FOURTH DIVISION
Rule 23 Order filed on September 25, 2014
Modified upon denial of rehearing November 13, 2014

No. 1-12-3588

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	10 CR 158
	)	
CLEOPHUS MOONEY,	)	Honorable
	)	Brian Flaherty,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Taylor concurred in the judgment.

ORDER

¶ 1 *Held*: Alleged hearsay statement was admissible as an excited utterance and, therefore, counsel's failure to object did not constitute ineffective assistance of counsel; defendant failed to show that he was prejudiced by counsel's alleged deficient representation because the evidence overwhelmingly supports his guilt. Defendant's sentence is affirmed where the trial court judge considered defendant's youth in sentencing him to 16 years' imprisonment.

¶ 2 Following a jury trial, defendant Cleophus "CC" Mooney was convicted of two counts of aggravated criminal sexual assault and was sentenced to two consecutive terms of eight years' imprisonment. Defendant now appeals his conviction arguing that the trial court judge improperly admitted certain hearsay statements and defendant's counsel was ineffective in his representation of him. Defendant also appeals his sentence arguing that the exclusive jurisdiction and automatic transfer provisions violate his federal and state constitutional rights. For the reasons that follow, we affirm the trial court's conviction and sentence.

¶ 3 BACKGROUND

¶ 4 Based upon events occurring on November 25, 2009, defendant Mooney, who was 17 years old at the time, was charged with various offenses related to the alleged sexual assault of 20-year-old A.N. The State proceeded to trial on: (1) two counts of aggravated criminal sexual assault, alleging the use or threat of force, and involving penetration between defendant's penis and A.N.'s vagina and anus, both of which caused bodily harm, and (2) two counts of criminal sexual assault, alleging contact between defendant's penis and A.N.'s vagina and anus when defendant knew that A.N. was unable to understand the nature of the act. The following testimony was elicited at trial.

¶ 5 A.N. testified that prior to the incident, she knew of defendant from her driver's education class that she took in 2007. She had said hi to him once in class. At that time, she thought he was cute and was attracted to him. Following driver's education, the next time she saw defendant again was after she was transferred to defendant's school and began taking the regular bus because they got off at the same stop. A.N. testified that she was in a special education program at school. The transition coordinator at the school A.N. was attending in 2009 testified that A.N. was in a special education program because "she functioned around a 40 I.Q."

¶ 6 A.N. testified that on November 25, 2009, defendant was riding the bus home with her and told her that he would come over. She did not respond to this. After getting off the bus, A.N. testified that defendant followed her home. Defendant asked her if she had a boyfriend, and she said no. When A.N. went to open her front door, defendant pushed her inside, said he was "going to smack that thing," and pushed her on her butt up the stairs and into a bedroom. Defendant then closed the door, pulled down his pants and asked A.N., "Do you want to touch this?" A.N. said no, but defendant told her she was fine. A.N. testified that she was holding onto her pants tightly, but defendant pulled them off and then took off his clothes. A.N. told defendant to close the blinds or else people would see him naked. A.N. testified that defendant closed the blinds, pushed A.N. onto the bed and then put his penis inside her vagina.

¶ 7 A.N. testified that she cried when defendant inserted his penis into her vagina as it was very painful. Defendant eventually turned A.N. over and put his penis into her anus, pulled her hair, and put his hand on her neck causing A.N. to believe that he was trying to choke her and snap her neck. A.N. saw "white stuff" on the sheets and told defendant that she needed to go to the bathroom. Defendant said she was fine. A.N. told defendant she had to go to the bathroom again, pushed defendant off the bed and went to the bathroom. In the bathroom, A.N. noticed she was bleeding. A.N. left the bathroom because she thought defendant might come and get her. When she returned, defendant asked her if her "momma wants some of this too," and said he felt bad for her mom because she was lonely. A.N. said "no," and defendant told her he might be her boyfriend and left. A.N. then called her mother.

¶ 8 Pauline J., A.N.'s mother and a registered obstetrics and gynecology nurse, testified that A.N. lost oxygen to her brain during birth and was once given a diagnosis of mild mental retardation with a profound learning disability. Pauline testified that A.N. learned by example,

took care of several animals, and performed some tasks for her own; however, she would never be able to live on her own. Pauline drove A.N. to school every day and A.N. took the bus home from school. While A.N. used to ride the "special ed bus," she began taking the regular bus because it was hard for her to always be with profoundly handicapped children and A.N. strived to be "normal." Before A.N. was allowed to ride the regular bus, Pauline and A.N.'s father secretly watched A.N. get on the regular bus, sit behind the bus driver, and get into her house on her own.

¶ 9 Pauline testified that on November 25, 2009, she received about 15 pager messages from A.N. around two o'clock p.m. When Pauline called A.N., A.N. was hysterical and screamed, "CC has been here and had sex with me and I am bleeding." Pauline drove herself home after receiving this call and when she got there, A.N. was still crying and was upset. Pauline then asked A.N. what had happened. Before Pauline answered, defendant's counsel interjected, "Judge, we would object." The trial court judge overruled this objection, and Pauline testified that A.N. told her that on the bus defendant told A.N. that he was coming home with her and followed her to her house. When A.N. unlocked the front door, defendant pushed her inside and into a bedroom where he pulled down his pants and touched her. A.N. held onto her trousers tight, but defendant pulled them down and had sex with her. When A.N. told defendant that someone was going to see him, defendant pulled down the blinds, grabbed her by the throat and hair and had sex with her. A.N. kept telling defendant she had to go to the bathroom, but defendant kept telling her she was alright. Pauline testified that she "guess[ed]" that defendant eventually let A.N. go to the bathroom, where A.N. noticed she was bleeding.

¶ 10 When the police arrived, Officer Barnes spoke with Pauline and A.N. Pauline showed the officers the blood in the upstairs toilet that A.N. had shown her. Officer Barnes then

collected A.N.'s clothes, and Pauline took A.N. to a hospital where she was examined by a nurse.

¶ 11 Pauline testified that A.N. was "panicked" for a few days, and went into "panic attacks" she had never experienced before. A.N. was eventually placed on Shaltapron, an anti-anxiety medication. Pauline stated that she and A.N. had just painted the room where the sexual assault occurred so A.N. could move into it, but A.N. ended up moving into a different room after the incident.

¶ 12 Pauline further testified that defendant came to her house the following Sunday. Pauline knew who defendant was because she had given him a ride to school on two occasions. Defendant asked if A.N. was home, but left when Pauline grabbed her phone.

¶ 13 Nurse Nancy Healy, an expert in sexual assault nurse examinations, testified that she owned a private business that contracted out sexual assault examinations. Healy performed the examination on A.N., collecting swabs from her lips, neck, vaginal area, and anal area. The parties stipulated that the male DNA identified on A.N.'s neck matched that of defendant. Semen was identified on A.N.'s vaginal swab and her underwear, but there was insufficient human male DNA for analysis. Healy testified that A.N. had bruising and discoloration on both sides of her hymen, a tear to her hymenal wall, and a large amount of bleeding on the hymenal shelf. Healy observed a tear to A.N.'s anus and an opening in the cervix. Healy opined that A.N.'s injuries were consistent with what A.N. had told her. Healy testified that she has performed approximately 1,200 sexual assault examinations, and that "maybe ten percent of patients that [she had] seen out of those 1,200 [] had the level of injury that [A.N.] had."

¶ 14 Defendant testified that on November 25, 2009, after he and A.N. got off the bus, A.N. asked him if he wanted to come over. Defendant said yes and they hung out in the living room for a while. A.N. asked defendant what he wanted to do, and he said "it don't matter."

Defendant then followed A.N. upstairs and waited for her while she went to the bathroom. When A.N. returned from the bathroom, she and defendant hugged and kissed. Defendant then pulled down his pants, and A.N. told him to close the blinds. Defendant then sat A.N. on the bed and pulled down her pants. Defendant testified that he believed A.N. wanted to have sex with him. Defendant stood between A.N.'s legs and tried to put his penis into her vagina, but it would not go in. Defendant then laid A.N. on her back and put his penis into her vagina "a little bit." A.N. then got on top of defendant, and he again put his penis into her vagina. Defendant then turned A.N. on all fours, and they continued to have sex. Defendant removed his penis from A.N.'s vagina and ejaculated.

¶ 15 Defendant testified that when he removed his penis from A.N.'s vagina, A.N. asked what was wrong and he responded "nothing" and put his clothes on. A.N. told him not to tell anyone what had happened. A.N. went to the bathroom and defendant went downstairs. A.N. then came downstairs and asked defendant if he would be her boyfriend. Defendant said it was possible. They hugged, told each other that they loved one another, and defendant went home. After defendant left A.N.'s house, he began to think A.N. was upset, so he went back to her house on Sunday to talk about what had happened and to see if they could be friends.

¶ 16 Defendant was arrested on November 30, 2009, at school and was taken to an interrogation room at Markham courthouse. That evening, defendant spoke with ASA Shawn McCarthy and Detective Vincent Garret and signed a statement prepared by ASA McCarthy. Defendant testified that not everything in the statement was correct, but he signed it because Detective Garret promised him he could go home if he signed it. Garret denied making that promise.

¶ 17 ASA McCarthy took the statement of defendant, which was dated November 30, 2009,

5:44 p.m., and was signed by defendant. ASA McCarthy published the statement to the jury and then testified that defendant's statement indicated the following: Defendant asked A.N. if he could come over, and she told him no. When they got off the bus, defendant asked A.N. if her mother was home and she said no. Defendant followed A.N. to her house. When A.N. walked to her front door, defendant was behind her grabbing her butt with his hands. A.N. did not say anything. A.N. did not invite defendant into the house, but when she opened the door, defendant continued to grab her butt and pushed her into the house. Defendant then stood behind A.N. with his chest against her back, put his arms around her, and put his hands up her shirt and began feeling her breasts. Defendant walked directly behind A.N. pushing her butt and waist as they walked up the stairs.

¶ 18 Defendant's statement went on to indicate that after they entered a bedroom, A.N. closed the bedroom door and sat on the bed. Defendant pulled down his pants and asked A.N., "have you ever seen this before?" A.N. told defendant to close the blinds, which he did. Defendant then went over to the bed and removed A.N.'s pants and underwear. A.N. told him that she had never done this before. Defendant pushed her legs apart and tried to put his penis inside her vagina but was unable to do so because she was "dry." Defendant then moved A.N. onto her back, spread her legs, and put his penis into her vagina. A.N. put her hands over her face and said "I have to go to the bathroom." Defendant would not let her up because he wanted to "get his." By "get his" he meant ejaculate. A.N. then told defendant to take his shirt off, which he did. As defendant tried to put his penis deeper into A.N. he could feel her hands pushing his chest away from her body. When defendant removed his penis, he noticed blood on his penis and on A.N.'s vaginal area. Defendant ejaculated on A.N.'s inner thigh. Defendant then rolled A.N. onto her stomach and lifted her legs so that she was on her hands and knees. Defendant

tried to push his penis into A.N.'s anus. As he pushed, A.N. moved forward and away. Defendant was able to force his penis into A.N.'s anus; however, he stopped because he "came to his senses about what was going on." By this, defendant meant that he felt like he was taking advantage of A.N. and "this wasn't right." Defendant saw that A.N. was crying. Defendant then told A.N. that he was going, and A.N. asked him not to tell anyone about this.

¶ 19 Defendant's statement further indicated that defendant went to A.N.'s house that Sunday, intending to tell her he was sorry and that he wasn't really thinking. A.N.'s mother came to the glass door frame and kept asking "what are you doing here?" A.N.'s mother would not open the door, so he left. If he had spoken to A.N. that day, he would have told her he was sorry because he felt like he took advantage of her and made her do something she did not want to do.

¶ 20 During closing arguments, the State's attorney made several comments that are relevant to the issues raised in this appeal. To begin, the prosecutor stated, "Rapists have a place in this courtroom, and it is right here (indicating). You now know how this defendant earned that seat, why he deserves that seat[,] and why he deserves to be called a rapist." The prosecutor then told the jury that defendant deserved "much more than that seat," and "much more than that title." The prosecutor informed the jury that A.N. was a "happy girl" who was "starting to feel just like all of the other kids" by "taking the regular bus, by becoming independent." The prosecutor told the jury that A.N. was "happy" about "asserting her independence and trying to be as normal as possible," but that "all of that ended" on November 25, 2009. The prosecutor concluded by stating "Tell him he needs to take responsibility for what he did. Tell him with a verdict of guilty as to all the charges."

¶ 21 In defense counsel's remarks, he told the jury that the case was not about "telling anybody anything" or whether defendant was a good or bad person, but whether the intercourse occurred

through force or consent.

¶ 22 In rebuttal, the prosecutor stated that "[A.N.] was so brave to come in here and tell everyone, every stranger in here what happened to her." The prosecutor then stated, "He is a good person or a bad person? He is a bad person." She then noted that it was "terrible" that A.N. was still bleeding when she was examined by Nurse Healy. She stated that defendant was the "only person in this room with the absolute reason to lie" and that "[h]e had all the time to come up with a story and the B.S. that he came in here and told you." She stated that A.N. had to "tell the police, go tell the nurse, tell everyone what happened," and she would have to live with what defendant did to her for the rest of her life. The prosecutor further stated that defendant is "a bad person," that he "knew what he did was wrong," and that "today is the day" for the jury to tell defendant that what he did was "absolutely wrong" through "a guilty verdict on each and every count."

¶ 23 While deliberating, the jury asked whether defendant was charged as an adult. The jury was instructed that it had all the evidence and should continue to deliberate. The jury returned a verdict finding defendant not guilty of either charge of criminal sexual assault, and guilty of both charges of aggravated criminal sexual assault.

¶ 24 At the sentencing hearing, the trial court judge heard a statement from A.N.'s mother, a statement from defendant's mother, a letter from defendant's aunt, a brief remark from defendant, and then arguments from the State and defense counsel. The State emphasized that the trial court judge heard all the testimony and was aware that the jury found that defendant penetrated A.N's vagina and anus through force. The defense emphasized that defendant was still in high school at the time of the incident, that he had no law enforcement record before this incident, and there were no incidents while he was out on bond. The defense argued that defendant could be

rehabilitated and, therefore, asked the judge to impose the minimum sentence of 12 years.

¶ 25 The trial court sentenced defendant to two, consecutive eight-year sentences in prison. In doing so, the trial court judge noted "Once I heard [A.N.'s] statement, I know [A.N.] can't make that up. You just can't make that up. A woman, young woman like that, just doesn't make anything like that up." He further noted that this was a "terrible, vicious attack" against a woman who had clear deficiencies and that defendant's conduct caused her serious harm. He further commented on the fact that defendant was a "young man," that there was "some light for [him] afterwards" and that he did not have a prior criminal background. Defendant filed a motion to reconsider the sentence, which was denied.

¶ 26 Defendant now appeals his conviction and sentence.

¶ 27 ANALYSIS

¶ 28 Hearsay Statements

¶ 29 Defendant argues that the trial court improperly admitted certain hearsay statements when it allowed A.N.'s mother to testify regarding what A.N. told her when she arrived home on the day of the incident. Defendant additionally argues that even if these statements were properly admitted, they were improperly admitted without the necessary limiting instruction, Illinois Pattern Jury Instruction-Criminal 11.66 (4th ed.) ("IPI 11.66"), pursuant to section 115-10(c) of the Code of Criminal Procedure of 1963 (the Code) (725 ILCS 5/115-10(c) (West 2008)). The State, on the other hand, argues that A.N.'s mother's testimony about what A.N. told her when she arrived home amounted to an excited utterance and, therefore, was not inadmissible hearsay and further not subject to section 115-10 of the Code.

¶ 30 At trial, A.N.'s mother testified that when she first spoke with A.N. over the telephone, A.N. was hysterical and told her that defendant had come over, had sex with her, and she was

bleeding. Defendant concedes that these statements were admissible as excited utterances. See Ill. R. Evid. 803(2). However, A.N.'s mother also offered testimony regarding the conversation she had with A.N. upon returning home. After speaking with A.N. over the phone, A.N.'s mother drove home, and when she arrived home, A.N. was still crying. A.N.'s mother asked A.N. what had happened and A.N. told her a more detailed story of what had occurred. Specifically, A.N. told her mother that on the bus defendant told A.N. that he was coming home with her and followed her to her house. When A.N. unlocked the front door, defendant pushed her inside and into a bedroom where he pulled down his pants and touched her. A.N. held onto her trousers tight, but defendant pulled them down and had sex with her. When A.N. told defendant that someone was going to see him, defendant pulled down the blinds, grabbed her by the throat and hair and had sex with her. A.N. kept telling defendant she had to go to the bathroom, but defendant kept telling her she was alright. Defendant argues that these statements—A.N.'s mother's statements regarding what A.N. told her at home—amounted to hearsay and were improperly admitted over defense counsel's general objection.

¶ 31 Evidentiary rulings are within the sound discretion of the trial court and will not be reversed unless the court has abused that discretion. *People v. Reid*, 179 Ill. 2d 297, 313 (1997). "Such an abuse of discretion will be found only where the trial court's decision is arbitrary, fanciful or unreasonable or where no reasonable man would take the view adopted by the trial court." *People v. Illgen*, 145 Ill. 2d 353, 364 (1991).

¶ 32 First, we note that defense counsel only made a general objection to the testimony at issue—he did not give any basis for his objection. A general objection raises only the question of relevance. *People v. Duff*, 374 Ill. App. 3d 599, 602 (2007); *People v. Buie*, 238 Ill. App. 3d 260, 275 (1992). Accordingly, we do not find that the trial court abused its discretion when it

found that A.N.'s statements about what had happened to her during the alleged attack were relevant and, therefore, admissible. We further do not find the admission of the statements made by A.N. to her mother at their home was redundant thereby making it unfairly prejudicial. When A.N. first spoke with her mother, it was very briefly over the phone. A.N.'s mother immediately came home to find A.N. still crying. At that point, A.N. told her mother the details of her encounter with defendant, including many details that were not a part of the brief conversation they had had over the phone.

¶ 33 Second, and more importantly, we find that based upon the record before us, it would not have been an abuse of discretion for the trial court judge to admit this statement as an excited utterance. Ill. R. Evid. 803(2) ("A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."). An appellate court may affirm the trial court's decision on any basis appearing in the record. *Jandeska v. Prairie International Trucks, Inc.*, 383 Ill. App. 3d 396, 398 (2008).

¶ 34 Statements admitted under the excited utterance exception to the hearsay rule are admitted because the contents of the out-of-court statements tend to be reliable. *People v. Nevitt*, 135 Ill. 2d 423, 443 (1990). For a hearsay statement to be admissible under the excited utterance exception, there must be (1) an occurrence or event sufficiently startling to cause a spontaneous and unreflecting statement; (2) an absence of time to fabricate; and (3) a relationship between the statement and the circumstances of the occurrence. *People v. Meras*, 284 Ill. App. 3d 157, 161-62 (1996); *People v. Smith*, 152 Ill. 2d 229, 258 (1992). No one factor is determinative since each case rests on its own facts and is judged from the totality of the circumstances surrounding the event. *People v. Lesure*, 271 Ill. App. 3d 679, 683 (1995). Among the factors courts consider are (1) the passage of time; (2) the nature of the event; (3) the mental and physical

condition of the declarant; (4) the distance travelled from the scene before making the declaration; (5) the presence or absence of self-interest; (6) the influences of intervening occurrences; and (7) the nature and circumstances of the statement itself. *Meras*, 284 Ill. App. 3d at 162. The primary question to be addressed in such a situation is whether there was time for reflection and invention. *Id*.

¶ 35 Here, we find that all three elements of an excited utterance were present. The first and last elements were undoubtedly met as A.N. had just been sexually assaulted by defendant and A.N.'s statements to her mother at home were about what occurred during the assault. Defendant argues that this was not an excited utterance because there was not an absence of time in which A.N. could fabricate her story. Given the circumstances of this case, we find this argument unavailing even in the absence of knowing exactly how much time passed between the phone call and when A.N.'s mother arrived home. First, A.N.'s mother testified that she came home right after speaking with A.N. over the telephone, suggesting that it was not an excessive amount time that had lapsed between each conversation. Second, when A.N.'s mother arrived home, A.N. was still crying and was still bleeding from her injuries. Third, A.N. was a 20-year-old mentally challenged young woman with an I.Q. of around 40 when she was making the statements. Fourth, A.N. was still in her home where the attack occurred while making those statements to her mother. And fifth, there is no evidence in the record of anything occurring between the time A.N. called her mother and the time that A.N.'s mother arrived home and spoke with A.N. Accordingly, although defense counsel only made a general relevance objection to A.N.'s mother testifying about what A.N. told her in their home, we find that these statements would have been admissible as excited utterances. Ill. R. Evid. 803(2). Accordingly, we cannot say that the trial court judge abused his discretion in admitting these statements.

¶ 36 We further find defendant's argument with respect to section 115-10 of the Code to be unpersuasive given that the testimony at issue was relevant and was admissible as an excited utterance. See *People v. Pitts*, 299 Ill. App. 3d 469, 478 (1998) (Section 115-10 is inapplicable where statements were not admitted pursuant to that section but, rather, pursuant to the excited utterance exception to the hearsay rule); *Nevitt*, 135 Ill. 2d at 443 ("we conclude that the legislature did not intend to preclude admission of a statement under the excited utterance exception to the hearsay rule when it enacted the version of section 115-10 applicable here"). Further, there was never any indication from either party that these statements were even being admitted pursuant to section 115-10 of the Code. Where the is "no evidence in the record that defendant objected to the admission of the testimony in question pursuant to section 115-10, or that the trial court subsequently admitted the evidence in question pursuant to that section" this court has ruled that it cannot find that "the State violated section 115-10(d) by failing to give notice to defendant that it intended to introduce the statement in question into the record." *People v. Roman*, 260 Ill. App. 3d 436, 444 (1992).

¶ 37 For similar reasons, defendant's reliance on *People v. Mitchell*, 155 Ill. 2d 344 (1992), is misplaced. There, the trial court judge admitted hearsay statements of a 9-year-old child relating to the child's alleged sexual assault. *Mitchell*, 155 Ill. 2d at 350-52. Although there was no objection prior to these statements being admitted, the court found that the trial court abused its discretion by not holding a hearing pursuant to section 115-10 of the Code prior to such statements being admitted because there was insufficient evidence in the record to establish the reliability of those statements. *Id*. at 353 ("It is error in a jury trial to admit into evidence, pursuant to section 115-10, testimony about a child's out-of-court statement without such a hearing" where "the record neither establishes the reliability of the statements *** nor provides a

basis from which one may infer that these statements are reliable."). Thus, in *Mitchell*, the court found that the statements at issue were admitted pursuant to section 115-10 of the Code, and further found that the statements were improperly admitted because there was no basis of reliability in the record that would allow the statements to be properly admitted. Here, not only were the statements at issue not admitted pursuant to section 115-10 of the Code, but as stated above, the evidence in the record showed that the statements were reliable as they were admissible as excited utterances. See Ill. R. Evid. 803(2).

¶ 38 Given that the statements at issue were not admitted pursuant to section 115-10 of the Code, it follows that any failure to read a limiting instruction to the jury pursuant to section 115-10(c) of the Code, including defense counsel's failure to request such an instruction, is irrelevant. We note, though, that where this argument has been raised previously, it has been found to be harmless error where the jurors were adequately informed with the standard instruction advising jurors to consider the witness' ability and opportunity to observe (*People v. Booker*, 224 Ill. App. 3d 542, 556 (1992)), as was done here.[1]

¶ 39 Last, while defendant argues that the admission of both statements that A.N. made to her mother was cumulative and, therefore, unfairly prejudicial to defendant's case, we disagree. As stated earlier, the first conversation that A.N. had with her mother over the phone was extremely brief. The second conversation A.N. had with her mother at home was far more detailed. Although both conversations conveyed that defendant had sex with A.N., the second conversation was far more detailed and described the incident in a way that suggested a sexual attack rather than a sexual encounter. As such, we find that the probative value of A.N.'s second

[1] The jury was instructed with Illinois Pattern Jury Instruction 1.02, which states "[i]n considering the testimony of any witness, you may take into account his ability and opportunity to observe, his memory, his manner while testifying, any interest, bias, or prejudice he may have, and the reasonableness of his testimony considered in light of all the evidence in the case."

statement to her mother, that fully described the details of a sexual attack, outweighed any unfair prejudice that could have resulted to defendant's case. See Ill. R. Evid. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

¶ 40 Ineffective Assistance of Counsel

¶ 41 Defendant argues that he was denied effective assistance of counsel based on numerous errors that defense counsel made throughout the course of the trial. First, defendant argues that his counsel was ineffective by failing to object to testimony and argument that was only aimed to arouse sympathy for A.N., specifically references to A.N. riding the "short bus," testimony regarding A.N.'s psychological harm after the alleged sexual assault, and testimony concerning the severity of A.N.'s injury as a result of the alleged rape. Second, defendant argues that defense counsel was ineffective by failing to object to testimony and argument that was only aimed at degrading defendant, specifically references to defendant as a "rapist," a "bad person," a "liar," and references to the alleged rape being a "nightmare" for A.N. and the "end of A.N.'s happiness." Third, defendant again claims that the admission of A.N.'s second statement to her mother without the appropriate limiting instruction also resulted in ineffective assistance of counsel where defense counsel failed to object to the omission of that limiting instruction. Defendant argues that all of these errors, especially when viewed together, amounted to plain error because they undermined the outcome of the trial.

¶ 42 In determining whether a defendant was denied the effective assistance of counsel, we apply the familiar two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Patterson*, 217 Ill. 2d 407, 438 (2005). To prevail on an ineffective-assistance claim, a

defendant must show that: (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant such that he was deprived of a fair trial. *Strickland,* 466 U.S. at 687. The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *Id*. at 697. "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. * * * If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Id*. at 668.

¶ 43 We disagree with defendant's claim that he was denied effective assistance of counsel. Our review of the record demonstrates that even assuming, *arguendo,* that all of the alleged errors constitute deficient representation, they would not have altered the result in this case because the evidence of defendant's guilt is overwhelming. There is, therefore, no need to review the individual claims of inadequate representation to determine whether counsel acted within the range of reasonable professional assistance. See *People v. Albanese*, 104 Ill. 2d 504, 527 (1984).

¶ 44 Here, defendant signed a statement wherein he admits that he was not invited into A.N.'s home, but grabbed her butt and pushed her inside; admits that while he was penetrating A.N. vaginally, A.N. had her hands over her face and was asking to go to the bathroom; admits that he would not let A.N. get up because he wanted to ejaculate; admits that as he tried to penetrate A.N. deeper, he could feel A.N. pushing his chest away from her body; admits that even after observing blood on his penis from A.N.'s vagina, he flipped her over and began to penetrate her anus; admits that he stopped penetrating A.N.'s anus because he "came to his senses about what was going on"; and admits that he attempted to apologize to A.N. a few days later because he felt

like he took advantage of her and made her do something she did not want to do. All of these admissions by defendant, when coupled with A.N.'s statements made immediately after the incident and at trial and Dr. Healy's testimony that A.N.'s injuries were consistent with what A.N. told her, lead us to find that even if all of the alleged errors constituted substandard representation, the outcome of the trial would not have been different. Accordingly, we find that defendant was not denied a fair trial and, therefore, was not denied effective assistance of counsel.

¶ 45 Prosecutorial Misconduct

¶ 46 Defendant also argues that the misconduct exhibited by the prosecutor during closing arguments—references to defendant as a "rapist," a "bad person," a "liar," and references to the alleged rape being a "nightmare" for A.N. and the "end of A.N.'s happiness"—amounted to plain error, thus requiring a new trial, because they encouraged the jury to be upset with defendant and to feel sympathy for A.N. Under the plain error doctrine, a reviewing court may consider an unpreserved error if either (1) the evidence is so closely balanced that the jury's verdict may have resulted from the error rather than the evidence or (2) the error was so fundamental and of such a magnitude that it affected the fairness of the trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). "This so-called disjunctive test does not offer two divergent interpretations of plain error, but instead two different ways to ensure the same thing—namely, a fair trial." *Id*. at 179. Whether statements made by a prosecutor at closing argument were so egregious that they warrant a new trial is a legal issue this court reviews *de novo*. *People v. Wheeler*, 226 Ill. 2d 92, 121, (2007); *People v. Graham*, 206 Ill. 2d 465, 474 (2003).

¶ 47 As to the first prong, as discussed earlier in this order, the evidence in this case is not closely balanced. As previously stated, defendant signed a statement wherein he admits that he was not invited into A.N.'s home, but grabbed her butt and pushed her inside; admits that while he was penetrating A.N. vaginally, A.N. had her hands over her face and was asking to go to the bathroom; admits that he would not let A.N. get up because he wanted to ejaculate; admits that as he tried to penetrate A.N. deeper, he could feel A.N. pushing his chest away from her body; admits that even after observing blood on his penis from A.N.'s vagina, he flipped her over and began to penetrate her anus; admits that he stopped penetrating A.N.'s anus because he "came to his senses about what was going on"; and admits that he attempted to apologize to A.N. a few days later because he felt like he took advantage of her and made her do something she did not want to do. All of these admissions by defendant, when coupled with A.N.'s statements made immediately after the incident and at trial and Dr. Healy's testimony that A.N.'s injuries were consistent with what A.N. told her, lead us to find that despite the allegations of prosecutorial misconduct, the outcome of the trial would not have been different. Accordingly, the jury's verdict could not have resulted from the prosecutor's remarks rather than the evidence, which overwhelmingly supports defendant's guilt. *People v. Marshall*, 2013 IL App (5th) 110430, ¶ 12.

¶ 48 As to the second prong, our supreme court has "equated the second prong of plain-error review with structural error." *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). A structural error for purposes of plain-error review is "a systemic error which serves to erode the integrity of the judicial process and undermine the fairness of the defendant's trial. [Citations.]" (Internal quotation marks omitted.) *Id.* at 613-14. Defendant cannot meet his burden of persuasion that the prosecutor's remarks were a structural error.

> "Structural errors have been recognized in only a limited class of cases including: a complete denial of counsel; trial before a biased judge; racial discrimination in the selection of a grand jury; denial of self-representation at trial; denial of a public trial; and a defective reasonable doubt instruction. [Citation.] Error in closing argument does not fall into the type of error recognized as structural." *People v. Cosmano*, 2011 IL App (1st) 101196, ¶ 78.

Thus, for all of the foregoing reasons, defendant's argument that he is entitled to a new trial based on the prosecution's comments during closing arguments must fail.

¶ 49 We recognize defendant's suggestion that this case is analogous to *People v. Blue*, 189 Ill. 2d 99 (2000). However, we disagree with this suggestion and find *Blue* to be clearly distinguishable from the case at bar. In *Blue*, the court granted a new trial under the plain error doctrine based upon a number of alleged errors, including the State's improper remarks before the jury and the State's presentation of a life-size, headless mannequin wearing the murder victim's (a police officer) uniform, which was stained from the officer's blood and brain matter, before the jury during the examination of several witnesses and then also during the jury's deliberations. *Blue*, 189 Ill. 2d at 120-40. With respect to the mannequin, the court found that "[t]he nature and presentation of the uniform rendered the exhibit so disturbing that its prejudicial impact outweighed its probative value. It's admission into evidence was error." *Id*. at 126.

¶ 50 Here, the only prosecutorial misconduct alleged was remarks made by the State during closing arguments. As stated above, comments made during closing arguments do not amount to structural error. See *Cosmano*, 2011 IL App (1st) 101196, ¶ 78. Accordingly, as there was no

alleged prosecutorial error here beyond the State's improper comments during closing arguments, this case is distinguishable from *Blue* where the court's grant of a new trial was in large part based on the trial court's improper admission of a uniform containing the victim's blood and brain matter during witness examinations and also during the jury's deliberations. As such, *Blue* is distinguishable from the case at bar and has no bearing here.

¶ 51 Exclusive Jurisdiction and Automatic Transfer Provisions of the Juvenile Court Act

¶ 52 Defendant argues that the exclusive jurisdiction provision and the automatic transfer provision of the Juvenile Court Act violate his eighth amendment United States constitutional rights as well as the proportionate penalties clause of the Illinois Constitution. The exclusive jurisdiction provision states in relevant part: "Proceedings may be instituted under the provisions of this Article concerning any minor who prior to his or her 18th birthday has violated or attempted to violate, regardless of where the act occurred, any federal, State, county or municipal law or ordinance." 705 ILCS 405/5-120 (West 2008). The automatic transfer provision states in relevant part: "The definition of delinquent minor under Section 5-120 of this Article shall not apply to any minor who at the time of an offense was at least 15 years of age and who is charged with: (i) first degree murder, (ii) aggravated criminal sexual assault***." 705 ILCS 405/5-130 (West 2008). Together, these provisions required that defendant be tried as an adult and, therefore, defendant argues that neither the jury nor the judge was able to take into consideration his age when determining the minimum and maximum statutory sentences he could receive. Defendant argues that such an automatic transfer to adult court conflicts with the United States' Supreme Court's rulings in *Graham*, *Roper* and *Miller*.

¶ 53 The eighth amendment to the United States Constitution prohibits the imposition of cruel and unusual punishment. U.S. Const., amend. VIII. The proportionate penalties clause of the

Illinois Constitution provides that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, §11. The proportionate penalties clause has been read as coextensive with the eighth amendment. *In re Rodney H.*, 223 Ill. 2d 510, 518 (2006).

¶ 54 We recognize the well-established rule that "[a]ll statutes are presumed to be constitutional, and the burden of rebutting that presumption is on the party challenging the validity of the statute to demonstrate clearly a constitutional violation." *People v. Greco*, 204 Ill. 2d 400, 406 (2003) (citing *People v. Sypien*, 198 Ill. 2d 334, 338 (2001)). This presumption means that, if possible, we must construe the statute "so as to affirm its constitutionality and validity." *Greco*, 204 Ill. 2d at 406 (citing *People v. Fuller*, 187 Ill. 2d 1, 10 (1999)). The constitutionality of a statute may be challenged at any time, and *de novo* review applies. *People v. Dinelli*, 217 Ill. 2d 387, 397 (2005).

¶ 55 We do not find the automatic transfer statute violates either the eighth amendment or the proportionate penalties clause of the Illinois Constitution. While defendant relies on *Roper*, *Graham*, and *Miller* in support of his argument here, in *People v. Salas*, our appellate court found that the automatic transfer statute "does not impose any punishment on the juvenile defendant, but rather it only provides a mechanism for determining where defendant's case is to be tried." *People v. Salas*, 2011 IL App (1st) 091880, ¶66. Therefore, because the statute does not impose any punishment, the *Salas* court found it was not subject to the eighth amendment scrutiny. *Salas*, 2011 IL App (1st) 091880, ¶66; see also *People v. Jackson*, 2012 IL App (1st) 100398, ¶¶23–24; *People v. Pacheco*, 2013 IL App (4th) 110409, ¶55 (agreeing with *Salas*). Moreover, we note, as this court did in *People v. Harmon*:

> "*Graham*, *Roper*, and *Miller* stand for the proposition that a

> sentencing body must have the chance to take into account mitigating circumstances before sentencing a juvenile to the 'harshest possible penalty.' *Id.* The harshest possible penalties involved in those cases, *i.e.*, the death penalty and life imprisonment without the possibility of parole, are simply not at issue here. See *People v. Pacheco*, 2013 IL App (4th) 110409, ¶ 51 ('[T]he Supreme Court in *Roper*, *Graham*, and *Miller* was only concerned with the death penalty and life without the possibility of parole, which are the two most severe punishments allowed under the United States Constitution.'). " *People v. Harmon*, 2013 IL App (2d) 120439, *appeal pending* (Mar. 2014), ¶54.

As such, because the automatic transfer statute does not actually impose a penalty and because we are not dealing with the harshest criminal penalties in this case, death or life without the possibility of parole, we find that the automatic transfer statute does not violate the 8th amendment cruel and usual punishment clause of the United State constitution or the proportionate penalties clause of the Illinois constitution.

¶ 56 Further, contrary to defendant's argument that these provisions violate his procedural and substantive due process rights, Illinois courts have found the automatic transfer statute does not violate a juvenile offender's substantive and procedural due process rights. See *People v. J.S.*, 103 Ill. 2d 395, 402-05 (1984) (Automatic transfer statute constitutional because it was not unreasonable for the legislature to determine that 15 and 16 year olds who have committed certain crimes should be treated differently than those under 15); *People v. Patterson*, 2012 IL App (1st) 101573, ¶27 (rejecting defendant's challenge to the constitutionality of the Juvenile

Court Act's automatic transfer provision for juveniles at least 15 years old accused of aggravated criminal sexual assault); *Jackson*, 2012 IL App (1st) 100398, ¶¶13–17 (holding "*People v. J.S.* remains on solid footing with the Supreme Court's holdings in *Roper* and *Graham*" and "Defendant's substantive due process rights were not violated when he was automatically transferred to adult court pursuant to the automatic transfer provision of the Illinois Juvenile Court Act"); *People v. Croom*, 2012 IL App (4th) 100932, ¶¶13-18. In *People v. Croom*, this court noted *Roper* and *Graham* did not consider due process arguments and found those cases distinguishable because each "applied (1) a different analysis (2) under a different test for (3) an alleged violation of a different constitutional provision regarding severe sentencing sanctions—not the automatic transfer to adult court at issue here." *Croom*, 2012 IL App (4th) 100932, ¶¶13–18; see also *Pacheco*, 2013 IL App (4th) 110409, ¶63 *appeal allowed*, 996 N.E.2d 20 (Ill. 2013). Moreover, and probably most importantly, here the trial court was able to consider defendant's age, and did in fact consider defendant's age, in determining an appropriate sentence, which fell far short of a life sentence. As such, based upon our Illinois court precedent, which has upheld the constitutionality of the automatic transfer statute even in the wake of *Roper*, *Graham* and *Miller*, we find that the automatic transfer statute did not violate defendant's substantive or procedural due process rights.

¶ 57 Mandatory Consecutive Sentencing Statute and Truth in Sentencing Statute

¶ 58 Last, defendant argues that the combination of the mandatory consecutive sentencing statute along with the truth in sentencing statute, alone or along with the automatic transfer provision and exclusive jurisdiction provision, are unconstitutional, thus warranting defendant's sentence be vacated and remanded for a hearing in juvenile court to determine if defendant's case should be transferred to adult court.

¶ 59 The mandatory consecutive sentencing statute states: "When an Illinois court *** (ii) imposes a sentence of imprisonment on a defendant who is already subject to a sentence of imprisonment imposed by an Illinois court, a court of another state, or a federal court, then the sentences shall run concurrently unless otherwise determined by the Illinois court under this Section." 730 ILCS 5/5-8-4(a)(ii) (West 2008). The truth in sentencing statute provides, in relevant part, "that a prisoner serving a sentence for *** aggravated criminal sexual assault, *** shall receive no more than 4.5 days of sentence credit for each month of his or her sentence of imprisonment." 730 ILCS 5/3-6-3(a)(2)(ii) (West 2008). As a result, defendant will have to serve at least 85% of his 16-year imprisonment.

¶ 60 The eighth amendment to the United States Constitution prohibits the imposition of cruel and unusual punishment. U.S. Const., amend. VIII. The proportionate penalties clause of the Illinois Constitution provides that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, §11. The proportionate penalties clause has been read as coextensive with the eighth amendment. *In re Rodney H.,* 223 Ill. 2d at 518.

¶ 61 "All statutes are presumed to be constitutional, and the burden of rebutting that presumption is on the party challenging the validity of the statute to demonstrate clearly a constitutional violation. [Citation.] If reasonably possible, a statute must be construed so as to affirm its constitutionality and validity." *Greco,* 204 Ill. 2d at 406. Whether a statute is constitutional involves a question of law, and our review is *de novo. People v. Woodrum,* 223 Ill. 2d 286, 307 (2006).

¶ 62 In *Miller,* 567 U.S. at ——, 132 S. Ct. at 2460, two 14-year-old offenders were convicted of murder, and the trial courts had no discretion but to sentence them to life in prison without the

possibility of parole. The defendants argued the mandatory life sentence without parole for juvenile offenders violated the eighth amendment. The Supreme Court agreed. *Miller,* 567 U.S. at ——, 132 S. Ct. at 2460. The Court noted "children are constitutionally different from adults for purposes of sentencing." *Miller,* 567 U.S. at ——, 132 S. Ct. at 2464. Also, the mandatory sentencing schemes prevented the sentencing courts from taking into consideration an offender's youth, which "prohibit[ed] a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender." *Miller,* 567 U.S. at ——, 132 S. Ct. at 2466. "Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences." *Miller,* 567 U.S. at ——, 132 S. Ct. at 2468. Along with factors such as the family and home environment and the possibility of rehabilitation, the Court held the eighth amendment prohibits "a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." *Miller,* 567 U.S. at ——, 132 S. Ct. at 2469. "By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment." *Miller,* 567 U.S. at ——, 132 S. Ct. at 2469.

> "*Graham, Roper,* and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory

> sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment." *Miller*, 567 U.S. at ——, 132 S. Ct. at 2475.

Here, because we find that defendant was not sentenced to death or life imprisonment without the possibility of parole, we find the Supreme Court's decisions in *Graham*, *Roper* and *Miller* unavailing in this case. Defendant was sentenced to 16 years' imprisonment, which does not equate with "the harshest possible penalty for juveniles." *Miller*, 567 U.S. at ——, 132 S. Ct. at 2475. Moreover, the trial court was not without discretion in sentencing defendant between the minimum of 12 years and the maximum of 60 years (see 720 ILCS 5/12-14(a)(2) (West 2008) (aggravated criminal sexual assault is a Class X felony); 730 ILCS 5/5-8(a)(3) (West 2008) (range for Class X felonies is six to 30 years)), and after considering defendant's youth along with all the other mitigating and aggravating factors, the trial court judge determined in his discretion that a 16-year sentence, which is far from the maximum sentence that could have been imposed, was appropriate.

¶ 63 CONCLUSION

¶ 64 For the reasons stated above, defendant's conviction and sentence are affirmed.

¶ 65 Affirmed.