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2016 IL App (3d) 140358-U

Order filed June 2, 2016

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2016

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 9th Judicial Circuit, Knox County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-14-0358
	)	Circuit No. 13-CF-347
MICHAEL A. ZIEGENHORN,	)	
Defendant-Appellant.	)	Honorable Scott Shipplett, Judge, Presiding.

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JUSTICE SCHMIDT delivered the judgment of the court.  
Justice Carter concurred in the judgment.  
Justice McDade dissented.

**ORDER**

¶ 1 *Held:* (1) The State proved beyond a reasonable doubt that defendant committed aggravated criminal sexual abuse. (2) The trial court's rejection of defendant's posttrial claim of ineffective assistance of trial counsel is not against the manifest weight of the evidence.

¶ 2 Following a bench trial, the trial court convicted defendant, Michael A. Ziegenhorn, of aggravated criminal sexual abuse. After trial, the court conducted a preliminary inquiry pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), into defendant's posttrial ineffective assistance of

trial counsel claim. The trial court rejected defendant's claim on the merits without appointing new counsel to investigate defendant's claim further.

¶ 3 Defendant appeals, arguing the State failed to prove he committed the offense beyond a reasonable doubt. Alternatively, defendant argues that the evidence presented at the *Krankel* hearing is sufficient to raise the possibility that trial counsel was ineffective where counsel failed to call a specific witness to testify at trial. Thus, defendant argues that the trial court erred when it found it unnecessary to appoint new counsel. We affirm.

¶ 4 **FACTS**

¶ 5 The State charged defendant by information with two counts of aggravated criminal sexual abuse. Count I alleged that on June 13, 2012, defendant, who was over the age of 17, committed the act of sexual conduct with A.T., who was under the age of 13, by placing his hand on her vagina (720 ILCS 5/11-1.60(c)(1)(i) (West 2012)). Count II alleged that defendant placed his hand on A.T.'s breasts (*id.*). A.T. was nine years old at the time of the offense. The incident occurred at the home of A.T.'s aunt and uncle, Tracy and Kevin Ryden. At the time of the incident, A.T. had been visiting her grandfather, Tony Ryden, who lived in the basement.

¶ 6 Prior to trial, defendant's case was consolidated with the case of codefendant, Daniel K. Mitchell, without objection. Both defendants were charged with the same offenses committed upon the same victim, in the same location, and in the same general time frame. Both defendants waived the right to a jury trial and the case proceeded to a bench trial. Mitchell is not a party to this appeal.

¶ 7 At trial, A.T.'s mother, Randi Ryden, testified that on the day of the offense, A.T. visited her grandfather, Tony,<sup>1</sup> at Tracy and Kevin's home. Tony lived in the basement. At around 7:45 p.m., Randi received a telephone call from Tracy. Tracy told Randi to come get A.T. and take her home because A.T. was crying. A.T. also spoke with Randi on the telephone, crying and asking Randi to come get her.

¶ 8 Randi drove to Tracy's home and picked up A.T. and Tony. When they returned to Randi's home, A.T. told Randi what occurred at Tracy's home. A.T. had been in the basement using a computer when Tracy went upstairs, leaving A.T. alone with two men A.T. did not know. A.T. told Randi that one of the men walked over to her and rubbed her leg, while the other man rubbed her back. When A.T. asked the men what they were doing, they told her to be quiet. A.T. stood up, went upstairs, and told Tracy. At that point, Tracy called Randi. A.T. referred to one of the men as "Ziggy" and did not know the other man's name. Randi called the police after A.T. explained what had happened.

¶ 9 Four days later, Randi took A.T. to the Knox County Child Advocacy Center (child advocacy center). At the child advocacy center, A.T. spoke with forensic investigator Judy Guenseth regarding her allegations.

¶ 10 On cross-examination, Randi noted that she spoke with Officer Zachary Tuley on the day of the incident. On redirect, Randi clarified that when A.T. first told her what had happened, A.T. only mentioned one man touching her vagina. When Randi spoke with Tuley, she only told him that A.T. had been touched by one man, because at that time Randi had only been told by A.T. that one man had touched her. Randi had not learned about A.T.'s claim that the second

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<sup>1</sup>Tony is referred to as David in other witnesses' testimony. For clarity, we refer to him as Tony throughout this order.

man had been rubbing her back until the interview at the child advocacy center. Randi also acknowledged that A.T. initially told her that Tracy was upstairs during the incident, but later told Guenseth that Tracy was present for part of the incident.

¶ 11 Randi was also told by A.T. that Tracy had also been touched by one of the men while they were in the basement. A.T. told Randi that Tracy asked the man to stop because A.T. would tell somebody. Randi could not recall which man A.T. said had touched Tracy. A.T. could not describe what she saw the man doing to Tracy.

¶ 12 Officer Tuley testified that he responded to the dispatch call at Randi's home. He spoke with A.T. A.T. told him that she had been at her aunt Tracy's house and two males had inappropriately touched her. A.T. told Tuley both men touched her vaginal area. A.T. stated that both men told her not to tell anybody about the incident.

¶ 13 On cross-examination, Tuley clarified that A.T. only told him that one man had touched her vaginal area. Tuley's police report indicated that A.T. had been in the basement with two men, but only one man touched her. A.T. also told him that she remained downstairs until at least one of the men left the basement. A.T. told Tuley that Tracy was not in the basement at the time of the incident.

¶ 14 Guenseth testified that she conducted an interview with A.T. at the child advocacy center on June 17, 2013 (four days after the incident). The video recording of the interview was admitted into evidence and played in court without objection.

¶ 15 In the video recording, Guenseth asked A.T. to identify and name body parts on an anatomical drawing. A.T. described the vagina as "pee pee." After labeling body parts on the drawing, Guenseth asked A.T. if she had ever been touched by someone that she was not comfortable with. A.T. said yes, and told Guenseth that she had been touched at her

grandfather's house (referring to Tracy and Kevin's house). A.T. said she was alone in the basement with two men, while Tracy was upstairs. A.T. was playing on a computer in the basement when "he" started rubbing her. When asked who she referred to as "he," A.T. responded that she forgot his name but believed his name was "Zig-a-horn." When he touched her, A.T. backed up until she reached the couch and then started watching television.

¶ 16 A.T. told Guenseth in the interview that Randi wanted her to tell Guenseth that Tracy was also touched that day. Guenseth acknowledged A.T.'s statement, but returned to questioning A.T. about what happened to A.T. on that day. Guenseth asked A.T. to show on the anatomical drawing where "they" (instead of the previous "he") touched her. A.T. said her "pee pee" and "butt." Guenseth asked A.T. if both men touched her and A.T. said yes. Both men told A.T. not to tell anyone. A.T. said Tracy was upstairs the entire time this incident occurred.

¶ 17 A.T. told Guenseth that the two men stopped touching her when she backed away. After A.T. backed away, the men started using the computer and A.T. went upstairs and watched television. A.T. believed this was around 6 p.m. Later, A.T.'s grandfather, Tony, returned and told the men to leave. Tony then went outside and fell asleep. Later, A.T. told her grandfather what happened.

¶ 18 Further into the interview, A.T. began using the pronoun "he" when identifying the areas of the body where she had been touched. She said "he" was near the side of her body and touched her buttocks, partly on clothing, and partly on skin. A.T. said "he" put his finger up her sleeve and touched her over her clothing, near her breast. A.T. said just one of the men touched her up her sleeve. That man was "Zig." A.T. said that the "other guy" touched her and Tracy.

¶ 19 Unlike her statement earlier in the interview that Tracy was upstairs the entire time the incident occurred, A.T. then told Guenseth that Tracy was in the basement for part of the time

that A.T. was being touched—toward the end. The “other guy” started to touch Tracy, Tracy pushed him away, and told him not to do that in front of A.T. or A.T. would tell people. A.T. said that one of the men touched A.T. on her arm and the other touched her on the bottom, and that the one who touched her on the bottom was the one who touched Tracy. A.T. said that she told Tracy what happened after she told Tony.

¶ 20 At trial, A.T. testified that she was over at Tony’s house in the basement playing on the computer. In the basement there was a ping pong table, a bar, and Tony’s bed. A.T. was alone in the basement with two men she did not know. Both men touched her. Using an anatomical picture, A.T. circled the parts of her body indicating where the men had touched her. Those areas circled were A.T.’s vagina, buttocks, and shoulder. They touched her over her clothing and attempted to unbuckle her pants. When asked who the two men were that touched her, A.T. identified both defendants.

¶ 21 On cross-examination, A.T. said that Tracy was present in the basement when A.T. was touched. After being touched, A.T. went upstairs and watched television. A.T. remembered seeing Tracy and defendant “fooling around” while she was in the basement. A.T. stated that both men touched her at the same time. Only one man, “Ziggy” (defendant), tried to unzip her pants. The other man tried to get into the back of her pants while defendant tried to unbuckle her pants. A.T. identified defendant as the one trying to put his hand inside her shirt. The other man did not try to put his hand under her blouse. Tracy was downstairs half of the time the touching incident occurred. Tracy watched the touching incident, but did not do anything. A.T. recalled telling Randi that Tracy saw the incident.

¶ 22 Detective Kevin Legate testified that he presented A.T. with two photographic lineups at the child advocacy center. The first lineup consisted of six subjects and included a photograph

of Mitchell (codefendant). A.T. marked the photograph of Mitchell. The second lineup contained six subjects and included defendant. A.T. identified defendant. She identified both individuals as the men who touched her.

¶ 23 Legate also testified that Mitchell and defendant were both over the age of 18 on the date of the incident. Legate took photographs of the basement after the incident to corroborate A.T.'s description of the basement. Contained in the photographs is a bar with a computer sitting on top, a ping pong table, and a bed where her grandfather slept.

¶ 24 In addition, Legate spoke with defendant while he was in custody at the Knox County jail. Defendant told Legate that he was present in the basement of the house on the day of the incident. Defendant said that he might have patted A.T. on her back, that he might have touched her while reaching for a ping pong ball or playing ping pong, and A.T. also might have sat on his lap at one point while they were outside. Legate spoke with Tracy as well, and Tracy did not tell him that she was in the basement when the incident occurred.

¶ 25 During its case-in-chief, the defense called codefendant Mitchell to testify. He testified that he knew Tony because they went to school together. Mitchell had seen Tracy before and spoken to her briefly. On the day in question, Mitchell and defendant were invited over to Tracy and Kevin's house to play ping pong and drink beer. They arrived at the home around 3 p.m. Tracy was asleep in the bedroom. Defendant went into the bedroom where Tracy was sleeping and woke her up. A.T. went into the bedroom a few minutes later. A.T. then left the room and said that defendant was kissing Tracy.

¶ 26 Tracy, A.T., Mitchell, and defendant went into the basement (Tony was not in the house at the time). A.T. was playing on the computer and Mitchell was sitting at the bar. Tracy and defendant were playing ping pong. After the game, A.T. asked Tracy and defendant if they

wanted to play ping pong, but they said they were too tired. A.T. asked Mitchell to play, and he agreed. They played ping pong for about 15 minutes. During the game, Mitchell saw defendant kissing Tracy. After playing ping pong, A.T. sat at the bar and Mitchell sat in a chair near the bar area. A.T. then sat on the couch in the basement and watched television. Shortly thereafter, A.T. went upstairs because Tony and Kevin had returned home from a trip to the store. Tracy went upstairs a few minutes after A.T., then came back downstairs and told Mitchell and defendant to leave.

¶ 27           When Mitchell left, Tony was sleeping in a car. While defendant and Mitchell were trying to wake him up, A.T. came outside. A.T. started talking to Tony. A.T. pointed to defendant and told Tony that defendant drank Kevin's beer. A.T. did not say anything about being touched. Mitchell later left defendant and walked home alone.

¶ 28           Mitchell testified that he never touched A.T. Mitchell also stated that he was with defendant the entire time he was at Tracy's house and never saw defendant grab A.T. or try to put his finger up her bra or shirt. When Mitchell left the house, he did not know anything happened to A.T.

¶ 29           The defense did not call defendant or Tracy to testify.

¶ 30           In defense counsel's closing argument, he emphasized the inconsistency in the statements A.T. made regarding the abuse. Defense counsel also noted the fact that several other adults were present at the house around the time the alleged incident occurred, but the State did not call any of the other witnesses to testify. Defense counsel also noted that A.T. testified that Tracy was present during the abuse and the State had the opportunity to call Tracy, but did not. Defense counsel stated that he did not know whether Tracy was present or not during the abuse, but argued that it is not the defense's job to prove defendant innocent.



¶ 31 Ultimately, the trial court found Mitchell not guilty of both counts. The trial court found defendant guilty of count I (aggravated criminal sexual abuse by placing his hand on A.T.'s vagina), but found him not guilty of count II (aggravated criminal sexual abuse by placing his hand on A.T.'s breast). The trial court explained its findings.

¶ 32 The trial court believed that the incident occurred at a time when defendant and Mitchell were alone in the basement with A.T. Therefore, the case depended on A.T.'s credibility. First, the trial court considered whether there was any external evidence relating to A.T.'s credibility. The trial court noted that the only external evidence was the photographs of the basement taken by Detective Legate. The trial court found A.T.'s description of the room consistent with the photographs.

¶ 33 The trial court also found that A.T.'s statement about defendant "fooling around" with Tracy corroborated by Mitchell's testimony that this occurred, even though the trial court found it unlikely that "a married woman [would] start fooling around with [defendant] in full view of this niece in the same house where she lives and her boyfriend or husband is just out getting beer and he'll be back any time."

¶ 34 In addition, the trial court found it significant that A.T. told the story multiple times. The trial court believed A.T. told the story seven times to: Tracy, Tony, Randi, Officer Tuley, Detective Legate, Guenseth, and in the courtroom.<sup>2</sup> The trial court found that in all of those accounts, A.T. was consistent in saying that defendant tried to touch and rub her through her clothing around her vaginal area and tried to get into her pants, and that both defendant and Mitchell touched her in various places on her body.

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<sup>2</sup>While the trial court believed A.T. told her story seven times to different individuals, neither Tony nor Tracy testified at trial regarding A.T.'s account of the incident.

¶ 35 The trial court also emphasized the fact that during the child advocacy center interview, A.T. initially used the word “he”—referring to only one person touching her—until Guenseth started asking questions using the term “they” instead of “he.” The trial court noted that these later statements seemed “somewhat odd” in light of A.T.’s prior statements to Officer Tuley and Randi that only one person touched her.

¶ 36 Further, the trial court found Mitchell’s testimony about what happened that day to be incredible. The judge did not believe Mitchell’s testimony that nothing out of the ordinary happened in the basement. The trial court noted that there may be many reasons a child would make up a story about abuse, but that children rarely just “make them up out of whole cloth” when nothing happened at all. The trial court believed that Mitchell was “just testifying to protect [defendant].”

¶ 37 The trial court concluded its findings by noting that defendant, in his statement to Detective Legate, admitted to touching A.T. in a nonsexual manner. Although the trial court believed count I had been proven, the trial court found defendant not guilty on count II because it was not convinced that defendant’s hand was on A.T.’s breast.

¶ 38 In finding Mitchell not guilty, the trial court stated that it “strongly suspect[ed]” that Mitchell made some physical contact with A.T., but that it was not sure it was of a sexual nature.

¶ 39 Before the scheduled sentencing hearing, defendant wrote a letter to the circuit clerk alleging that his trial attorney provided ineffective assistance of counsel. In the letter, defendant requested a “hearing to dismiss counsel, and have new counsel appointed.” In addition, trial counsel filed a motion for a new trial alleging the State failed to prove defendant guilty beyond a reasonable doubt.

¶ 40 At the sentencing hearing, the trial court held an inquiry into defendant’s *pro se* posttrial claims of ineffective assistance of counsel. Defendant claimed that trial counsel was ineffective for failing to call Tracy as a witness. Defendant believed Tracy would have provided a historical background to provide a context for the allegations against him. Defendant said that trial counsel may have called Tracy if trial counsel had performed a proper investigation.

¶ 41 The trial court asked defense counsel to explain why he did not call Tracy as a witness. Defense counsel said that Tracy was present at the courthouse on the day of trial and that defense counsel had spoken to her. Defense counsel thought the State would call Tracy as a witness because she was listed as an occurrence witness. However, when the State did not call Tracy to testify, defense counsel chose not to call Tracy as a witness because he did not feel it was within his duty to call her. Although defense counsel believed Tracy was under subpoena from his office to appear at trial, he chose not to call her as a witness.

¶ 42 The trial court rejected defendant’s claims, noting that defense counsel had not demonstrated any lack of preparation. The trial court also noted that Tracy’s testimony could have actually benefited the State and that it was defense counsel’s strategic responsibility to determine who to call as a witness. The trial court then concluded that defense counsel was not ineffective at trial. Ultimately, the trial court sentenced defendant to six years’ imprisonment.

¶ 43 ANALYSIS

¶ 44 I. Sufficiency of the Evidence

¶ 45 On appeal, defendant argues that the State failed to prove beyond a reasonable doubt that he committed aggravated criminal sexual abuse. “A person commits aggravated criminal sexual abuse if: (1) that person is 17 years of age or over and: (i) commits an act of sexual conduct with a victim who is under 13 years of age[.]” 720 ILCS 5/11-1.60(c)(1)(i) (West 2012). The sexual

conduct that is the basis for defendant's conviction is that he knowingly touched or fondled, either directly or through clothing, A.T.'s vagina for the purpose of sexual gratification or arousal of defendant. 720 ILCS 5/11-1.60(c)(1) (West 2012).

¶ 46 Defendant argues the evidence is insufficient because his conviction is based on A.T.'s statements, which defendant contends are inconsistent and contradicted by Mitchell's testimony. Upon review, we find the evidence, when viewed in the light most favorable to the prosecution, supports the trial court's finding of guilt beyond a reasonable doubt.

¶ 47 In reviewing a challenge to the sufficiency of the evidence, the question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). A criminal conviction will only be reversed where the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt. *People v. Brown*, 2013 IL 114196, ¶ 48.

¶ 48 It is not this court's function to retry a defendant who challenges the sufficiency of the evidence. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). Instead, in a bench trial, the trial court remains responsible for determining the credibility of the witnesses, the weight to be given to their testimony, and the reasonable inferences to be drawn from the evidence. *Id.*

¶ 49 At trial, A.T. identified the areas of her body where the men touched her as her vagina, buttocks, and shoulder. While A.T. testified that two men touched her, she stated that defendant tried to unzip her pants and put his hand on her shoulder. By contrast, A.T. testified that the other man, Mitchell, only attempted to put his hand into the back of her pants. Viewing this testimony in the light most favorable to the State, a trier of fact could reasonable infer that defendant was the individual who touched A.T.'s vagina. This testimony alone, if credible, was

sufficient to find defendant guilty of aggravated criminal sexual abuse. Significantly, the trial court found A.T. to be a credible witness.

¶ 50 Defendant challenges this credibility finding by calling our attention to the fact that A.T.'s credibility was impeached in two ways at trial. First, defendant argues A.T.'s inconsistent statements impeached her credibility. Defendant argues A.T.'s statements were inconsistent regarding the following facts: (1) whether Tracy was present in the basement at the time the abuse occurred; (2) whether one or two men touched her; (3) what A.T. did following the abuse; and (4) whether defendant or Mitchell touched Tracy. Second, defendant argues that A.T.'s testimony was contradicted by Mitchell's testimony that he was present in the basement during the entire time in question and did not observe defendant commit the offense.

¶ 51 However, none of the above points call into question A.T.'s consistent allegation that one man touched her and the area where he touched A.T. was her vagina. A.T.'s mother and Officer Tuley both testified that A.T. told them that a man rubbed her leg and vaginal area. During A.T.'s interview with Guenseth, A.T. stated that "Zig-a-horn," touched her vagina. During the same interview, A.T. consistently identified her vagina as the area where she had been touched. Thus, A.T.'s statements and testimony with regard to defendant touching her vagina were never inconsistent. Further, even though Mitchell's testimony contradicted A.T.'s, the trial court found Mitchell's testimony on this matter incredible.

¶ 52 The inconsistencies cited by defendant do not render A.T.'s testimony so improbable as to raise a reasonable doubt of defendant's guilt. We emphasize that the trier of fact had the opportunity to observe both A.T. and Mitchell while they testified. It was the trier of fact's role to resolve any inconsistencies in her testimony and determine the weight to be given. *Id.* Based on its findings, the trier of fact found A.T. credible regardless of any minor inconsistencies in her

testimony and also found Mitchell's testimony incredible. We will not substitute our judgment for that of the trial court on questions involving the credibility of a witness. *Id.*

¶ 53 Moreover, we note that the record also contains circumstantial evidence supporting the trial court's finding that A.T. was a credible witness. We note Detective Legate's testimony that A.T.'s description of the basement where the incident occurred was consistent with the photographs he took of the basement. In addition, A.T.'s statement about defendant "fooling around" with Tracy was corroborated by Mitchell's testimony that this occurred (even though the trial court found his testimony incredible on every other matter). We also note defendant's admission to Legate that defendant may have patted A.T. on the back, that he may have touched her while playing ping pong, and A.T. may have sat on his lap on the day of the incident. Although defendant told Legate that the physical contact with A.T. was not sexual in nature, viewing this evidence in the light most favorable to the State and in conjunction with A.T.'s claim that defendant touched her inappropriately, we believe this statement supports the trial court's finding that A.T. was credible.

¶ 54 Viewing the above facts and circumstances in the light most favorable to the State, we find sufficient evidence was presented at trial to allow the trier of fact to find that defendant committed the offense of aggravated criminal sexual abuse (720 ILCS 5/11-1.60(c)(1)(i) (West 2012)).

¶ 55 II. *Krankel* Inquiry

¶ 56 Alternatively, defendant argues that he is entitled to new posttrial motion proceedings because the preliminary *Krankel* inquiry into his *pro se* allegations of ineffective assistance of counsel revealed "possible neglect of the case." Specifically, defendant calls our attention to defense counsel's failure to call Tracy as a witness. Upon review, we find the trial court's trial

determination with regard to defense counsel’s decision whether to call Tracy as a witness is not manifestly erroneous.

¶ 57 A defendant raising *pro se* posttrial claims of ineffective assistance of counsel is entitled to have those claims heard by the trial court. *Krankel*, 102 Ill. 2d at 181. There are two steps to the process due to defendant making such claims. First, the trial court makes a preliminary inquiry to examine the factual basis of defendant’s claim. *People v Moore*, 207 Ill. 2d 68, 78 (2003). If the claim is meritless, or if it solely concerns matters of trial strategy, then the court may deny the motion without appointing new counsel. *Id.* at 77-78. However, if the allegations show “possible neglect of the case,” new counsel is appointed to represent defendant in a full hearing on his *pro se* claims. *Id.* at 78. Defendant concedes that the trial court properly conducted a preliminary inquiry into his claims, but contends the preliminary inquiry revealed “possible neglect of the case” and, therefore, the trial court should have appointed new counsel for further inquiry.

¶ 58 Before addressing the merits of defendant’s argument, we must determine the proper standard of review. Defendant contends that *de novo* applies here because the trial court utilized the incorrect legal standard when determining his claim. Specifically, defendant argues that the trial court incorrectly reached its decision by finding counsel was not ineffective. According to defendant, he did not need to establish a full claim of ineffective assistance of counsel during the preliminary inquiry. Rather, defendant contends he only needed to establish possible neglect of the case. *People v. Munoz*, 348 Ill. App. 3d 423, 438-39 (2004) (applying *de novo* review to an evidentiary matter in part because the trial court based its ruling on an erroneous rule of law).

¶ 59 In this case, the trial court did not apply the incorrect legal standard, but reached a determination on the merits of defendant’s ineffective assistance of counsel claim by finding the

decision whether to call Tracy as a witness was a matter of trial strategy. *Moore*, 207 Ill. 2d at 77-78. When the trial court reached its determination on the merits, we reverse only if the trial court's action was manifestly erroneous. *People v. McCarter*, 385 Ill. App. 3d 919, 941 (2008).

¶ 60 Having determined the proper standard of review, we turn to consider the merits of defendant's argument. It is defendant's contention that facts presented at the *Krankel* hearing show the possibility that defense counsel neglected the case by failing to call Tracy as a witness. Defendant argues that the decision was unsound trial strategy. According to defendant, Tracy could have been a crucial witness for the defense because A.T. stated at the child advocacy center interview and at trial that Tracy was present in the basement at the time the abuse occurred. Defendant also notes Mitchell's testimony that Tracy was present in the basement. Thus, defendant argues, Tracy's testimony could have potentially corroborated or contradicted portions of either A.T.'s or Mitchell's testimony. The fact that the State did not call Tracy as a witness, defendant argues, suggests that her testimony would have benefited the defense.

¶ 61 We begin by noting that "decisions concerning whether to call certain witnesses on a defendant's behalf are matters of trial strategy, reserved to the discretion of trial counsel." *People v. Enis*, 194 Ill. 2d 361, 378 (2000). As a result, "[s]uch decisions enjoy a strong presumption that they reflect sound trial strategy, rather than incompetence \*\*\*." *Id.* We keep this principle in mind as we turn to the facts presented at the *Krankel* hearing.

¶ 62 At the hearing, defendant stated that he believed Tracy's testimony would have provided historical background and added context to the allegations against him. He did not argue that Tracy would have provided exculpatory evidence. Defense counsel explained that he knew Tracy was present at the trial and that he spoke with her. He believed the State would call Tracy as a witness because the State's discovery listed her as an occurrence witness. However, defense



counsel did not call Tracy as a witness, because he did not believe it was within his duty. In other words, defense counsel believed it was the State's duty to prove defendant guilty and not defense counsel's duty to prove defendant innocent.

¶ 63 In arguing that the decision to not call Tracy as a witness was unsound trial strategy, defendant presumes Tracy's testimony would have benefited the defense. Defendant speculates that *if* Tracy were present the entire time A.T. said the abuse occurred, and did not observe defendant touch A.T., her testimony could have potentially provided exculpatory evidence. Similarly, defendant speculates that if Tracy testified that she was not present at the time A.T. was abused, Tracy's testimony would have impeached A.T. However, defendant ignores the fact that it is also just as possible that Tracy was present and observed defendant abuse A.T. Because defense counsel stated that he spoke to Tracy and chose not to call her as a witness, we will not speculate as to why he did not call her as a witness. Instead, we view counsel's decision as a matter of trial strategy to which we defer. We emphasize that defense counsel's statement is consistent with the defense presented at trial, which was to argue that the evidence the State presented was insufficient to prove defendant guilty beyond a reasonable doubt. In particular, we note defense counsel's closing argument referencing the fact that A.T. said Tracy was in the basement during the abuse *and* the State had the opportunity to have Tracy testify to what she observed, but did not. Therefore, we hold that the trial court's determination that the decision to call Tracy as a witness was a matter of trial strategy is not manifestly erroneous.

¶ 64

#### CONCLUSION

¶ 65 For the foregoing reasons, we affirm the judgment of the circuit court of Knox County.

¶ 66 Affirmed.

¶ 67 JUSTICE McDADE, dissenting.

¶ 68 I respectfully dissent from the majority’s decision to affirm the defendant’s conviction. I do not believe that the State proved the defendant guilty beyond a reasonable doubt.

¶ 69 As the majority notes, the standard of review for a challenge to the sufficiency of the evidence is that we must view the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the essential elements of the crime to be proven beyond a reasonable doubt. *Collins*, 106 Ill. 2d at 261. Further, “[w]e will not reverse a conviction unless the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant’s guilt.” *People v. Collins*, 214 Ill. 2d 206, 217 (2005).

¶ 70 My review of the evidence presented in this case reveals that it was improbable, unsatisfactory, and inconclusive such that it created a reasonable doubt of the defendant’s guilt. I believe that the evidence in this case was extremely weak. A.T. gave multiple versions of the events of the day of the alleged incident, and there was little consistency between those versions. Guenseth may well have tainted A.T.’s recollection of the incident when she changed the pronoun A.T. had used from “he” to “they.”

¶ 71 In addition, I find it significant that at least one important witness was not called to testify in this case. I acknowledge the prosecutor’s right to decide how to prove the State’s charges and I will not speculate as to why particular witnesses were or were not called. However, it appears that Tracy could have resolved a major inconsistency in A.T.’s accusations and the fact that she was not called to testify in this case is perplexing and troubling.

¶ 72 While I acknowledge that the determinations by the trier of fact of witness credibility, evidentiary weight, and reasonable inferences to be drawn from the evidence are generally entitled to deference (*Siguenza-Brito*, 235 Ill. 2d at 228), those determinations are not conclusive (*People v. Cunningham*, 212 Ill. 2d 274, 280 (2004)). Were this not true, meaningful appellate

review would be impossible. Here, the circuit court’s credibility findings appear to me to be arbitrary. First, I cannot agree that A.T.’s recollection that the basement contained a computer, a ping pong table, a bar, and her grandfather’s bed had any bearing on her credibility. There is no indication in the record that she had not been present in that basement on multiple occasions before the alleged offense or before trial. Second, it is unclear to me how the fact that the defendant told Legate in an interview that he had touched A.T. in a nonsexual manner was in any way relevant to the determination of whether the defendant committed the crimes with which he was charged. In my opinion, using a statement that nonsexual touching occurred as evidence that sexual touching occurred has the effect of requiring the defendant to prove his own innocence. Third, I fail to see how it was significant that A.T. told numerous people about what allegedly transpired in the basement. Her versions varied greatly and none of them were as consistent as the trial court and the majority have found them to be.

¶ 73 Our supreme court has stated that under the *Collins* standard of review, testimony may be insufficient “but only where the record evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt.” *Id.* I believe that A.T.’s testimony was in fact that insufficient. I disagree with the majority that A.T.’s trial testimony was the most significant (*supra* ¶ 49), and that the variations in A.T.’s versions of the incident presented nothing more than “minor inconsistencies” (*supra* ¶ 52). For example, there is nothing minor about inconsistencies related to whether another individual—Tracy—was or was not present in the room at the very time the alleged sexual contact occurred.

¶ 74 I acknowledge that it is not this court’s function to retry a defendant (*People v. Digirolamo*, 179 Ill. 2d 24, 43 (1997)) or substitute our judgment for that of the trier of fact (*People v. Evans*, 209 Ill. 2d 194, 211 (2004)). However, even when viewing the evidence in the

light most favorable to the State, I cannot agree that the evidence was so probable, so satisfactory, and so conclusive as to eliminate *all reasonable doubt* of the defendant's guilt.

¶ 75 For the foregoing reasons, I respectfully dissent.