2016 IL App (3d) 140694-U

Order filed March 28, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2016

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 14th Judicial Circuit,
	)	Rock Island County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-14-0694
v.	)	Circuit No. 12-CF-763
	)	
SHAWN T. BLOCK,	)	Honorable
	)	Walter D. Braud,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Justices Holdridge and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defendant was proven guilty of predatory criminal sexual assault of a child beyond a reasonable doubt; (2) the trial court did not err in sentencing defendant; (3) the trial court did not prevent defense counsel from objecting to certain evidence; and (4) the information was not defective. Defendant's remaining contentions of error were forfeited.

¶ 2 Defendant, Shawn T. Block, appeals his conviction of predatory criminal sexual assault of a child arguing: (1) he was not proven guilty beyond a reasonable doubt; (2) the trial court committed various sentencing errors; (3) the trial court prevented defense counsel from objecting

to certain evidence; (4) the charging instrument was defective; (5) the trial court erred in permitting an undisclosed State's witness to testify; (6) the State violated defendant's right to a speedy trial; and (7) the trial court was prejudiced against defendant. We affirm.

¶ 3 FACTS

¶ 4 Defendant was charged by information with two counts of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2012)). Count I alleged that:

> "[Defendant,] between the dates of January 1, 2012, and September 2, 2012 *** committed the offense of PREDATORY CRIMINAL SEXUAL ASSAULT, in that said defendant, while acting with another for whose conduct he is legally responsible and who was 17 years of age or older, committed an act of sexual penetration with R.C., a minor ***, who was under 13 years of age when the act was committed, in that said codefendant Randi [H.-M.] placed her mouth on R.C.'s penis for her and the the [*sic*] defendant's sexual arousal, *** in violation of 720 ILCS 5/11-1.40(a)(1)."

¶ 5 The language of count II was identical to count I except count II omitted the phrase "while acting with another for whose conduct he is legally responsible." The State's Attorney signed the information. A verification was attached to the information. The name of the person who signed the verification was not printed on the verification and the signature was different than that of the State's Attorney who signed the information. There was a space printed on the verification for a notary public to sign, but the judge signed instead and printed the word "Judge" under the signature line for the notary public.

¶ 6 Prior to trial, defendant moved for a list of the State's witnesses. The State disclosed its potential trial witnesses but did not include Randi H.-M. on the list. At a pretrial hearing,

defense counsel requested a conference with the trial court pursuant to Illinois Supreme Court Rule 402(d) (eff. July 1, 2012). The conference was held off the record.

¶ 7 A bench trial commenced on March 17, 2014. The State called Randi as its first witness. Defense counsel objected on the ground that he did not have a disclosure from the State indicating that Randi was a potential witness. The prosecutor responded that she told defense counsel "over and over" that Randi was going to testify. The trial court overruled defense counsel's objection, stating:

> "I think the official requirement is a witness list preceding trial, but we don't have that and I'm going to attribute that the fact that this case has been continued a number of times for various reasons. But I have a personal recollection ***. But it's been said again and again and again that [Randi] is going to be a witness, both in this case and in her case."

¶ 8 Randi testified that she was R.C.'s mother. At the time the offenses were committed, R.C. was 6 years old, Randi was 30 years old, and defendant was 31 years old. Randi met defendant in November of 2011, and they had a relationship lasting 10 or 11 months. In the spring of 2012, defendant and Randi stopped communicating. They subsequently resumed their relationship but agreed they would only have a sexual relationship rather than a dating relationship.

¶ 9 Throughout their sexual relationship, Randi and defendant texted each other frequently and went out together. Defendant would spend the night at Randi's house after they went out or stop by her house after work. Near the end of their relationship, Randi learned defendant had a girlfriend the entire time he was in a relationship with Randi.

¶ 10 At first, defendant wanted to have sexual intercourse with only Randi. Over time, defendant wanted "more and more odd things." Defendant and Randi began having sexual intercourse in front of R.C. R.C. would peek out at them while hiding in a fort he built in the living room. Randi testified that R.C. watched her and defendant have sexual intercourse approximately three or four times. Defendant told Randi she should begin wearing no clothing around R.C. to make R.C. more comfortable with nudity, which she did.

¶ 11 Eventually, defendant and Randi actively involved R.C. in their sexual activities. Randi testified that R.C. was actively involved in sexual activity with her and defendant on two or three occasions between June 1 and September 7, 2012. Randi performed oral sex on R.C. on four or five occasions. Defendant was present on all but two of those occasions. Defendant touched R.C. "a couple times." Randi testified that on one occasion, defendant "put [R.C.] into his mouth" but she did not believe R.C. was aware. Defendant and Randi referred to engaging in sexual activities in front of or with R.C. as "family time" in their text messages. Randi did all the sexual activities with R.C. that defendant directed her to perform unless R.C. said no. Randi was trying to keep defendant happy because she cared about him. She believed her sexual activities with defendant would lead to a dating relationship.

¶ 12 Randi testified that she took a picture of herself performing oral sex on R.C. when defendant was not present and sent it to defendant because defendant wanted it. She told defendant that she "didn't like the idea," but she did it anyway. Randi explained:

> "The nonstop well, if you just do this, just a little bit, just a little bit here, but you guys mean so much to me, come on, please. The repetitiveness, asking, wearing down. There had been previous violent outbursts, never when [R.C.] was around, just when it was just him and I."

¶ 13 On each occasion that R.C. was involved in sexual activity, either Randi or defendant took photographs. At one point, defendant also took a video recording. Defendant requested pictures from Randi on several occasions via text message and in person. At first, defendant wanted pictures of Randi. Eventually, defendant wanted pictures of R.C. and Randi "doing things." Randi took pictures per defendant's request and sent them to defendant. Randi testified that defendant "always asked for pictures" and that she "never did anything without being directed to."

¶ 14 Randi identified several photographs that were taken of her and R.C. at her house by defendant. Randi testified that she was unaware that most of the photographs had been taken until she saw them in court. Two photographs showed Randi standing nude in the kitchen and R.C. standing next to her in his underwear. One photograph depicted R.C.'s hand holding an ice cube against Randi's naked breast. Two photographs showed Randi sitting nude on the floor and R.C. sitting nude on the couch. R.C.'s penis was visible in both photographs. Another photograph depicted R.C.'s penis pressed against Randi's skin. One photograph depicted a nude Randi performing oral sex on defendant while R.C. watched. R.C. was also nude in that photograph and his penis was visible. Another photograph depicted Randi embracing R.C. while they were both nude. Four photographs showed Randi nude on her hands and knees with R.C. underneath her.

¶ 15 The prosecutor played several video recordings. Randi testified that defendant took the video recordings and identified defendant's voice on the videos. Randi and R.C. were nude in the videos. In one of the videos, defendant asked R.C. if he wanted "to try it down there." Randi testified that defendant was asking R.C. to place ice cubes near her vagina. In another video

recording, defendant's arm was on Randi's breast. Defendant told R.C. he "needed to warm it up down there." Randi testified that R.C.'s mouth was on her breast in one of the videos.

¶ 16 When Randi spoke with the police, she told them that the sexual activities concerning R.C. were just a fantasy and it never went further than pictures. She and defendant had agreed to tell the police this story. A police officer told Randi they had proof that she had performed oral sex on R.C. on two occasions. Randi then admitted to performing oral sex on R.C. on two occasions. She told the police that defendant was present on one occasion. On the second occasion, she took pictures and sent them to defendant.

¶ 17 Randi testified that she allowed defendant to use her to groom R.C. because she was weak and believed she needed defendant. Randi told defendant that she was sexually excited by their sexual activities involving R.C. because that was what defendant wanted. Randi testified that she "knew what happened when [defendant did not] get what he want[ed]." Randi stated that she was testifying against defendant because she owed it to R.C. She did not know if she would receive a longer sentence of imprisonment if she did not testify, but stated that she "would be probably looking at a whole lot more time because [she] would be going to trial."

¶ 18 Randi admitted that she never mentioned defendant's physical abuse of her in her text messages to defendant or told anyone about the abuse. When she was interviewed, Randi did not tell the police that defendant touched R.C.

¶ 19 The prosecutor showed Randi extensive records of text messages, which Randi identified as text messages exchanged between herself and defendant. The text messages dated between June 1 and September 6, 2012. The State offered the text message records into evidence. The trial court asked defense counsel if there was any objection to the introduction of the text

message records, and defense counsel replied that he had no objection and had received the text messages in discovery. The trial court then addressed defendant:

> "[Defendant], so you're comfortable, if there was to be an objection to these records, that objection needs to be made before at this stage of the proceeding. I assume that any challenges to this type of evidence would have been made. So I'm just saying this so that you don't think your lawyer's backing up on you or something. He's doing all that he can so far."

¶ 20 The prosecutor read many of the text messages aloud and occasionally asked Randi questions about the content of the text messages. On June 24, at approximately 1 a.m., defendant sent Randi a text message stating that it would be "a huge turn on" for him if he and Randi engaged in sexual activity while Randi's 10-year-old sister was in the next room. Defendant also stated he had a fantasy of Randi's sister walking in on them having sexual intercourse. Randi replied that if her sister saw them having sexual intercourse she would tell everyone because she had autism. Randi asked defendant why he got "ideas" when her sister was there but did not like to come over when R.C. was home. Defendant replied that he had "ideas" when R.C. was there too. Defendant asked Randi if she had "ever thought of any of this" before. Randi replied that she had, but her "thoughts kinda stop[ped] when the kid asks what [you are doing]."[1] Defendant replied, "That's where my thoughts keep going."

¶ 21 That same morning, defendant and Randi exchanged more text messages in which defendant stated he watched pornography involving bestiality and was interested in group sex.

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[1]We note that there are various spelling errors and colloquial abbreviations in the text messages exchanged between defendant and Randi. In this order, we quote the text message records verbatim without use of the "[*sic*]" notation.

Defendant also told Randi he had masturbated in front of his daughter before.[2] Randi replied that she had masturbated in front of R.C. before when she believed he was asleep.

¶ 22 Later that morning, defendant asked Randi to tell him a "naughty play date fantasy." Randi began to describe a fantasy in which she and defendant had sexual intercourse in her bathroom while R.C. and defendant's daughter played in another room. The children knocked on the door and asked if she and defendant were all right. Defendant asked, "Did u want it to stop there?" Randi continued to describe a fantasy in which their children watched her and defendant have sexual intercourse. Defendant then asked Randi: "[T]ell me one more deep dark fantasy uve had…maybe involving [R.C.] or [your sister]?" Randi replied that she had not had any fantasies involving them. Randi testified at trial that the play date fantasy was "an act of creative writing" and she was not actually planning on doing this with defendant and their children.

¶ 23 Later that day, Randi asked defendant if he was "into kid porn." Defendant replied that he had watched it before but was not "super into it." Randi responded: "Good. That would upset…not sit well with me. Kids catching, walking in while we finish up is fine…even us fooling around while they are sleeping next to us but that is as far as I can go." Defendant replied, "I would never hurt a kid like that. The idea of fulfilling a childs natural curiosity turns me on a lot but I push those thoughts aside." Defendant then stated: "I would never impose anything on a child but it would be tough for me to turn something down if they wanted to know more about something."

¶ 24 On June 29, defendant sent Randi a text message asking her to describe some "really kinky things." Randi began describing a fantasy in which she and defendant engaged in various sexual activities. Defendant suggested that Randi involve her sister and R.C. Randi continued

[2]Randi testified that she believed defendant's daughter was four years old at the time.

the fantasy, eventually describing herself engaging in oral sex with R.C. Defendant then sent Randi a text message stating, "You have no idea how badly I wanna live all this out." Randi responded, "I don't know how far I could actually take this. I know I would cut off before I did anything to [R.C.] but letting him see and him touch me or himself is another thing." Randi asked defendant, "Still on no feelings?" Defendant replied, "We will seehow it goes when we start getting closer in this way honey."

¶ 25 Defendant asked Randi if she wanted to "start with [R.C.]" that weekend. Randi replied that she did, but she wanted it to be a "chance thing" rather than something they did on purpose. Randi stated she was afraid R.C. would tell his father. Defendant replied that they would not do anything with R.C. that Randi could not "explain away." Defendant added, "We just have to have a plan to explain it and show things to [R.C.] the right way. And if he does end up telling his dad everything then u can explain something in a very innocent way so not to raise an alarm."

¶ 26 On June 30, defendant sent Randi a text message suggesting they begin "family fun time" the next day. Defendant suggested that Randi "lay the ground work" that night by showing R.C. a movie with sexual intercourse in it or doing "show and tell." Randi replied, "Not without you!! *** this is suppose[d] to be a by chance thing." Defendant and Randi then exchanged text messages detailing a fantasy in which they engaged in sexual activities with R.C. Randi stated: "There is still a part of me somewhere in the back of my head saying this is wrong." Defendant replied: "I understand. We won't hurt him or eachother with any of this. I adore you guys and want what's best for you!"

¶ 27 On July 1, Randi and defendant exchanged text messages discussing their plans for defendant to come over to Randi's residence that evening to have sexual intercourse. Randi stated she had walked around in front of R.C. in her underwear that morning. Defendant

responded: "That's how u should be now then too so he knows its okay for me to see u like that." Randi testified that defendant came over that night.

¶ 28 On July 2, defendant sent Randi a text message asking if she wanted to be "a bad mommy" again. Randi replied that she did. Defendant stated that he would come over. Later that day, Randi sent defendant a text message stating: "[R.C.] said he kept watching us." Defendant later sent Randi a text message stating: "I think its so hot that [R.C.] watched us today." Defendant sent Randi another text message stating: "U should also tell [R.C.] its ok if he sees me naked and if I seehim naked."

¶ 29 Between July 3 and July 9, defendant and Randi exchanged text messages discussing sexual activities they wanted to engage in with R.C. On July 5, Randi sent defendant text messages describing how she was touching R.C. sexually. Defendant repeatedly requested photographs. On July 9, defendant sent Randi a text message stating he wanted to "move on to oral" sex that weekend with R.C. and his daughter.

¶ 30 Between July 11 and July 13, defendant and Randi exchanged text messages discussing their plans to engage in sexual activities with R.C. that weekend. On July 13, defendant sent Randi a text message saying he was coming over to her residence. Defendant then asked Randi, "Want to try [R.C.] getting u off real quick?" Randi replied, "Maybe…..join me in the bedroom."

¶ 31 The next day, July 14, defendant sent Randi a text message stating he wanted to "take this to a higher level tonight" and asked if she had any suggestions. Randi replied: "Well u saw how [R.C.] acts when he is sleeping but we can still try to involve him into our play." Defendant responded: "Maybe rubbing him. Kissing him." Defendant asked if R.C. would wear a diaper

that night and Randi replied that R.C. could maybe begin without a "pull-up." Defendant asked Randi to "try for more pix tonight." Defendant then said he was on his way.

¶ 32 On July 15, defendant sent Randi a text message asking, "Do u think we are hurting [R.C.] by doing this?" Randi replied: "I don't know. Last night, maybe cuz he starting crying out in his sleep. Today, no." Defendant then asked: "Something u wanna keep exploring?" Randi replied, "I think so. What about you?" Defendant replied, "Ya I think so too. Part of me wants to stop and the other part wants to push to get what we want." Later that day, defendant sent Randi a text message stating: "I think u could get him to rub u tonight." Randi replied, "I would like to *** I don't think he is ready."

¶ 33 On July 20, defendant sent Randi a text message asking, "When can we get more family time in?" Randi replied that R.C. was at his father's house for the next few days. Defendant then asked, "What's ur fav family time moment so far?" Randi responded: "I loved last weekend…us having sex while he watched…or me rubbing on both of you at the same time. It's a tied." Defendant replied: "Ya both of those were really hot!" Then, Randi asked: "What about yours?" Defendant responded: "When I jerked him off and it turned u on."

¶ 34 On July 27, Randi sent a text message to defendant stating: "I think [R.C.] wants some family fun time." Defendant asked how she knew, and Randi responded that R.C. had been playing with her breasts. Defendant then asked, "try for more pix tonight?" Randi replied that she would try. Randi admitted at trial that defendant had not sent her any prior text messages to prompt her to suggest having "family fun time" with R.C. Randi explained she was manipulating defendant to get him to come over.

¶ 35 Defendant then sent Randi a text message stating, "I really think he wants to explore these things…I'm starting to feel that we could get a lot farther if u pushed the envelope with him

alone and then I arrived as an add on." Randi replied, "I think he does too. I'm very surprised. He initiated things today which took me by surprise. I can't wait to see you." Defendant responded, "So take it really far with him…and see what he does." Randi replied, "It is easier to do when u are here. I don't feel so, um, creepy." Defendant responded, "its not creepy. Its loving!"

¶ 36 On July 28, Randi sent defendant a text message stating: "[R.C.] just got naked and is studying his penis." Defendant replied, "Pics?" Randi responded, "I'm gonna try. I got to play with himself but he doesn't want me to touch it." Defendant responded, "Ok. Just kinda show him how to stroke it with out u touching it." Randi responded, "I did. *** I talked about how girls put it in their mouths to make it feel real good and [he] asked if that is like I do to you." Defendant replied, "Mmmmm u should show him real quick…like for 10 seconds then take a pic." Randi responded, "I won't if he doesn't want me to. So far he isn't ready."

¶ 37 Later on July 28, defendant sent Randi a text message stating, "I want to try to take this to the next level tonight." Randi replied that she wished defendant was there and that R.C. was letting her "play with him." A few minutes later, Randi sent another text message stating R.C. asked her to perform oral sex on him but stopped because he thought he needed to use the bathroom. Defendant replied, "Can I try for pix tonight baby? And did u suck on him?" Randi responded, "Yes hun, I keep trying for pics ***. I did suck on him. I keep telling him things I want to do with you and him to prepare him and try to make him more relaxed." Defendant replied, "That's so hot baby! U should ask if I can suck on him too." Later that day, Randi sent defendant a text message describing how she performed oral sex on R.C. Defendant replied, "Get him to try again…ill be there in 2 [minutes]."

¶ 38 On July 29, defendant sent Randi a text message asking: "Anymore bjs tonight? Lol." Randi responded: "Lol. Nope…at least not yet." Defendant replied: "Please try for pix babydoll."

¶ 39 On July 31, defendant sent Randi a text message stating, "I can't wait to have more family fun with you." Later that day, Randi sent defendant a text message stating she was afraid that R.C. would eventually threaten to "tell" if she did not give him his way. Randi then stated, "Oh, last night I offered to make him feel good while he was trying to relax but he declined." Defendant replied, "I think if u let him know that ur in control he won't get that way…like let him lay back while u blow him but only if he's a good boy." Randi responded, "That is a good point. I think I've lost a lot of authority over him ***. Maybe I can use this to help get some of it back." Defendant replied, "Take some control this way. That will help all of us. Then reward him when he listens and follows through[.] And punish him when he doesn't." Randi responded, "I'm trying. The hard part of that is I want this to be on his own want…not something I force on him." Defendant replied, "Well we already know this is something he wants…he just needs structure and authority to follow through with it." Randi replied, "And I need you to to keep me balanced when I start questioning it all." Defendant asked what she meant. Randi responded, "When I start having my 50 questions and doubts you pull me back and keep me level headed about it…remind me that it is family and about love." Defendant responded, "Ok baby I can do that."

¶ 40 On August 1, defendant sent Randi a text message stating, "Oh baby…that's sooo hot! U should take his pullups all the way off." Randi had not sent a text message prior to that. After receiving defendant's text message, Randi described how she was having "playtime" with R.C. Defendant repeatedly requested that she send him pictures.

¶ 41 On August 8, defendant sent Randi a text message stating, "I'm going to try and get [my daughter] this weekend…and if we play it out right I don't see why we all can do full on oral with eachother." Randi replied, "Good because I want it all to happen…and soon. Actually, I need it all to happen. I think you are wearing off on me." Defendant responded, "I think we should make that happen. Not push the issue but basicly take charge…cause once we pass that hump then its downhill from there." Randi replied, "I want it to happen. I just don't want it to backfire. I don't want him to say anything come the time they have the class in school next year that they had last year. That is what keeps holding me back." Defendant responded, "What if we reward him for being a good boy and explain to him that its ok if its mommy and me only."

¶ 42 On August 10, defendant texted Randi and asked if she wanted to have "family fun." Randi replied, "Maybe. *** I just have to keep him up." Defendant replied, "Ok baby...maybe try for more pix?" Randi sent defendant text messages stating that she and R.C. took a shower together. Defendant replied, "Any fun left for me?" Randi responded, "Oh yeah. We only did a little touching." Defendant replied, "Goody *** you should really prep him this next half [hour]." Later, Randi sent defendant a text message stating R.C. had fallen asleep. Defendant stated, "Maybe if he's in a deep sleep we can try for more pix."

¶ 43 On August 11, defendant sent Randi a text message stating, "that was so fun last night." Randi replied, "It was a lot of fun. I enjoyed it. You should come over for a repeat." Defendant responded, "Did you notice that the more assertive u were the more fun he had." Randi sent defendant a text message stating that R.C. was "in a silly mood." Defendant stated, "You should start blowing him." Randi replied, "I will try to start stuff." Defendant responded, "Ok I can be up in 15 [minutes]."

¶ 44 On August 12, defendant sent Randi a text message stating, "I'm so happy [with] the progress [R.C.] is makin[g] with you." Randi replied, "Me too." Randi went on to describe sexual acts she had performed with R.C. that morning. Defendant then stated, "I really am wondering how we get him to take it to the next level." Randi stated that she had performed oral sex on R.C. that morning. Defendant replied, "I really wanna set a camera in ur room baby." Defendant added, "Maybe just setting up cameras in full view and that way [R.C.] gets used to them and forgets about them…and u can just hit record before u think something is gonna happen."

¶ 45 On August 13, Randi sent defendant a text message stating that she "made [R.C.] cum." Defendant replied: "Really??" Randi described how she performed oral sex on R.C. Defendant asked: "So how did he cum? Did he actually produce semen?" Randi replied: "I swallowed some of it and then he had a little white dot of cum. It was hot." Defendant responded, "U should suck his dick some more and get pictures." Randi replied, "I would love to but he is done. *** I was going to try for some pics when he falls asleep." Defendant replied, "Goodie *** make it a no underwear night." Randi testified at trial that she did not actually make R.C ejaculate; she was exaggerating "in hopes of getting [defendant] over."

¶ 46 Later on August 13, defendant and Randi exchanged text messages regarding pictures of R.C. that Randi had sent to defendant. Defendant then suggested giving their children Nyquil before bed so they could "get away with *** more with them." Randi responded, "I will think about it. I still want this to be them wanting it more than us. It helps with my conscious that way." Defendant replied, "Its not like we will abuse them…we will do the same thing we do now when they sleep. Just more of it."

¶ 47 On August 14, defendant sent Randi a text message stating he would come over that night. Defendant stated, "You should institute complete nudity time tonight." Later that day, defendant sent Randi a text message stating, "That was a very hot night." Randi replied, "Yes it was! I was very surprised. He is opening up to you." Defendant responded, "we just need to get him interested in oral on us now."

¶ 48 On August 22, defendant sent Randi a text message stating, "I think about our last family time often." Randi replied, "Me too. Do you know how happy I was watching you and [R.C.] play together? That alone turned me on." Defendant responded, "Ya that was hot when he was touching me ***. I think he will start letting me blow him soon. Then he will start going down on us." Randi replied, "I think so too. I'm glad he is opening up to you. I need to find a way to talk to him about how this is only ok with me and you. I just haven't figured that out yet."

¶ 49 On September 3, Randi sent defendant a text message stating, "I know what I'm going to say if I'm questioned." Defendant replied, "What will u say?" Randi responded, "That he caught us having sex and we finished instead of stopping." Defendant replied, "Ya for me its a non issue. We didn't do anything wrong and *** we will be more careful in the future not to expose him to that." Randi replied, "Exactly."

¶ 50 Randi testified that she eventually told a friend "some of what was going on" with defendant and R.C., and her friend went to the police.

¶ 51 Lieutenant Darren Gault testified that he interviewed defendant at the police department on September 7, 2012, in connection with the present case. The interview was audio and video recorded. Defendant told Gault he had a casual sexual relationship with Randi but she was not his girlfriend. Defendant stated he and Randi had sexual intercourse multiples times in front of R.C. At first, R.C. walked in on them while they were having sexual intercourse and eventually

they intentionally had sexual intercourse in front of R.C. Defendant told Gault that Randi found it thrilling when R.C. caught them, and her excitement excited defendant. On some of these occasions, defendant and Randi had sexual intercourse in the living room while R.C. was in a blanket fort where he could watch. Eventually, R.C. was in bed with defendant and Randi while they were having sexual intercourse.

¶ 52 Defendant denied ever touching R.C. Defendant stated he received a text message from Randi containing a picture of Randi performing oral sex on R.C. Defendant told Gault that he had asked Randi to send him a picture but he did not think she would actually do it. Defendant stated that he immediately deleted the picture and then ended his relationship with Randi. A portion of the video recording of the interview was played in court and the video was entered into evidence.

¶ 53 Gault was not aware of the text message exchanges between defendant and Randi at the time of the interview. Defendant permitted Gault to look at his cell phone, but defendant had deleted the text messages on his cell phone prior to September 2, 2012.

¶ 54 Detective Jeremy McAuliffe testified that he examined a secure digital (SD) card recovered from defendant's home. The SD card fit into defendant's cell phone, which was also recovered by the police. McAuliffe recovered 13 pornographic photographs involving R.C. and 4 video recordings of R.C. from the SD card. The State offered the photographs and video recordings into evidence. These photographs and video recordings were previously identified by Randi during her testimony. The State rested.

¶ 55 Defendant called Detective Joshua Allen as a witness. Allen investigated allegations of sexual misconduct against Randi and defendant involving R.C. as well as defendant's daughter

and Randi's younger sister. Allen's investigation showed the allegations involving defendant's daughter and Randi's sister to be unsubstantiated.

¶ 56 Allen interviewed R.C. and Randi. At the conclusion of his interviews, Allen had no indication that defendant had ever touched R.C. During Allen's interview with R.C., R.C. stated that his mother had placed his penis in her mouth on two occasions. Defendant was not present on one of the occasions. On the other occasion, defendant was there and he was naked.

¶ 57 During Allen's interview with Randi, Allen told Randi he had proof that she had engaged in sexual activity with R.C. At that point, Randi admitted that she performed oral sex on R.C. on two occasions. On one of these occasions, defendant was not present but she sent him a picture at his request. On the other occasion, defendant was present. After Allen told Randi he had proof that she touched R.C., Randi became upset and started crying. Allen then began asking her direct questions. Randi told him the sexual acts she committed with R.C. were defendant's idea. She did not say that she attempted to stop the sexual acts. At the end of the interview, Allen placed Randi under arrest. The video recording of Allen's interview with Randi was introduced into evidence and a portion of the video recording was played in court.

¶ 58 Allen did not have records of text messages exchanged between Randi and defendant at the time of the interviews. Eventually, Allen reviewed the text message records and learned that defendant was far more involved than Randi had indicated to him.

¶ 59 The trial court found defendant guilty of both counts of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2012)). The court noted that it was required to find that acts of sexual penetration with R.C. happened on two occasions, but it believed the acts happened five times. The trial court found Randi to be a credible witness. The trial court noted

that defendant did not initially tell Randi he wanted to have sexual intercourse with R.C. but rather said he wanted to have sexual intercourse with her. The court reasoned:

> "[T]he text messages show a clear progression from what I would consider to be ordinary sex, to a little more risque sex, to very risque sex, to let's explore the boundaries, sexual boundaries, to let's try other couples, to let's include the children, let's include your child, let's include touching, let's try to put [R.C.] in a situation where he will be comfortable being touched, let's put [R.C.] in a situation where he would be comfortable being naked and seeing us naked, all the way to he will be comfortable with us, my old south side of Chicago talk, see us doing it. Expose the child so that he can be comfortable seeing what adult body parts look like when they are intersecting in an act of sexual intercourse or oral intercourse so that he can be prepared, as a child, to participate."

¶ 60 Defendant filed a motion to reconsider and a motion for a new trial, arguing the State did not establish beyond a reasonable doubt that defendant was accountable for the actions of Randi. At a hearing on the motions, defense counsel argued the court did not make a finding following trial that defendant was accountable for Randi's acts of sexual penetration with R.C. but rather found that it was enough for the State to prove that the acts occurred.

¶ 61 The trial court denied the motions. The trial court reasoned:

> "[T]he Prosecutor has been cautious. It may well be that only two acts in her view could be proven beyond a reasonable doubt but there has to be 50 or 100 acts in here that are in violation of something.

> The defendant is the puppeteer here. [Randi] is a fool. *** So accountability without question has been established ***. So the motion is denied."

¶ 62 Defendant also filed several *pro se* motions which the trial court refused to consider.

¶ 63 A sentencing hearing was held on May 28, 2014. The trial court noted that defendant faced mandatory consecutive sentences of 6 to 30 years' imprisonment on each count. The trial court noted that it had considered the multiple letters of support from friends and family members of defendant. The court also considered letters from various family members of R.C.

¶ 64 Defense counsel offered into evidence a psychological evaluation report of defendant prepared by Dr. Jerome M. Fialkov on April 27, 2014. The report stated that Fialkov performed a psychiatric evaluation of defendant on June 1, 2013, during which defendant stated he had been sexually abused as a child. The report opined that if defendant were released into the community, he would be a moderate risk for sexual violence. The report stated: "According to the available information, [defendant's] sexual offenses involved non-coercive exposure of sexual activity and fantasy to the young son of a female friend with whom he was engaged in a sexual relationship." The report also stated:

> "[Defendant] acknowledged he had been accused of a sex offense against a 6-year-old child. There was some indication he had deviant sexual desires and had been sexually aroused by fantasies involving the child observing him and the mother engaging in sexual activity. He denied having attempted to manipulate a child into engaging in sexual activity. However, he recognized the excitement and anticipating that preceded him acting out the sexually deviant behaviors. In addition, he received pictures over the Internet made by the mother who fellated

her 6-year-old son. He knew it was wrong to engage in sexual activity with an underage person, acknowledged some type of sexual offense was committed, had made a mistake, but believed allegations against him have been exaggerated and attempted to explain what happened by indicating he was 'mixed up.' "

¶ 65 The report opined that defendant was not a pedophile but had exhibited sexually deviant behaviors and had shown extraordinarily inappropriate behaviors. The report concluded that defendant was not likely to relapse if exposed to children.

¶ 66 Fialkov testified at the sentencing hearing that he performed a psychological evaluation on defendant. Fialkov determined that defendant posed a moderate risk of reoffending, which meant defendant was "at somewhat elevated risk for sexual violence." Defendant was not at low or no risk for reoffending, but was "certainly not at a very elevated risk for sexual violence." In making his determination, Fialkov used a psychological test called the Sexual Violence Risk-20 and reviewed digital versatile discs (DVDs) of interviews with defendant, R.C., and Randi.

¶ 67 Fialkov opined defendant would be a good candidate for treatment because he was honest, open, thoughtful, and insightful. Fialkov thought that defendant had "learned his lesson *** by the consequences of his actions." Fialkov also believed defendant would be more successful with treatment than others he had observed because defendant had insight, had above average intellectual ability, and did not have a sexual deviation.

¶ 68 Fialkov had not read through the trial testimony. Fialkov was not aware that defendant had taken video recordings of R.C. performing sexual acts on Randi, but believed they were likely isolated incidents based on his interview with defendant. Fialkov believed he reviewed the text messages and recalled that "they basically sort of agreed with the interview, the DVD interview, of [defendant] and the victim's mother, and in fact the child." Fialkov testified that his

risk assessment would not have changed if he had been aware of the text messages from defendant stating that he had been involved in bestiality, viewed child pornography, taken video recordings of R.C. performing sexual acts on his mother, and masturbated in front of his daughter.

¶ 69 Defendant made a statement in allocution, stating that he was sorry and he "never intended to hurt anyone with [his] deviant behavior." Defendant acknowledged he hurt his family and friends, as well as R.C. Defendant stated that he never physically abused Randi, sexually assaulted R.C. in person, or sexually touched any child.

¶ 70 The trial court sentenced defendant to terms of 22 years' imprisonment on each count, to be served consecutively. Regarding defendant's risk to reoffend, the trial court stated as follows:

> "So I listened to the doctor who was very impressive and he thinks you're a moderate risk offender. I think he's a little off. I think the amount of time that you worked on [Randi], the careful and calculated manner in which you did it, your unyielding dedication to getting her to move this child into a place where he could be victimized says that you have a deviation, sexual deviation that's more severe than the doctor's giving us in his testimony. I don't mean to say that I'm more attune to this than he is. I'm saying that all things being equal the likelihood that you would reoffend is greater than what he contends and that's my job to make that decision.
>
> So with that in mind you are a high risk offender which means that the range of punishment, the low range is 22 years for each count."

¶ 71 The trial court noted that it believed defendant was remorseful. The trial court stated that the fact that defendant committed a sex offense with a child alone did not require a substantial

penalty because that was the offense itself. The trial court reasoned: "It is the calculation, the length of time, the amount of activity in doing these two crimes that takes this out of the ordinary and eliminates any chance of having a low range sentence." The trial court explained:

> "[B]ased on the nature of the charges, the fact that I do not believe that you are safe to not reoffend, and taking into account all of the good things about you, my obligation to protect the public, my obligation not to give a sentence that would lower the seriousness of the offense, as a high risk offender 22 years is the least sentence that I can impose and be consistent with others who might not be as articulate as you."

¶ 72 Defendant filed through counsel a motion to reconsider sentence. Defendant subsequently filed a *pro se* amended motion to reconsider sentence. Defendant also filed a motion to remove his attorney from the case and indicated to the court that he wished to proceed *pro se*. The trial court allowed defendant to discharge his attorney.

¶ 73 Defendant appeared *pro se* at the hearing on his motion to reconsider sentence. Defendant argued that his 44-year sentence was excessive. Defendant stated he did not cause serious physical harm or injury to R.C. Defendant admitted to sending "highly egregious, disgusting, reprehensible text messages to another adult," but emphasized that " there was absolutely no physical contact whatsoever between [defendant] and the victim." Defendant argued he should have received a shorter sentence, closer to the nine-year sentence Randi received. Defendant emphasized that he and Randi had similar backgrounds and the offense they committed "was a perfect storm of two willing adults." Defendant stated: "it was [Randi] and not myself who actually carried out the predatory abuse on the victim. Was she forced to do this? Absolutely not."

¶ 74 The State argued that defendant's sentence of 44 years' imprisonment was appropriate. The State contended defendant was more culpable than Randi because he "played on" Randi's lack of self-esteem and desire to be loved so he could get to R.C.

¶ 75 The trial court denied defendant's motion to reconsider sentence. The trial court reasoned that, unlike defendant, Randi recognized she committed a crime and admitted it from the beginning. The trial court stated:

> "But, even today, you are not completely remorseful. Even today your argument is, It wasn't as bad as it sounds. I didn't do as much as they say. I didn't do as much as she did, and you got me all wrong, and you are being too mean to me because I'm not as bad as you say. That's not remorse. ***
>
> *** But you have not even to this date been willing to say what your role was."

¶ 76 The trial court also stated:

> "And one of the factors that you didn't mention that I'm required to apply is not the nature of the offense that's what you are charged with but the circumstances around it. Now, just the fact that it happened, you don't get extra years for that. But it's the day after day, text message after text message, the photographing, the suggesting, that really almost commands this sentence."

¶ 77 ANALYSIS

¶ 78 I. Sufficiency of the Evidence

¶ 79 On appeal, defendant contends the evidence adduced at trial was insufficient to prove him guilty of predatory criminal sexual assault of a child (720 ILCS 5/11-1.40(a)(1) (West 2012)) on an accountability theory. We find that the evidence, including Randi's testimony and the text

message records, was sufficient to prove beyond a reasonable doubt that defendant was guilty of predatory criminal sexual assault of a child.

¶ 80 To prove that defendant was guilty of predatory criminal sexual assault of a child on a theory of accountability, the State was required to prove: (1) Randi committed an act of sexual penetration with R.C.; and (2) either before or during the offense, defendant solicited, aided, abetted, agreed, or attempted to aid Randi in the planning or commission of the offense with the intent to promote or facilitate the commission of the offense. 720 ILCS 5/11-1.40(a)(1), 5-2(c) (West 2012).[3] "Sexual penetration" is defined by statute as "any contact, however slight, between the sex organ or anus of one person and an object or the sex organ, mouth, or anus of another person, *** including, but not limited to, cunnilingus, fellatio, or anal penetration." 720 ILCS 5/11-0.1 (West 2012).

¶ 81 When presented with a challenge to the sufficiency of the evidence, we ask 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). It is not the function of this court to retry the defendant. *People v. Givens*, 237 Ill. 2d 311, 334 (2010). When a challenge to the sufficiency of the evidence is presented, we draw all reasonable inferences from the record in favor of the prosecution. *Id.*

¶ 82 Here, the evidence overwhelmingly established that Randi committed two acts of sexual penetration with R.C. Randi testified that she performed oral sex on R.C. on four or five

[3]The State was also required to prove that Randi was 17 years of age or older and R.C. was under 13 years of age at the time of the sexual penetration. This is undisputed by the parties. See 720 ILCS 5/11-1.40(a)(1) (West 2012).

occasions between June 1 and September 7, 2012. Additionally, Detective McAuliffe testified that Randi admitted to him that she performed oral sex on R.C. on two occasions. Randi told McAuliffe defendant was present on one occasion and she took a photograph for defendant on the other occasion.

¶ 83 To prove that defendant was accountable for Randi's conduct, the State was required to prove that defendant had the mental state required for the offense and aided in the commission of the crime either before or during the offense. *In re W.C.*, 167 Ill. 2d 307, 337 (1995). Mere presence at the scene does not render a defendant accountable for the offense. *People v. Perez*, 189 Ill. 2d 254, 268 (2000). However, "active participation has never been a requirement for the imposition of criminal guilt under an accountability theory." *People v. Taylor*, 164 Ill. 2d 131, 140 (1995). Rather, "[a]ccountability focuses on the degree of culpability of the offender and seeks to deter persons from *intentionally* aiding or encouraging the commission of offenses." (Emphasis in original.) *Perez*, 189 Ill. 2d at 268. "A defendant may be deemed accountable for acts performed by another if defendant shared the criminal intent of the principal, or if there was a common criminal plan or purpose." *Taylor*, 164 Ill. 2d at 140-41. "Intent may be inferred from the character of defendant's acts as well as the circumstances surrounding the commission of the offense." *Perez*, 189 Ill. 2d at 266.

¶ 84 In the instant case, when viewed in the light most favorable to the State, the trial evidence established beyond a reasonable doubt that defendant was accountable for Randi's acts of sexual penetration with R.C. Both Randi's testimony and the text message evidence established that defendant and Randi planned, over a period of months, to engage in various sexual activities with R.C., including oral sex. Randi testified that she performed oral sex on R.C. on four or five occasions and defendant was present on all but two occasions. On one of the occasions where

defendant was not present, Randi took a photograph of herself performing oral sex on R.C. and sent it to defendant. Randi testified that she photographed herself performing oral sex on R.C. and sent the photographs to defendant because defendant asked her to do so. The trial court found Randi to be a credible witness, and we defer to the trial court's credibility determination. *People v. Wittenmyer*, 151 Ill. 2d 175, 191 (1992) ("The credibility of the witnesses and the weight to be given their testimony is exclusively within the province of the trier of fact.").

¶ 85 Contrary to defendant's contention that Randi performed oral sex on R.C. to impress him but that he did not direct this act, the text message records showed defendant continually encouraged and directed Randi to perform sexual acts on R.C., including oral sex. On July 9, defendant sent Randi a text message stating he thought they would be able to "move on to oral" sex that weekend with R.C. On July 28, in response to a text message from Randi stating that she told R.C. what oral sex was, defendant stated, "Mmmmm u should show him real quick…like for 10 seconds then take a pic." On August 11, defendant sent Randi a text message stating, "You should start blowing [R.C.]"

¶ 86 Additionally, the trial evidence showed that over a period of months, defendant sent text messages to Randi suggesting various things she should say and do with R.C. to make him more comfortable engaging in sexual activities with Randi and defendant. For example, defendant suggested on several occasions that Randi be naked around R.C. to make him comfortable with nudity. On one occasion, defendant suggested that Randi tell R.C. that it was all right for R.C. to see defendant naked and also for defendant to see R.C. naked. On another occasion, defendant suggested that Randi show R.C. a movie with sexual intercourse in it or play show and tell with him. On July 27, defendant sent Randi a text message stating, "I'm starting to feel that we could get a lot farther if u pushed the envelope with [R.C.] alone and then I arrived as an add on."

Defendant added, "So take it really far with him…and see what he does." On another occasion, after telling Randi he was coming over that night, defendant stated, "you should really prep [R.C.] this next half [hour]."

¶ 87 We also note that defendant continually pushed Randi to go further when she expressed doubts about involving R.C. in their sexual activities. For example, on June 29, Randi expressed fear that R.C. would tell his father if she and defendant involved R.C. in their sexual activities. Defendant responded: "We just have to have a plan to explain it and show things to [R.C.] the right way. And if he does end up telling his dad everything then u can explain something in a very innocent way so not to raise an alarm." The next day, Randi told defendant: "There is still a part of me somewhere in the back of my head saying this is wrong." Defendant responded that they would not hurt R.C. and that defendant wanted what was best for Randi and R.C. On July 31, Randi told defendant that when she had doubts about the sexual acts they were performing with R.C., she needed defendant to "remind [her] that it is family and about love." Defendant responded that he could do that. On another occasion, defendant suggested giving their children Nyquil before bed so they could "get away with *** more." Randi expressed reluctance to the idea, and defendant responded: "Its not like we will abuse them."

¶ 88 Lastly, we reject defendant's argument that he was not proven guilty beyond a reasonable doubt of predatory criminal sexual assault of a child because the State failed to prove he was sexually aroused in a physiological sense by Randi placing R.C.'s penis in her mouth. Sexual arousal was not an element of the offense of predatory criminal sexual assault of a child. See 720 ILCS 5/11-1.40(a)(1) (West 2012). Consequently, the State was not required to prove that defendant was sexually aroused by Randi's acts of sexual penetration with R.C.

¶ 89 II. Sentencing

¶ 90 Defendant also raises several arguments regarding his sentence, including: (1) his sentence was excessive; (2) the trial court considered an improper sentencing range; (3) the trial court improperly ignored expert medical testimony at the sentencing hearing; (4) his sentence was vastly disproportionate to that of Randi and violated his right against self-incrimination; and (5) the trial court improperly considered a factor inherent in the offense. For the reasons that follow, we reject defendant's contentions of error.

¶ 91 A. Excessive Sentence

¶ 92 We first address defendant's argument that his sentence was excessive considering that he was convicted on a theory of accountability for the actions of Randi. A trial court's sentencing decision is granted great deference by reviewing courts. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). Such deference is appropriate because the trial court is generally in a better position to determine the appropriate sentence since it has the opportunity to weigh factors like "the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age." *Id.* It is not our duty to reweigh the factors involved in the trial court's sentencing decision. *People v. Coleman*, 166 Ill. 2d 247, 261-62 (1995).

¶ 93 Where the trial court imposes a sentence within the statutory limits, we will not reverse the trial court's determination absent an abuse of discretion. *Id.* at 258. "A sentence will be deemed an abuse of discretion where the sentence is 'greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense.' " *People v. Alexander*, 239 Ill. 2d 205, 212 (2010) (quoting *Stacey*, 193 Ill. 2d at 210).

¶ 94 Defendant faced a sentencing range of 6 to 60 years' imprisonment on each count of predatory criminal sexual assault of a child. 720 ILCS 5/11-1.40(b)(1) (West 2012). Defendant was subject to mandatory consecutive sentencing. 730 ILCS 5/5-8-4(d)(2) (West 2012). We

note that the trial court and the parties, both at the trial level and on appeal, incorrectly believed that defendant faced 6 to 30 years' imprisonment on each count, the typical sentencing range for a Class X felony. Section 11-1.40(b)(1) of the Criminal Code of 1961 (Criminal Code) (720 ILCS 5/11-1.40(b)(1) (West 2012)) provides that a defendant convicted of predatory criminal sexual assault of a child under section 11-1.40(a)(1) of the Criminal Code "shall be sentenced to a term of imprisonment of not less than 6 years and not more than 60 years." 720 ILCS 5/11-1.40(b)(1) (West 2012). Thus, defendant's total sentence of 44 years' imprisonment—that is, consecutive sentences of 22 years' imprisonment on each count—was well within the statutory limits.

¶ 95 Given the circumstances of this case, the trial court's sentence of 44 years' imprisonment was not an abuse of discretion. The trial court reasoned that defendant's total sentence of 44 years' imprisonment was warranted based on the circumstances surrounding the offense and the fact that the trial court believed defendant was likely to reoffend. The trial court noted the length of time and calculated manner in which defendant "worked on" Randi, getting her to a point where she was willing to abuse R.C. The trial court also noted that it believed defendant was remorseful and defendant had "lived pretty much a blameless life."

¶ 96 The trial evidence, including Randi's testimony and the voluminous text messages exchanged between defendant and Randi, overwhelmingly established defendant's accountability and culpability for Randi's acts of sexual penetration with R.C. Despite the overwhelming evidence and heinous nature of defendant's offense, defendant still received a sentence significantly below the maximum.

¶ 97 The fact that defendant was convicted on a theory of accountability rather than as a principle has no bearing on our analysis. *People v. Brown*, 267 Ill. App. 3d 482, 487 (1994) ("A

defendant *** convicted on an accountability theory shares equal guilt with the principal perpetrator of the crime.").

¶ 98 B. Trial Court Applied Improper Sentencing Range

¶ 99 Defendant also contends the trial court erroneously believed that it had to sentence defendant to a minimum of 22 years' imprisonment solely because it determined defendant was a high-risk offender. The record belies defendant's argument.

¶ 100 During sentencing, the trial court stated that defendant was a "high risk offender which means that the range of punishment, the low range is 22 years for each count." The trial court subsequently explained:

> "[B]ased on the nature of the charges, the fact that I do not believe that you are safe to not reoffend, and taking into account all of the good things about you, my obligation to protect the public, my obligation not to give a sentence that would lower the seriousness of the offense, as a high risk offender 22 years is the least sentence that I can impose and be consistent with others who might not be as articulate as you."

¶ 101 The above statement shows that the trial court did not incorrectly believe it was legally required to sentence defendant to 22 years' imprisonment on each count because it determined defendant was a high-risk offender. Rather, the trial court found that, given the circumstances surrounding defendant's offense, including defendant's mitigating factors, defendant's risk to reoffend, and the trial court's need to protect the public, the court could not impose a sentence lower than 22 years' imprisonment on each count. The consideration of all these factors was relevant and proper. See *People v. Kolzow*, 301 Ill. App. 3d 1, 8 (1998) ("Relevant factors in

determining an appropriate sentence include the nature of the crime, protection of the public, deterrence and punishment as well as the defendant's rehabilitative prospects and youth.").

¶ 102 Additionally, we note the trial court's mistake of law with regard to the sentencing range. The trial court believed the maximum sentence defendant could receive on each count was 30 years' imprisonment when the statutory maximum was actually 60 years' imprisonment. See 720 ILCS 5/11-1.40(b)(1) (West 2012). The record shows that defendant likely benefited from the trial court's mistake. That is, the trial court may have intended to sentence defendant to an upper-range sentence but it actually sentenced defendant to a mid-range sentence.

¶ 103 C. Court Improperly Ignored Expert Testimony at the Sentencing Hearing

¶ 104 Defendant next argues the trial court improperly ignored the medical testimony of Dr. Fialkov at the sentencing hearing that defendant was at a moderate risk to reoffend. Citing *In re Juan M.*, 2012 IL App (1st) 113096, ¶ 59, defendant argues the trial court could not " ' "disregard expert medical testimony that is not countervailed by other competent medical testimony or medical evidence." ' " *Id.* (quoting *In re F.S.*, 347 Ill. App. 3d 55, 64 (2004), quoting *In re Ashley K.*, 212 Ill. App. 3d 849, 890 (1991)).

¶ 105 We note that *Juan M.*, a juvenile abuse and neglect case, involved the medical testimony of a physician who examined a child and opined that his physical injuries were the result of nonaccidental trauma. *Id*. Thus, *Juan M.* is immediately distinguishable from the instant case, which involved a psychiatric evaluation of defendant's future risk to reoffend.

¶ 106 Moreover, it is clear from Fialkov's report that he did not consider all the evidence presented at trial in reaching his finding that defendant posed a moderate risk to reoffend. Fialkov based his determination on his interview with defendant and police interviews with defendant and Randi. In the interviews, neither defendant nor Randi disclosed all the sexual

conduct that had occurred involving R.C. Fialkov testified he believed he reviewed the text messages between defendant and Randi and that "they basically sort of agreed with the interview, the DVD interview of [defendant] and the victim's mother, and in fact the child." Fialkov's report stated that, according to his information, defendant's sexual offenses involved noncoercive exposure of sexual activity and fantasy to a child.

¶ 107 Contrary to Fialkov's report, the trial evidence showed that defendant carefully manipulated both Randi and R.C. over a period of months with the goal of R.C. actively participating in sexual activity with him and Randi. The evidence showed R.C. was not only exposed to sexual activity by defendant and Randi, but actively participated. The text message records showed defendant encouraged Randi to try to increasingly involve R.C. in their sexual activities by trying to get R.C. to engage in various sexual acts. Given the limited information on which Fialkov based his risk assessment as compared to the trial evidence, we find no error in the trial court's finding that defendant was at a higher risk to reoffend than Fialkov opined.

¶ 108 Even if we were to accept defendant's contention of error with regard to Fialkov's testimony, we find any error to be harmless. We reassert our finding that defendant's sentence was not excessive and was based on proper considerations. Additionally, due to the trial court's mistake of law, defendant did not receive an upper-range sentence despite the trial court's finding that he was a high-risk offender.

¶ 109 D. Disparity Between Defendant's and Randi's Sentences

¶ 110 Defendant also claims his 44-year sentence: (1) punished him for exercising his constitutional right against self incrimination; and (2) was vastly disproportionate to Randi's sentence.

¶ 111 In support of his argument that the trial court punished defendant for exercising his right against self-incrimination, defendant points to the trial court's following statement to defendant following a hearing on defendant's *pro se* motion to reconsider sentence: "But you have not even to this date been willing to say what your role was."

¶ 112 Read in context, however, the above statement was not referring to defendant's exercise of his right against self-incrimination. Rather, the above statement was made in response to defendant's argument at the hearing on his motion to reconsider sentence that he should have a lower sentence comparable to the nine-year sentence Randi received. Specifically, defendant argued that he and Randi had similar backgrounds, defendant never touched R.C., and defendant did not force Randi to abuse R.C. In denying defendant's motion, the trial court reasoned that Randi received a shorter sentence than defendant because she pled guilty and admitted to her role in the offense. The trial court found that defendant, on the other hand, lacked complete remorse, continued to minimize his role in R.C.'s abuse, and blamed Randi.

¶ 113 Furthermore, we find no error in the disparity between defendant's sentence and that of Randi, as defendant was sentenced pursuant to a finding of guilt following trial while Randi pled guilty. Our holding is based on three separate grounds. First, the trial court's distinction is supported by the record. Second, "the sentence imposed on a codefendant who entered a guilty plea under a plea agreement cannot be compared to a sentence imposed after a trial." *People v. Morales*, 339 Ill. App. 3d 554, 562 (2003). Finally, upon being found guilty, defendant continued to minimize his role in abusing R.C.

¶ 114 E. Improper Consideration of Factors Inherent in the Offense

¶ 115 Finally, defendant argues that in sentencing defendant, the trial court considered a factor inherent in the offense—namely that defendant repeatedly over a period of time suggested that

Randi involve her son in their sexual activities. Specifically, defendant points to the trial court's following statement, which was made at the hearing on defendant's motion to reconsider sentence: "[I]t's the day after day, text message after text message, the photographing, the suggesting, that really almost commands this sentence." Defendant contends that since he was convicted on an accountability theory, evidence that aided, abetted, or convinced Randi to commit acts of sexual penetration with R.C. was inherent in the offense.

¶ 116 We find that the trial court did not err in considering the amount of time and effort that defendant expended planning and aiding in the abuse of R.C. While the trial court may not consider factors inherent in the underlying offense in sentencing a defendant, the court "may consider the nature and circumstances of the offense, including the nature and extent of each element of the offense committed by the defendant." *People v. Rennie*, 2014 IL App (3d) 130014, ¶ 29. The mere fact that defendant solicited, aided, or abetted Randi in committing acts of sexual penetration with R.C. is inherent in the charged offenses. However, it was not improper for the trial court to consider the surrounding circumstances, including the ongoing and persistent nature of defendant's encouragement of Randi to include R.C. in their sexual activities.

¶ 117 The trial evidence showed that defendant's role in the sexual assault of R.C. went beyond that of a mere accomplice. Defendant's grooming of Randi and R.C. and his direction of the sexual abuse of R.C. were not factors inherent in the offense and were properly considered by the court during sentencing. The text messages showed Randi was initially resistant to the idea of being actively involved in sexual conduct with R.C. She became willing after defendant repeatedly suggested she do so and became more affectionate toward her when she did. Defendant pushed Randi to further involve R.C. in their sexual activities, stating on various occasions through text messages that he wanted to "take this to a higher level" and wondered

"how we get [R.C.] to take it to the next level." Defendant repeatedly requested that Randi engage in sexual activities with R.C. when defendant was not there so R.C. would be more comfortable participating when defendant came over. Randi expressed unease with involving R.C. in sexual activities on multiple occasions, and defendant assured Randi they were not doing anything wrong. Any time Randi had doubts, defendant consistently sought to allay her doubts.

¶ 118 III. Preventing Objection

¶ 119 Next, defendant argues that plain error occurred where the trial court prevented defense counsel from making any objections to the text message records. In so arguing, defendant points to the following statement made by the trial court after the text message records were admitted into evidence:

> "[Defendant], so you're comfortable, if there was to be an objection to these records, that objection needs to be made before at this stage of the proceeding. I assume that any challenges to this type of evidence would have been made. So I'm just saying this so that you don't think your lawyer's backing up on you or something. He's doing all that he can so far."

¶ 120 Defendant contends that by making the above statement, the trial court prevented defense counsel from objecting to the admission of the text message records and from raising "any further objection." Defendant's strained interpretation of the trial court's statement is not supported by the record. Before the trial court admitted the text message records, the trial court asked defense counsel if he had any objection to admission of the records and defense counsel replied that he did not. The trial court then made the above statement, which was directed to defendant rather than defense counsel. The trial court was merely explaining to defendant that if defense counsel had an objection to the text message records, he likely would have made it prior

to trial. The trial court's statement merely addressed defense counsel's lack of objection to the admission of the text message records and in no way prevented defense counsel from making further objections. As we have found that no error occurred, we need not proceed to plain error review.

¶ 121 IV. Charging Instrument

¶ 122 We next address defendant's argument that the information was insufficient in the following ways: (1) the conduct charged in both count I and count II was not specific enough to bar future prosecution; (2) count II did not charge defendant with a cognizable crime; and (3) the signing and verification requirements of section 111-3(b) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/111-3(b) (West 2012)).

¶ 123 A. Bar to Future Prosecution

¶ 124 Defendant first argues that both counts of the information were defective in that they failed to bar future prosecution for the same conduct. In support of his argument, defendant points to the trial court's remark in delivering its ruling that acts of penetration between Randi and R.C. happened five times. Defendant also points to the trial court's remark while ruling on defendant's posttrial motion that "there has to be 50 or 100 acts in here that are in violation of something." Defendant contends the information does not bar future prosecution because he could be charged with additional crimes based on other acts involving R.C. that occurred during the time period in the information. We disagree.

¶ 125 Defendant did not challenge the sufficiency of the information in the trial court. "When an indictment or information is attacked for the first time on appeal, it is sufficient that the indictment or information 'apprised the accused of the precise offense charged with sufficient specificity to prepare his defense and allow pleading a resulting conviction as a bar to future

prosecution arising out of the same conduct.' " *People v. Thingvold*, 145 Ill. 2d 441, 448 (1991) (quoting *People v. Gilmore*, 63 Ill. 2d 23, 29 (1976)).

¶ 126 Here, both counts charged defendant with Randi's acts of sexual penetration with R.C., named the time period during which the acts occurred, named the county where the acts occurred, and cited the statutory section defendant was charged with violating. The mere fact that the State presented evidence that defendant committed more offenses than he was charged with does not render the information deficient. We note that "a court may resort to the record of a prior prosecution to determine whether the prior prosecution is a bar to future prosecutions arising out of the same conduct." *People v. Caliendo*, 84 Ill. App. 3d 987, 994-95 (1980) (citing *People v. Jones*, 53 Ill. 2d 460, 464 (1973)). The offenses of which defendant was convicted can be discerned from the record in this case. Additionally, we note the holding in *People v. Long*, 55 Ill. App. 3d 764, 773 (1977), that "[i]n the absence of *** a prosecution [that subjects the defendant to double jeopardy] or other prosecutorial harassment, we need not finally dispose of the question as to whether the proof presented is sufficient to avoid a double jeopardy problem."

¶ 127 B. Failure to State a Crime

¶ 128 Next, defendant argues count II of the information was defective because it failed to charge defendant with a crime, which prevented defendant from preparing a defense. Specifically, defendant contends count II did not charge him on an accountability theory for Randi's act of putting her mouth on R.C.'s penis but rather charges him only with being aroused by Randi's actions. Defendant's argument is without merit.

¶ 129 The language in count II of the information, which charged defendant with predatory criminal sexual assault of a child based on Randi's act of sexual penetration with R.C., was sufficiently specific to allow defendant to prepare a defense to the charge. It is immaterial that

count II did not explicitly allege that defendant was accountable for Randi's actions; the State was not required to allege that it was prosecuting defendant on an accountability theory in the information. *People v. Ceja*, 204 Ill. 2d 332, 361 (2003) ("It is proper to charge a defendant as a principal even though the proof is that the defendant was only an accomplice. [Citations.] Courts permit this pleading practice because accountability is not a separate offense, but merely an alternative manner of proving a defendant guilty of the substantive offense.").

¶ 130 While count II alleged that defendant was aroused by Randi's act of sexual penetration with R.C., this language was mere surplusage. Sexual arousal was not an element of the offense of predatory criminal sexual assault of a child. 720 ILCS 5/11-1.40(a) (West 2012). Thus, we find count II of the information was sufficiently specific to inform defendant he was being prosecuted for predatory criminal sexual assault of a child based on Randi's act of sexual penetration with R.C.

¶ 131 C. Defects Related to Signing and Verification

¶ 132 Defendant next contends that the information is void because it was signed and sworn to by an unnamed person before an unnamed notary public and, consequently, failed to comply with the requirement of section 111-3(b) of the Code (725 ILCS 5/111-3(b) (West 2012)) that "an information shall be signed by the State's Attorney and sworn to by him or another." Initially, we note that a failure to comply with section 111-3(b) of the Code would not divest the circuit court of jurisdiction such that a resulting judgment would be rendered void. *People v. Castleberry*, 2015 IL 116916, ¶ 15 ("[T]he failure to comply with a statutory requirement or prerequisite does not negate the circuit court's subject matter jurisdiction or constitute a nonwaivable condition precedent to the circuit court's jurisdiction.") Far from rendering the information void, the fact that an information was not signed by the State's Attorney or supported

by an affidavit has been held to be a "mere technical objection[]" that does not constitute reversible error. *People v. Devine*, 295 Ill. App. 3d 537, 543 (1998).

¶ 133 V. Forfeited Issues

¶ 134 Defendant also raises the following issues: (1) the trial court erred in allowing Randi to testify because the State did not file a disclosure listing her as a witness; (2) defendant's right to a speedy trial was violated because more than 120 days elapsed between the time defendant was taken into custody and the time of trial; (3) the trial court's conduct regarding the pretrial Rule 402 conference improperly influenced the trial court's opinion of the case and defendant; and (4) certain statements made by the trial court show it was prejudiced against defendant.

¶ 135 Defendant failed to raise contemporaneous objections to any of the above issues other than the court allowing Randi to testify. Moreover, defendant failed to properly raise any of the above issues in a posttrial motion.[4] Consequently, we deem these issues forfeited. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988).

¶ 136 As we have found that the above issues are forfeited, we may review this issue only if defendant has established plain error. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). Defendant did not request plain error review of any of these issues in his initial brief. In response to the

[4]Defendant raised the speedy trial issue and the issue regarding the Rule 402 conference in a *pro se* motion for a new trial. However, the trial court did not consider defendant's *pro se* motion, as defendant was still represented by counsel at the time. *People v. Pondexter*, 214 Ill. App. 3d 79, 87 (1991) ("An accused has either the right to have counsel represent him or the right to represent himself; however, a defendant has no right to both self-representation and the assistance of counsel.").

State's contention that defendant failed to argue for plain error review of these issues in his brief, defendant argued as follows in his reply brief:

> "As stated in the original brief, Defendant believes each of these errors fall within the plain-error doctrine, and that the general forfeiture rule doesn't apply and the reviewing court can, therefore, consider each of the unpreserved errors because the errors are all serious. [Citations to *People v. Clark*, 406 Ill. App. 3d 622, 636 (2010) and Illinois Supreme Court Rule 615.][5]
>
> That is, Defendant believes that improper charging documents, surprise witnesses, violations of the right to a speedy trial, and the right to an unbiased judge are all relatively serious enough that trial counsel's failure to preserve them shouldn't prevent this court from reviewing them."

¶ 137 We recognize that a defendant may argue for plain error review for the first time in his reply brief. *People v. Ramsey*, 239 Ill. 2d 342, 412 (2010). However, the above conclusory statements in defendant's reply brief do not constitute a sufficient plain error argument. "A reviewing court is entitled to have the issues on appeal clearly defined with pertinent authority cited and a cohesive legal argument presented." *Thrall Car Manufacturing Co. v. Lindquist*, 145 Ill. App. 3d 712, 719 (1986). Because defendant did not present an adequate plain error argument, we do not reach the merits of these issues. *Hillier*, 237 Ill. 2d at 545-46 ("[W]hen a defendant fails to present an argument on how either of the two prongs of the plain-error doctrine is satisfied, he forfeits plain-error review.")

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[5]In defendant's original brief, defendant argued for plain error review only on the issue of whether the trial court prevented defense counsel from objecting to the text message records.

¶ 138 Even if we were to excuse defendant's failure to properly address plain error here on appeal and also assume that the four issues described above constitute error; we hold none of them actually constitute plain error. The doctrine of plain error allows a reviewing court to address an otherwise forfeited contention of error where a defendant demonstrates that the error was prejudicial. *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007). To prove that an error was prejudicial, a defendant must show that the evidence at trial was so closely balanced that the error tipped the scales of justice against him. *Id*. at 565. Alternatively, if the error is so serious that it rises to the level of a structural error, prejudice to the defendant is presumed, regardless of the closeness of the evidence at trial. *Id*.; *People v. Thompson*, 238 Ill. 2d 598, 608 (2010). Structural errors are those systemic errors which erode the integrity of the judicial process and serve to undermine the fairness of a defendant's trial. *Thompson*, 238 Ill. 2d at 613-14.

¶ 139 Upon review, we hold the evidence at trial was not closely balanced. Instead, the evidence affirmatively established, beyond a reasonable doubt, that defendant committed two counts of predatory criminal sexual assault of R.C. We also hold that none of the four issues, *if accepted as true*, resulted in an erosion of the judicial process and deprived defendant of his right to a fair trial.

¶ 140 CONCLUSION

¶ 141 The judgment of the circuit court of Rock Island County is affirmed.

¶ 142 Affirmed.