what defendant argues, there is simply no indication that the State wanted to introduce Raissa's entire statement to "put her comments before the court in a substantive fashion." In her statement to detectives, Raissa repeatedly asserted her belief that defendant was innocent. This distinguishes the matter from *People v. Allen*, 36 Ill. App. 3d 821, 825 (1976), and *People v. Robinson*, 46 Ill. App. 3d 713, 718 (1977), in which the out-of-court statements at issue implicated the defendants in the charged offenses. The only portion of Raissa's statement that defendant argues could even potentially have been incriminating to him were her remarks about a 2010 DCFS investigation into allegations that defendant had abused M.L. However, defendant himself elicited testimony on this topic from Raissa during his case-in-chief. Therefore, even before the trial court listened to Raissa's police interview, it was aware of the 2010 investigation. For all of these reasons, the trial court did not abuse its discretion in admitting Raissa's entire statement for the purposes of impeaching her with her prior inconsistent statements and impeaching her by omission.

¶ 69 Defendant also complains of the way that the trial court ultimately used Raissa's recorded statement. However, he does not cite any factually analogous case to support his claim of error. We reiterate that after the court overruled defense counsel's general objection to the use of impeachment evidence, defense counsel agreed that the court could listen to the entire recording and read the transcript. The interview was admitted in its entirety for the purpose of impeaching

Raissa, and the court simply relied on it for that purpose. Under these circumstances the trial court's comments about Raissa's demeanor during her interview were not error.

¶ 70 Moreover, the court found Raissa to be unworthy of belief for reasons other than her demeanor in the police interview. For example, the court noted that Raissa was a convicted felon and that her testimony as to defendant's inability to walk was contradicted by the Wal-Mart video footage. In contrast, the court found M.L. to be a credible witness, emphasizing that she answered questions without hesitation, that her testimony was consistent, and that she described events beyond the understanding of a girl her age. It is thus clear that the trial court would have found M.L.'s testimony to be more credible than Raissa's testimony even if the court had not commented on Raissa's demeanor during the prior police interview. Any error by the trial court did not constitute plain error. See *Deramus*, 2014 IL App (1st) 130995, ¶ 28 ("Although defendant raises his claim under the doctrine of plain error, there can be no plain error if an error is harmless.").

¶ 71 (C) Amendment of the Guilty Finding on Count II

¶ 72 Defendant next argues that the court erred in revising its guilty findings on count II.

¶ 73 Defendant was originally charged in an information with six counts of predatory criminal sexual assault of a child and two counts of indecent solicitation of a child. Count II was one of the counts that alleged predatory criminal sexual assault of a child, a Class X felony. At the beginning of trial, the State orally moved to amend count II to allege aggravated criminal sexual abuse, a Class 2 felony. Defense counsel had no objection to the State's request, and the court allowed the amendment. After the parties presented their evidence, they submitted written closing arguments. In their arguments, both defendant and the State incorrectly asserted that defendant faced six counts of predatory criminal sexual assault of a child and two counts of

indecent solicitation of a child. In announcing its rulings on November 26, 2014, the court stated that it found defendant guilty on count II of predatory criminal sexual assault of a child.

¶ 74 Defendant did not identify this error in his posttrial motion. Instead, the State addressed the problem at the beginning of the hearing on defendant's posttrial motion on March 13, 2015. After the Assistant State's Attorney explained the issue to the court, the court asked: "What is the State's position, just so I am clear, that instead of being a predatory Class X, it is now an aggravated criminal sexual abuse and that is I believe a class 2; is that right?" The Assistant State's Attorney responded: "That is correct, Judge." The court asked defense counsel whether he wanted to "discuss or make any comments about that" before the court made its ruling. Defense counsel replied: "No, judge." The court then said: "Based upon the evidence that was presented, I'll revise my finding to indicate that as to Count 2 the defendant is found guilty of the offense of Aggravated Criminal Sexual Abuse, a Class 2 felony." The written order states that the "court finds defendant guilty of aggravated criminal sexual abuse on ct. 02, and reaffirms its findings of guilty on counts 01 and 03 through 06."

¶ 75 On appeal, defendant argues that the court erred in revising its guilty finding, because "the revised order convicted [him] of a crime containing different legal elements than the initial guilty finding entered at the close of the bench trial." According to defendant, "this issue has only arisen in the context of the return of jury verdicts that the court later amends to state a crime other than the one contained in the charging instrument." To that end, he attempts to draw analogies to *People v. Crite*, 261 Ill. App. 3d 1041 (1994), while distinguishing the matter from *People v. Kirkland*, 2013 IL App (4th) 120343. He asks us to review his arguments pursuant to the plain-error doctrine.

¶ 76 In *Crite*, the defendant was indicted on several charges, including one count of aggravated battery with a firearm. *Crite*, 261 Ill. App. 3d at 1043. The jury was instructed both as to the charged offense of aggravated battery with a firearm and the uncharged offense of aggravated discharge of a firearm. *Crite*, 261 Ill. App. 3d at 1048. The jury signed a guilty verdict form for aggravated discharge of a firearm; the jury was not provided forms relating to the offense of aggravated battery with a firearm. *Crite*, 261 Ill. App. 3d at 1045. On the date of the sentencing hearing, the State filed a motion to correct the verdict form. *Crite*, 261 Ill. App. 3d at 1045. According to the State, "the jury had reached its decision based on the definition and proposition for the offense of aggravated battery with a firearm and, therefore, the trial court should amend the verdict form to be consistent with the jury's decision." *Crite*, 261 Ill. App. 3d at 1045. The trial court granted the motion over defendant's objection. *Crite*, 261 Ill. App. 3d at 1045.

¶ 77 On appeal, defendant argued that the court "erred in amending the jury's verdict to reflect a guilty finding on the charged offense of aggravated battery with a firearm rather than a guilty finding on the uncharged offense of aggravated discharge of a firearm." *Crite*, 261 Ill. App. 3d at 1045. This court agreed with the defendant. Noting that aggravated discharge of a firearm was a Class 1 felony while aggravated battery with a firearm was a Class X felony, we first rejected the State's contention that this was merely a typographical error. *Crite*, 261 Ill. App. 3d at 1045-46. Additionally, we emphasized that the verdict form tendered to the jury was "straightforward and needed no interpretation." *Crite*, 261 Ill. App. 3d at 1046. We also noted that the State had foregone three opportunities to object to the verdict form pertaining to the offense of aggravated discharge of a firearm: once at the instruction conference, again when the verdict forms were read to the jury, and when the jury was polled. *Crite*, 261 Ill. App. 3d at

1049. Accordingly, we vacated the amended verdict of guilty with respect to the offense of aggravated battery with a firearm and remanded the matter for sentencing on the lesser offense of aggravated discharge of a firearm. *Crite*, 261 Ill. App. 3d at 1049.

¶ 78 *Kirkland* is another case involving the amendment of a verdict form returned by a jury. The defendant in *Kirkland* was charged by information with two counts of aggravated criminal sexual abuse; one count pertained to one of his stepdaughters, and the other count pertained to another stepdaughter. *Kirkland*, 2013 IL App (4th) 120343, ¶ 1. The jury instructions correctly identified the offenses at issue. *Kirkland*, 2013 IL App (4th) 120343, ¶ 7. However, although the guilty form returned by the jury with respect to one of the victims, S.C., contained no errors, the guilty form returned by the jury with respect to the other victim, B.C., listed the offense as "criminal sexual abuse" rather than "*aggravated* criminal sexual abuse." *Kirkland*, 2013 IL App (4th) 120343, ¶¶ 7-8. The discrepancy was never brought to the trial court's attention, and the court sentenced the defendant on two counts of aggravated criminal sexual abuse, a Class 2 felony. *Kirkland*, 2013 IL App (4th) 120343, ¶¶ 8-9.

¶ 79 On appeal, defendant argued that the jury wrongfully convicted him of an uncharged offense as to B.C.; alternatively, he argued that, with respect to B.C., he could be sentenced only for the offense of criminal sexual abuse, which was a Class 4 felony. *Kirkland*, 2013 IL App (4th) 120343, ¶¶ 12, 26. The court acknowledged that the verdict form returned by the jury "incorrectly but unambiguously" indicated that defendant was guilty of criminal sexual abuse rather than aggravated criminal sexual abuse. *Kirkland*, 2013 IL App (4th) 120343, ¶ 26. However, unlike *Crite*, where the jury was given instructions addressing both the charged offense and an uncharged offense, the jury in *Kirkland* was only instructed on the charged offense of aggravated criminal sexual abuse. *Kirkland*, 2013 IL App (4th) 120343, ¶ 26. The

court also found it significant that the evidence with respect to both victims was practically identical, which suggested that "the word 'aggravated' was simply left off the verdict form as to B.C." *Kirkland*, 2013 IL App (4th) 120343, ¶ 29. The court concluded that "the jury clearly intended to convict defendant of aggravated criminal sexual abuse and, but for the typographical error, the jury would have returned a guilty verdict of aggravated criminal sexual abuse as to B.C." *Kirkland*, 2013 IL App (4th) 120343, ¶ 30.

¶ 80 Defendant attempts to analogize the present case to *Crite*. He notes that the offense of predatory criminal sexual assault of a child carries a higher penalty than aggravated criminal sexual abuse and requires proof of different elements. Defendant also proposes, without citation to authority, that aggravated criminal sexual abuse is not a lesser included offense of predatory criminal sexual assault of a child. According to defendant, because the court granted the State's motion to amend the guilty finding after he had filed his posttrial motion, "the only appropriate remedy available at the sentencing hearing was vacation of the conviction on count two." Defendant then distinguishes *Kirkland* on the basis that the two crimes at issue here "contain different elements and neither was a lesser included offense of the other."

¶ 81 The State responds that *Crite* has no bearing on this case, because the verdict in *Crite* was rendered by a jury and later amended by the judge to a greater class felony. The State also notes that aggravated criminal sexual abuse may be a lesser included offense of predatory criminal sexual assault of a child, depending on the allegations in the charging instrument. See *People v. Kennebrew*, 2013 IL 113998, ¶¶ 35-36; *People v. Kolton*, 219 Ill. 2d 353, 372 (2006). Furthermore, the State contends that the trial court, "in expressly basing its ruling on the evidence presented, *** found that the defendant had been proven guilty beyond a reasonable

doubt of the offense charged in the amended information." According to the State, defendant suffered no prejudice due to the amendment, as he was convicted of a lesser charge.

¶ 82 *Crite* and *Kirkland* are distinguishable and do not support defendant's claim of error. As the State notes, one critical difference is that this case involves a bench trial rather than a jury trial. In *Crite* and *Kirkland*, the reviewing courts were in the position of having to ascertain the jury's intent. There is no similar issue in the present case, because the trial court amended its own findings. *Crite* and *Kirkland* are further distinguishable because they involved guilty verdicts on uncharged offenses that were *lesser* felonies than the offenses charged. In contrast, the trial court in the present case originally found defendant guilty of a *greater* class felony than what was charged in the amended information. Under no circumstances could defendant have been convicted of a greater class felony than charged. See *Kolton*, 219 Ill. 2d at 359-60 (although a defendant generally may not be convicted of an uncharged offense, an exception applies where such offense is a lesser-included offense of a crime that is expressly charged, and where the evidence supports a conviction on the lesser offense and an acquittal on the greater one). The record confirms that the trial court and the parties simply forgot that count II of the information had been amended to allege aggravated criminal sexual abuse. Neither *Crite* nor *Kirkland* involved remotely similar circumstances to the case at bar.

¶ 83 We note that defendant does not argue that the trial court implicitly found him *not guilty* of the charged offense of aggravated criminal sexual abuse when it originally found him guilty of predatory criminal sexual assault of a child. Moreover, any such argument would be belied by the record. In closing arguments, the parties incorrectly told the trial court that defendant was facing six counts of predatory criminal sexual assault of a child. The error was only brought to the court's attention on March 13, 2015, the date that was scheduled for hearing on defendant's

posttrial motion as well as sentencing. This was the court's first opportunity to consider the issue of defendant's guilt with respect to the offense actually charged in count II of the amended information. Importantly, the trial court at that point made an express finding of guilt in light of the evidence presented, as opposed to simply accepting the parties' apparent agreement to amend the finding as to count II ("Based upon the evidence that was presented, I'll revise my finding to indicate that as to Count 2 the defendant is found guilty of the offense of Aggravated Criminal Sexual Abuse, a Class 2 felony.")

¶ 84 Furthermore, defendant does not articulate any prejudice that he suffered due to the court amending its findings so as to render a ruling on the offense actually charged. Nor does he contend that the evidence failed to support a guilty finding as to the offense of aggravated criminal sexual abuse.

¶ 85 At the end of the section of his brief addressing this issue, defendant asserts that "[a]n alternate analysis of this issue considers whether amendment of the guilty finding amounts to an amendment of a formal defect." In support of his two-sentence argument on this point, he cites section 111-5 of the Code (725 ILCS 5/111-5 (West 2014)), which allows the State to amend the information at any time to address formal defects. Defendant also cites *People v. Flores*, 250 Ill. App. 3d 399, 400, 403 (1993), where the court held that a trial court properly allowed the State to amend an indictment during closing arguments to conform to evidence that the defendant had sold cocaine rather than heroin. Defendant's "alternate analysis" is misplaced. By its very terms, section 111-5 addresses amendments to charging instruments, not guilty findings.

¶ 86 For all of these reasons, we conclude that the trial court did not err by revising its findings with respect to count II.

¶ 87 (D) Sentencing

¶ 88 For his last contention of error, defendant argues that his sentence of 53 years' imprisonment is excessive, because: he is 40 years old, he was sentenced to probation for his only prior felony convictions, he had a difficult family background, he suffers from physical disabilities, and he has no prospect of release during his lifetime. He proposes that the minimum six-year term of imprisonment for each of the five Class X convictions would be more appropriate, allowing him to look forward to eventual release while still imposing a heavy burden on him. He also notes that the minimum terms of imprisonment for certain offenses involving "actual loss of life or the immediate threat of the loss of life" are less than the sentences that he received collectively on his six convictions.

¶ 89 In determining an appropriate sentence, the trial court must consider many factors, "including the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age." *People v. Perruquet*, 68 Ill. 2d 149, 154 (1977). The trial court is in the best position to consider such factors, and its decisions with respect to sentencing are accorded great weight and deference. *Perruquet*, 68 Ill. 2d at 154. A court of review will not disturb a sentence that is within statutory limits unless the trial court abused its discretion, which occurs where the sentence is "manifestly disproportionate to the crime" or "greatly at variance with the spirit and purpose of the law." *People v. Watt*, 2013 IL App (2d) 120183, ¶ 49.

¶ 90 Defendant was convicted of five counts of predatory criminal sexual assault of a child, each of which carried a penalty of between 6 and 60 years' imprisonment. 720 ILCS 5/12-14.1(b)(1) (West 2010). He was also convicted of one count of aggravated criminal sexual abuse. Although he was eligible for probation on that count, he was also eligible for a prison sentence of between 3 and 7 years. 720 ILCS 5/12-16(g) (West 2010); 730 ILCS 5/5-4.5-35

(West 2010). He thus faced a total sentencing range of 30 to 307 years' imprisonment, and his sentences were to run consecutively. 730 ILCS 5/5-8-4(d)(2) (West 2010).

¶ 91 In sentencing defendant, the court said that defendant's conduct was "disgusting" and that he "earned every bit of his punishment." The court added that "[t]he harm done to his daughter will likely never be undone." With respect to the factors in mitigation, the court noted that defendant did not have a significant criminal record, that he will compensate the victim, and that imprisonment would both entail hardship on his dependants and impact his medical conditions. In aggravation, the court found that defendant's conduct caused serious harm to M.L. The court gave little weight to the need for deterrence, because "the legislature has enacted mandatory sentences here which are strong enough to send any desired message." The court sentenced defendant to 10 years' imprisonment on each count of predatory criminal sexual assault of a child and the minimum of 3 years' imprisonment for aggravated criminal sexual abuse.

¶ 92 We find no abuse of discretion. Defendant's sentences were well within the statutory range. Indeed, 10 years' imprisonment is much closer to the minimum of 6 years than the maximum of 60 years. Given the seriousness of the offenses at issue, we cannot say that an aggregate of 53 years' imprisonment was manifestly disproportionate to the crimes or greatly at variance with the spirit and purpose of the law. The seriousness of sex offenses against children cannot be overstated. See *People v. Huddleston*, 212 Ill. 2d 107, 132-41 (2004) (providing an extensive discussion about the harm to children who are victims of sex offenses, and explaining legislative efforts to protect children from sex offenders). Defendant's attempt to compare his collective sentences to the mandatory minimum sentence for other crimes is also misguided and

inappropriate. As the State correctly notes, defendant was sentenced on six separate offenses; he did not receive 53 years' imprisonment for a single offense.

¶ 93 III. CONCLUSION

¶ 94 For the reasons stated, the judgment of the circuit court of Kendall County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4–2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 95 Affirmed.