2014 IL App (1st) 130385-U

FIFTH DIVISION
December 31, 2014

No. 1-13-0385

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.	)	No. 07 CR 21856
	)	
DARWIN ANDERSON,	)	Honorable
	)	Brian K. Flaherty,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Justices Gordon and Reyes concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court properly admitted hearsay statements of a psychologist and a treating nurse under sections 115-10 and 115-13 of the Code of Criminal Procedure; (2) the failure to instruct the jury pursuant to section 115-10(c) does not amount to plain error and defense counsel was not ineffective for failing to tender the instruction; (3) defendant's sentence is not excessive and the trial court properly considered mitigating evidence; and (4) defendant is entitled to 20 additional days of presentence credit for time spent in custody.

¶ 2 Following a jury trial, defendant Darwin Anderson was convicted of two counts of predatory criminal sexual assault against A.B. The trial court subsequently sentenced defendant to consecutive terms of 13 years in the Illinois Department of Corrections.

¶ 3 Defendant appeals, arguing that: (1) the trial court erred in admitting hearsay statements from the victim to a clinical psychologist under section 115-10 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10 (West 2012)) and a registered nurse under section 115-13 (725 ILCS 5/115-13 (West 2012)); (2) the trial court erred when it failed to give Illinois Pattern Jury Instructions, Criminal, No. 11.66 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 11.66); (3) the trial court abused its discretion by not considering defendant's mitigating evidence when imposing defendant's sentence; and (4) defendant is entitled to an additional 20 days of presentence credit for time served in custody.

¶ 4 Defendant was arrested in August 2007 and charged by indictment with four counts of predatory criminal sexual assault and two counts of aggravated kidnapping. Prior to trial, the State filed a motion seeking to admit statements made by A.B. to forensic interviewer, Dr. Myra West, a clinical psychologist, pursuant to the hearsay exception set forth in section 115-10 (725 ILCS 5/115-10 (West 2012)).

¶ 5 Section 115-10 provides for an exception to the hearsay rule and allows the admission of an out of court statement made by the child victim of certain sexual offenses complaining of the acts subject to prosecution to another person if: the trial court determines at a hearing that the time, content and circumstances of the statement provide sufficient safeguards of reliability; and the child testifies at trial or there is corroborative evidence of the act that is the subject of the statement. 725 ILCS 5/115-10 (West 2012).

¶ 6 A hearing was conducted on the motion on October 1, 2012. Dr. West testified that she is a licensed clinical psychologist and she was employed as the coordinator of investigative advocacy and support services at LaRabida Jolie Burell Children's Advocacy Center. She stated that she is a forensic interviewer and also managed the program and supervised other staff

members. She explained that during an interview she does not ask leading questions and makes sure not to "put any words in the kid's mouth." She said they are "trying to gather information from the child about whatever it is they have to say." She stated that the interview room has a one-way mirror in which individuals in an attached observation room can watch the interview. Detective Eric Armstrong and Detective Ramsey from the Harvey police department observed her interview with A.B.

¶ 7 On August 2, 2007, Dr. West conducted an interview of A.B., whose date of birth is May 30, 1996. Dr. West stated that prior to the interview she reviewed the police report, but it did not contain any specific details as to the sexual assault allegations. Dr. West told A.B. if she did not remember anything, that she should say that and not guess or make anything up. Dr. West also asked A.B. some basic questions about her age, school, where and with whom she lived. She stated that A.B. was able to communicate effectively. Dr. West further testified that she asked A.B. about telling the truth and ascertained that A.B. knew the difference between the truth and a lie. She asked A.B. if she would be willing to tell her only the truth, and A.B. agreed.

¶ 8 Dr. West testified that she asked A.B. if she knew why she was there. A.B. responded that it was because "somebody raped" her and A.B. indicated that defendant was the person who sexually assaulted her. A.B. said defendant was her mother's ex-boyfriend.

¶ 9 A.B. stated that she was walking to the candy store with her sisters and Paul, when defendant came up and asked Paul if A.B. could help him. Defendant said that he needed someone small to climb through a window to get his keys from his apartment. A.B. left with defendant. When they got to his residence, A.B. said defendant took a key from his pocket and opened the door. Once inside defendant's apartment, A.B. used the bathroom.

¶ 10 When she exited the bathroom, defendant had taken off his shorts and did not have any clothes on. A.B. stated that defendant "grabbed her by the arm and pulled her into the bedroom." She said defendant told her he was going to "freak her." A.B. said that defendant laid her on the bed and kissed her on the lips. Defendant then took off A.B.'s pants. A.B. stated that defendant had some "clear medicine" that he put on his hand and then he put his hand in her "private part." A.B. said that defendant also put his "private part" into her "private part." Dr. West testified that A.B. used the term "private part" and also called defendant's penis a "wee-wee." A.B. said that defendant's "wee-wee" was big.

¶ 11 A.B. stated that she was screaming when defendant put his penis in her vagina. Defendant told her to stop screaming or he would kill her. She also said defendant raised his hand like he was going to slap her, but he did not slap her. She said defendant put a pillow over her face. When defendant took his penis out of A.B.'s vagina, A.B. said that "her private part was hurting." She also said that "white stuff" came out of defendant's "wee-wee." A.B. told Dr. West that defendant said he would kill her if she told anyone. A.B. said she ran home and told her sister what happened and her mother called the police. A.B. went to the hospital and she noticed she had blood in her underwear. Dr. West also testified that A.B. stated that was the first day she had met defendant. A.B. also said she was on her porch when she first saw defendant that day.

¶ 12 On cross-examination, Dr. West stated that she did not remember anything about A.B. that indicated she had a learning disability. She noted that it was not age appropriate for A.B. to use the term "wee-wee," that it was a term that a younger child would use. Dr. West stated that terms for private parts "vary quite a bit, and it can depend on family. It could be that a child is regressing because of what happened to them." She explained there were a number of factors

and did not consider why A.B. used the term. Dr. West also testified that A.B.'s demeanor changed during the interview. At first, A.B. was friendly, but she became upset and had some difficulty telling Dr. West some of the details, which Dr. West stated was "not uncommon for a child in that situation." Dr. West described A.B. as "sad, embarrassed, distressed." Dr. West could not recall if she asked follow-up questions regarding A.B.'s statement that she met defendant the day of the sexual assault.

¶ 13 Following Dr. West's testimony and arguments on the motion, the trial court held that A.B.'s statements to Dr. West satisfied the requirements of section 115-10.

¶ 14 The following evidence was presented at defendant's October 2012 jury trial.

¶ 15 A.B. testified that at the time of the trial she was 16 years old. In August 2007, A.B. stated that she was 11 years old and she lived in Harvey with her mother, her sisters Mykalia and Mariah, her brother Shorme, and Paul Peyton, who A.B. described as "like an uncle" to her. Peyton took care of the children while her mother was at work. She stated she knew defendant because he was her mother's ex-boyfriend.

¶ 16 On August 1, 2007, A.B. walked to the candy store with Peyton and her sister Mykalia. The candy store was about a block away from her home. When they were walking home from the candy store, she saw defendant and he approached them. Defendant asked her to climb in his window because he did not have his key. She agreed and walked with defendant. She said his house was about two blocks away. When they got to the house, defendant opened the door with a key. They went inside and defendant told her to go upstairs. He opened the door to the upstairs apartment. A.B. did not see anybody on the first floor or anyone else in the apartment. She said he locked the door behind her.

¶ 17 A.B. testified that she went to the bathroom and defendant followed her. When she came out, defendant told her to get undressed. She stated that she took off her top and her bra, but defendant removed her underwear. She said she took off her clothes because defendant told her he was going to kill her and she was afraid. Defendant removed his clothes. Defendant then told her to get on the bed.

¶ 18 After she got on the bed, A.B. stated that defendant "put his finger in [her] private part." A.B. stated that defendant put his finger inside her vagina, he was "moving it around." Before he put his finger inside her vagina, A.B. said defendant put "some cream" from a "white tube" near the television on his fingers. A.B. testified that defendant also "put his penis inside of [her]." A.B. stated that she tried to scream, but defendant put a pillow over her face. She said it hurt when defendant put his penis in her vagina. After defendant was done, he told her to put on her clothes. He told her not to tell anyone.

¶ 19 A.B. stated that she left out of the back door and ran home. On her way home, she saw her sister Mykalia and told her what happened. They went home and told their brother. He called their mom. Their mother came home and called the police. A.B. said she went to the hospital in an ambulance. While in the ambulance, she pointed out defendant's house. At the hospital, A.B. stated that she spoke with a nurse and answered her questions about what happened. A.B. said she removed her clothing and had an examination where she had to put her legs up. A.B. said it was first time she had that type of exam. She testified that she was feeling pain during the exam.

¶ 20 Mykalia B. testified that at the time of trial she was 15 years old. In August 2007, she was 10 years old. She lived in Harvey with her mother, sisters, brother and Peyton, who she also

described as "like an uncle." She knew defendant because her mother had dated him in high school.

¶ 21 On August 1, 2007, she walked to the candy store with A.B. and Peyton in the early evening. She stated that defendant asked Peyton if he could use A.B. because he locked his keys in the house and Peyton said yes. She said defendant and A.B. walked into an alley. Mykalia testified that she got her younger sister's bicycle because she wanted to follow them after defendant told her she could not come. Mykalia said she lost sight of them because she did not want defendant to see her. After she lost sight of them, Mykalia stated that she was looking for A.B. while riding the bicycle. She eventually saw A.B. again the next block over from their house. Mykalia said A.B. was crying. They went home and called her mother and then her mother called the police.

¶ 22 Susan Trojaniak testified that she is an emergency medical technician. On August 1, 2007, she received a call in Harvey for a sexual assault victim. When she and her partner arrived at A.B.'s house, she stated that A.B. appeared "in shock, just very, very solemn, quiet" and she "cried a little bit." Trojaniak remained in the back of the ambulance while A.B. was transported to the hospital. While en route, A.B. said she recognized the house of the man who sexually assaulted her. A.B. pointed the house out to Trojaniak. Trojaniak stated that she told her partner and he stopped the ambulance. She relayed the information to the police.

¶ 23 Jamie Rademacher testified that she is employed as a registered nurse and in August 2007, she worked at Ingalls Memorial Hospital. Rademacher was the first nurse to treat A.B. when she arrived on August 1, 2007. Rademacher took her history and basic patient information, and alerted the physician that she was there.

¶ 24 Rademacher stated that she and the doctor went into a room to talk to A.B. about what happened. A.B. told Rademacher and the doctor about what happened. A.B. told them that she was walking with her sisters when they were approached by a man she knew who asked if she could crawl in through a window because he had locked himself out of his house. A.B. agreed. She went inside the man's house and he told her to take her clothes off and if she did not comply, he would kill her. After she took off her clothes, A.B. said the man "put some kind of clear or whitish jelly or liquid into his hand and that he proceeded to put his fingers inside of her vagina." Rademacher testified that A.B. told her that man also put his penis inside of her vagina.

¶ 25 Rademacher stated that they asked A.B. a lot of questions. Rademacher described A.B. as "very quiet, very --- she was teary eyed, but very flat, not a ton of emotion." Rademacher testified that A.B. had a hard time understanding the questions asked. Rademacher asked A.B. if she had urinated and A.B. said yes.

¶ 26 After the conversation, Rademacher and the doctor performed a rape kit on A.B. First, Rademacher placed a white cloth on the ground. A.B. stood on the cloth and completely disrobed. The cloth was sealed with the clothes in an evidence bag. A.B. was given a gown. Next, they combed A.B.'s hair onto white paper, scraped under her fingernails, and took oral swabs from inside and around A.B.'s mouth. She also looked for any markings on A.B.'s body. She observed dried fluid on A.B.'s thigh, which she swabbed. She noted a bruise to A.B.'s lower back that Rademacher testified appeared to be a new bruise.

¶ 27 Rademacher and the doctor then performed a pelvic exam. Rademacher testified that the outside of A.B.'s vagina had "evidence of definite trauma," including "redness" and "swelling." A.B. was complaining of a lot of pain so they were unable to use the speculum during the exam. They used swabs to get evidence from A.B.'s vagina. While getting a swab, "brownish bloody

fluid" came out of A.B.'s vagina. They also swabbed A.B.'s anus. The swabs and other evidence was sealed in the rape kit box and turned over to the Harvey police department.

¶ 28 Dr. West testified at trial regarding her interview with A.B. Dr. West's testimony was substantially similar to her testimony at the section 115-10 hearing.

¶ 29 Sergeant Kevin Ramsey of the Harvey police department testified that he was assigned to investigate the sexual assault of A.B. At approximately 9 a.m. on August 2, 2007, he went to 15124 S. Vine in Harvey, where the sexual assault occurred, to locate defendant. He described the location as a house with two apartments, one on the first floor, and the other on the second floor. He stated he knocked on the door and a person identified as Lynn Watkins answered the door. She said that defendant was upstairs. Sergeant Ramsey arrested defendant and had him transported to the police station. He remained at the scene and received permission from Watkins to search the apartment. In the bedroom, he recovered a tube of lubricant from the television stand. He also photographed the apartment.

¶ 30 Sergeant Ramsey also testified that he advised defendant of his *Miranda* rights at the police station. Defendant then signed a waiver form. Defendant told Sergeant Ramsey that he went to A.B.'s home at approximately 4:40 p.m. on August 1, 2007, and that he told Peyton that he needed A.B. to help him do something. He walked with A.B. together from her residence through an alley. Defendant made no further statement.

¶ 31 William Anselme testified that he is employed as a forensic biologist with the Illinois State Police crime lab. He stated that he received and tested the rape kit evidence. He explained the three different tests he performed to determine if semen was present. He first tested the vaginal swab. This swab tested positive for blood. Of the three semen tests, the first was positive, the second was a weak positive for semen, and the third was inconclusive for the

presence of sperm cells. He then tested the anal swab which also had a positive result on the first test for the presence of semen and a weak positive for the second test, but the third test was negative for sperm. No semen was present on the oral swab. The inner thigh swab tested negative for semen. He stated that several factors can affect the strength of the findings for the presence of semen, including urination and showering. On cross-examination, Anselme testified that the first test is not a conclusive test and that other bodily fluids can trigger a positive result.

¶ 32 Katherine Sullivan testified that she is a forensic biologist with the Illinois State Police crime lab and specializes in DNA testing. She received and tested evidence for DNA in this case. She tested both the vaginal and anal swabs from A.B. and the buccal swab from defendant. She explained two different types of DNA testing. The first is autosomal DNA, which looks at all the different chromosomes in a cell. The second is called YSTR, which only looks at the Y chromosome and is specific to males. Sullivan noted that "all males from the same paternal line would be expected to have exactly the same YSTR profile." Sullivan testified that the YSTR profile from the vaginal and anal swabs from A.B. matched the YSTR profile from defendant's buccal swab. She stated that the statistical rate for both samples would be expected to occur in approximately 1 in 370 unrelated black males, 1 in 290 unrelated Hispanic males, or 1 in 430 unrelated white males. The YSTR profiles on the swabs only matched defendant and did not match anyone else in the database of 4004 individuals.

¶ 33 Sullivan also tested the swab from A.B.'s inner thigh and A.B.'s bra and underwear. She was only able to recover DNA from the bra. She testified that the DNA on the bra was touch DNA, not from bodily fluids. She explained that touch DNA could have been skin cells from someone who handled the bra. The DNA on the bra was a mixture of two people, one a major female contributor and the other a minor male contributor. The male did not match defendant.

Sullivan stated that there are several ways the touch DNA could be found on clothing, including if the bra was washed with clothing that belonged to males.

¶ 34 On cross-examination, Sullivan testified that autosomal DNA analysis is the standard test to identify a specific individual as the source whereas YSTR testing cannot identify a specific person.

¶ 35 The State introduced A.B.'s birth certificate and defendant's birth certificate into evidence and rested. Defendant moved for a directed finding, which the trial court denied.

¶ 36 Cheryl Watkins testified for the defense that she lived in the first floor apartment located at 15124 S. Vine in Harvey in August 2007. Her sister Renee, who also uses the name Lynn, Watkins lived on the second floor. She stated that defendant lived with Lynn, but he was not on the lease. Cheryl knew A.B., but did not know her very well.

¶ 37 Cheryl stated that she can hear when someone walked on the wood floors of the second floor apartment and can hear voices if they spoke loudly. Cheryl testified that on August 1, 2007, two friends came over around 4 p.m. and stayed until 9 p.m. They played cards and talked. She said defendant stopped by her apartment in the afternoon and they talked. He then went upstairs. She can see the door to the house when her blinds are open and she stated that she did not see anyone coming in or out of the building that day. She also said she did not hear more than one set of footsteps in the upstairs apartment.

¶ 38 On cross-examination, Cheryl admitted that she was paying attention to her friends and talking while they played cards. She also said she only "somewhat" remembered that day and she had a better memory when she spoke to the police on August 2, 2007. She admitted that she told the police she heard footsteps up and down the stairs all afternoon. She also told them that she was busy doing her "own thing" and she did not try to see who was coming and going.

¶ 39 Lynn Watkins testified that in August 2007, she lived with defendant in the second floor apartment. She stated that defendant had lived there almost a year, but was not on the lease and he did not have a key to the apartment. Watkins testified that defendant was her boyfriend.

¶ 40 She stated that on August 1, 2007, she worked from 3:30 p.m. until 9 p.m. Defendant drove her to the bus stop around 2:30 p.m. When she arrived home after work, defendant was there and nothing appeared out of the ordinary. The next day, the police arrived and arrested defendant. She gave them permission to search the apartment. A couple days later, the police returned and took a tube of lubricant.

¶ 41 On cross-examination, Watkins admitted that defendant was still her boyfriend at the time of trial. She stated that she loves defendant, but she had not spoken with defendant about the case at all.

¶ 42 Defendant testified on his own behalf. He stated that he was 45 years old at the time of the trial. He said he knew A.B. because he used to date her mother. They dated in 1994 and then got back together in 2004. He stated that he lived with A.B.'s family for three months. Defendant testified that Peyton was in his mid to late 40s and A.B.'s mother was his caretaker. Defendant stated that Peyton had a disability and there was no romantic relationship between Peyton and A.B.'s mother.

¶ 43 Defendant stated that he had known Watkins for 20 years and lived with her in the second floor apartment in 2007. He said he did not have a key, but he did not need one. If Watkins was not home, defendant said he would spend time with Cheryl until Watkins returned home. If he knew he was returning, defendant would leave the door unlocked.

¶ 44 He testified that on August 1, 2007, he drove Watkins to the bus stop. Afterward, he stopped at A.B.'s house to see her brother, but he was not home. Defendant stated that he told

A.B. that he was going to tell her mother that she had recently lied to him. Defendant said that two or three weeks earlier, he had seen A.B. come out of an abandoned house. She had asked him not to tell, but he found out she lied and was going to tell her mother. He said A.B. became upset. He then went home and stayed there the rest of the day.

¶ 45 Defendant testified that A.B. did not come to his house that day, but had been there previously. He denied having any sexual contact with A.B. He denied asking Peyton for A.B. to help him. He denied telling the police that he asked A.B. for help or that he walked anywhere with A.B.

¶ 46 Sharon Richardson testified for the defense. She stated that she is employed with the Illinois Department of Children and Family Services (DCFS). She said that she conducted interviews as part of investigations. On August 22, 2007, Richardson interviewed A.B. A.B. told her that defendant sexually assaulted her. She stated that during the interview, A.B. told her that defendant had her climb through a window and A.B. did not mention a key. On cross-examination, Richardson admitted that she had no independent recollection of the interview and that it was possible that A.B. told her that defendant had to go to his house to have her go into the window.

¶ 47 The defense rested after Richardson's testimony. In rebuttal, the State called Detective Eric Armstrong. Detective Armstrong testified that he spoke with defendant on August 3, 2007. During that interview, defendant was given his *Miranda* rights and signed a waiver form. Defendant then said he went to A.B.'s house and spoke with Peyton. Defendant said he needed A.B. to go with him for something. Defendant told the detective that A.B. came with him and they walked south from A.B.'s house to an alley, and then walked east. Defendant did not tell him anything further about that day.

¶ 48 Following closing arguments, the jury found defendant guilty of two counts of predatory criminal sexual assault; one count for finger to vagina contact and one count for penis to vagina contact with A.B.

¶ 49 At the sentencing hearing, Investigator Lettiere from the Cook County Department of Corrections testified that defendant had cooperated with them on "gang information, narcotic information, weapons, anything that pertained to the jail." Investigator Lettiere stated that defendant contacts him almost daily about gang activity and he "potentially saved at least two guys lives in the jail, several other guys from getting beat up, attacked." Investigator McGough testified that he is partners with Investigator Lettiere. He stated that defendant has not received any benefits for the information he provided nor had he promised defendant anything in exchange for the information related to this case or anything else. An assistant State's Attorney also testified that defendant agreed to wear a wire to record a conversation related to a triple homicide investigation. The prosecutor stated that the only promise he made to defendant was to inform the trial court about his cooperation.

¶ 50 The trial court subsequently sentenced defendant to two consecutive terms of 13 years in prison.

¶ 51 This appeal followed.

¶ 52 Defendant first argues that the trial court erred in admitting A.B.'s statements through the hearsay testimony of Dr. West pursuant to section 115-10 (725 ILCS 5/115-10 (West 2012)) and Rademacher pursuant to section 115-13 (725 ILCS 5/115-13 (West 2012)). The State maintains that properly found that A.B.'s statement to Dr. West was sufficiently reliable to be admitted at trial under section 115-10 and A.B.'s statement to Rademacher was properly admitted pursuant to the medical diagnosis exception under section 115-13.

¶ 53 As we previously noted, section 115-10 provides for an exception to the hearsay rule and allows the admission of an out of court statement made by the child victim of certain sexual offenses complaining of the acts subject to prosecution to another person if: the trial court determines at a hearing that the time, content and circumstances of the statement provide sufficient safeguards of reliability; and the child testifies at trial or there is corroborative evidence of the act that is the subject of the statement. 725 ILCS 5/115-10 (West 2012).

¶ 54 "The determination as to whether the hearsay statements were sufficiently reliable so as to be admitted is committed to the discretion of the trial court and the court's decision will not be reversed absent a clear abuse of that discretion." *People v. Major-Flisk*, 398 Ill. App. 3d 491, 508 (2010) (citing *People v. Stechly*, 225 Ill. 2d 246, 312-13 (2007)). It is the State's burden, as the proponent of the evidence, to establish that the declarant's hearsay statements were reliable. *Id.* "A reliability determination is based upon the totality of the circumstances, but relevant factors include the child's spontaneity and consistent repetition, use of terminology unexpected of a child of similar age, lack of motive to fabricate, and the child's mental state." *Id.* at 508-09 (citing *Stechly*, 225 Ill. 2d at 313).

¶ 55 At the section 115-10 hearing, the trial court made the following finding.

> "Considering the nature and circumstances of the testimony that Dr. West told us, she certainly is a disinterested interviewer reading this statement.
>
> Obviously the statement that she is going to testify is hearsay. There are certain exceptions set forth in 115-10, and we are conducting this hearing to determine whether or not the time,

> content, circumstances of the statement provided sufficient safeguards of reliability.
>
> Considering the expertise of Dr. West regarding the number of interviews she has done, the fact that there were no leading questions, that she believes that the individual knows the difference between telling the truth and telling a lie, and that she even agreed, which according to her research indicates it's the most important thing that an interviewer can do or an individual who is giving a statement must learn, they don't have an answer, don't even guess; so I think the State has satisfied the requirements of 115-10. Dr. West will be allowed to testify."

¶ 56 Defendant contends that the State failed to establish that A.B.'s statements to Dr. West were reliable. Defendant asserts that before talking to Dr. West, A.B. had told her mother and her sister as well as Rademacher about the details of the sexual assault, but neither her mother or sister were called to testify and the State failed to offer any evidence as to the timing, content, or circumstances of that communication.

¶ 57 Defendant relies on the Fourth District decision of *People v. Simkins*, 297 Ill. App. 3d 668 (1998), for support of his argument that Dr. West's testimony should not have been admitted without the State's introduction of evidence of A.B.'s statements to her mother, sister and Rademacher. Defendant's reliance on *Simkins* is misplaced.

¶ 58 In *Simkins*, the defendant was charged with sexually abusing his daughter when she was five years old. At the section 115-10 hearing, a DCFS investigator testified about his interview with the victim. The interviewer acknowledged that he had previously interviewed the victim a

month earlier about allegations of sexual abuse of an older sibling by their grandfather, but he could not remember details of that interview. The trial court ruled that the investigator could testify regarding the victim's statements. *Id.* at 671-72. At trial, the victim, now eight years old, recanted the allegations that her father sexually abused her and said she had told the investigator " 'bad things' " and it was a " 'big lie.' " *Id.* at 673. She said she lied because she was mad at the defendant. *Id.* The DCFS investigator testified about his interview with the victim about the alleged sexual abuse by her father.

¶ 59 On appeal, the defendant challenged the admission of the investigator's testimony under section 115-10. The reviewing court found it "particularly troubling" that the substance of the investigator's prior interview was not disclosed. *Id.* at 676. Relying on the supreme court's decision in *People v. Zwart*, 151 Ill. 2d 37 (1992), the *Simkins* court found that the trial court abused its discretion in admitting the statements.

> "When the declarant of a statement the State seeks to offer under section 115-10 of the Code has been previously interviewed concerning allegations of sexual misconduct and the previous interview is relatively recent with regard to the timing of the section 115-10 statement, the State must affirmatively establish the content of the previous interview and must affirmatively demonstrate that it did not compromise the reliability of the proffered statement. If the State fails to offer any evidence regarding the substance and circumstances of the prior interview, the proffered statement should not be admitted unless other factors strongly suggest that the statement is reliable and not the result of

suggestiveness by others. Those individuals—particularly law enforcement officers or child abuse investigators—interviewing an alleged child victim should understand the importance of recording those interviews; it is simply not good enough to testify, 'I don't recall what I asked the alleged victim.'

In a given case, a statement by a child to a third party may have been given under circumstances which suggest sufficient indicia of reliability, and yet an argument could be made—perhaps successfully—that the statement was a product of suggestive interviewing techniques or manipulation. The best means to respond to this argument is for the child protective services investigator to audiotape (or record in some fashion) his interview of the alleged victim. Doing so provides the best evidence that no adult prompting or manipulation occurred, and trial courts can reasonably view the failure to do so as a negative factor when evaluating witness credibility and the State's claim that no improper interviewing techniques were used. Considering that many of the issues in a section 115-10 hearing are close, and considering further the deference courts of review would give to a trial court's ruling denying admission of the child's statement under section 115-10 of the Code, the State henceforth should be on notice of the risk it takes by not recording interviews of alleged child victims." *Id.* at 677-78.

¶ 60 Contrary to defendant's assertion, the *Simkins* court was focused on prior interviews by DCFS or other investigatory individuals. Nothing in *Simkins* suggested that evidence of all prior outcry statements must be introduced by the State to satisfy the burden to establish that an investigatory interview was sufficiently reliable. A.B.'s prior statements to her mother, sister and Rademacher were not interviews, but an outcry of the sexual assault allegations. The concerns in *Simkins* were suggestive interview techniques and possible manipulation by the investigator. The Second District in *People v. Sundling* has clarified that the holding in *Simkims* was limited to interviews by professional investigators. "The court [in *Simkins*] clearly was concerned that professional investigators might be tempted to encourage very young children to make unfounded allegations through the use of suggestive questioning techniques." *People v. Sundling*, 2012 IL App (2d) 070455-B, ¶ 42. The *Sundling* court found "[n]o such concerns are present here, where [the victim] first reported the alleged abuse to his mother, he did not recant, and no suggestive questioning techniques were used." *Id.*

¶ 61 Our review of the section 115-10 hearing shows that the State established its burden that the time, content, and the circumstances of A.B.'s statement to Dr. West satisfied the requirements of section 115-10 and the trial court did not abuse its discretion. A.B. first reported the sexual assault to her mother and sister, did not recant at trial, and she was not interviewed by an investigator prior to her interview with Dr. West. The interview occurred the day after the sexual assault at the LaRabida Children's Advocacy Center. Dr. West testified at the section 115-10 hearing that she did not use leading questions during the interview and that she asked questions to establish that A.B. knew the difference between the truth and a lie. Nothing at the hearing implied that any suggestive questioning occurred during the interview with A.B.

¶ 62 Additionally, defendant focuses on slight inconsistencies between A.B.'s statement to Dr. West and the evidence at trial. According to defendant, A.B.'s statements were not internally consistent nor were they consistent with other statements concerning the allegations. Defendant points to Dr. West's testimony that A.B. said she was walking to the candy store and A.B.'s trial testimony that she was walking from the candy store. Defendant also notes Dr. West's testimony that A.B. told her she met defendant that day, but had previously said she knew defendant because he was her mother's ex-boyfriend. Finally, defendant refers to Richardson's testimony that A.B. told her she climbed into defendant's house through the window rather than defendant using a key to unlock the door, which was A.B.'s statement to Dr. West and her testimony at trial. However, none of the inconsistencies related to allegations of sexual assault, which remained consistent at trial. Also, defendant argues that his trial testimony showed a motive for A.B. to lie, which rendered her statement unreliable. Neither of these arguments affect the reliability of Dr. West's hearsay testimony, but rather focus on issues of credibility to be determined by the trier of fact. "It falls within the province of the trier of fact to judge the credibility of witnesses, resolve conflicts in the evidence, and draw conclusions based on all the evidence." *People v. McCarter*, 2011 IL App (1st) 092864, ¶ 21 (citing *People v. Titone*, 115 Ill. 2d 413, 422 (1986)). Any inconsistencies in the testimony at trial affected its weight to be determined by the jury, but did not affect its admissibility. Accordingly, we find that the trial court did not abuse its discretion in admitting Dr. West's testimony under section 115-10.

¶ 63 Defendant also asserts that Rademacher's testimony regarding A.B.'s statements at the hospital about the sexual assault did not fall under the section 115-13 exception because Rademacher's questioning was geared toward gathering information for future prosecution rather than medical treatment.

¶ 64 In prosecutions of certain sex offenses, section 115-13 provides that "statements made by the victim to medical personnel for purposes of medical diagnosis or treatment including descriptions of the cause of symptom, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment shall be admitted as an exception to the hearsay rule." 725 ILCS 5/115-13 (West 2012).

¶ 65 "A trial court is vested with discretion in determining whether the statements made by the victim were 'reasonably pertinent to the victim's diagnosis or treatment.' " *People v. Davis*, 337 Ill. App. 3d 977, 989-90 (2003) (quoting *People v. Williams*, 223 Ill. App. 3d 692, 700 (1992)). "Generally, statements concerning a cause of injury made to a treating physician are admissible under the physician-patient exception to the hearsay rule; however, identification of the offender is outside the scope of the exception." *Davis*, 337 Ill. App. 3d at 990 (citing *People v. Hudson*, 198 Ill. App. 3d 915, 921-22 (1990)).

¶ 66 In *Davis*, a nurse testified that she treated the victim following a sexual assault and kidnaping. The nurse assessed the victim's injuries and further testified that the victim described the circumstances of the assault, including the event prior to her kidnaping and the physical description of the offenders. *Davis*, 337 Ill. App. 3d at 982. The defendant failed to object to this testimony at trial, but asked the court to consider it under the plain error rule. *Id.* at 989. The court found that the circumstances of the sexual assault and the manner of her injuries fell within the statute, but the identity of the persons who attacked the victim and events leading up to her kidnaping did not fall under the hearsay exception because these statements were not necessary for the victim to receive proper medical treatment. *Id.* at 990.

¶ 67 However, the *Davis* court found that the evidence was not closely balanced and any error in admitting this testimony was harmless. *Id.* at 990-91. "The hearsay testimony was cumulative

and corroborated by substantial other evidence. No fact regarding the crime was introduced through hearsay testimony that was not also established by [the victim's] own testimony." *Id.*

¶ 68 In the present case, any error in Rademacher's testimony regarding A.B.'s identification of defendant as the perpetrator was harmless. A.B.'s statements to Rademacher as to the circumstances in which she was sexually assaulted by defendant, which included penetration by finger and by penis, the pain she felt, and the use of a lubricant by defendant were within the exception recognized in section 115-13 to allow for diagnosis and treatment. While A.B.'s identification of defendant was unnecessary for medical treatment, this testimony from Rademacher was cumulative of other evidence at trial. A.B. admitted to Dr. West that defendant sexually assaulted her. A.B. also testified at trial about these sexual assaults and identified defendant as the perpetrator. Any error in admitting the identification testimony was harmless. " 'Admission of hearsay evidence is harmless error if there is no reasonable possibility the verdict would have been different had the hearsay been excluded.' " *People v. Garmon*, 394 Ill. App. 3d 977, 989 (2009) (quoting *People v. McCoy*, 238 Ill. App. 3d 240, 249 (1992)). Given the cumulative nature of this testimony and the evidence presented at trial, there is no reasonable possibility that the result of the trial would have been different absent this testimony from Rademacher.

¶ 69 Defendant also argues that the admission of A.B.'s statements to Dr. West and Rademacher was prejudicial, cumulative, and exceed the scope of sections 115-10 and 115-13. However, defendant failed to object on this basis in the trial court or to raise this claim in a posttrial motion. To preserve an issue for review, defendant must both object at trial and in a written posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Failure to do so operates as a forfeiture as to that issue on appeal. *People v. Ward*, 154 Ill. 2d 272, 293 (1992).

¶ 70 However, defendant asks this court to review this issue as plain error. Supreme Court Rule 615(a) states that "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). The plain error rule "allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) (citing *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005)). However, the plain error rule "is not 'a general saving clause preserving for review all errors affecting substantial rights whether or not they have been brought to the attention of the trial court.' " *Herron*, 215 Ill. 2d at 177 (quoting *People v. Precup*, 73 Ill. 2d 7, 16 (1978)). Rather, the supreme court has held that the plain error rule is a narrow and limited exception to the general rules of forfeiture. *Herron*, 215 Ill. 2d at 177.

¶ 71 Defendant carries the burden of persuasion under both prongs of the plain error rule. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009). Defendant asserts that the first prong of the plain error rule applies because the evidence was closely balanced. We disagree and find the evidence was overwhelming. Even if we do not consider A.B.'s statements from the testimony of Dr. West and Rademacher, the evidence was not closely balanced.

¶ 72 A.B. testified at trial that defendant approached her while she was with her sister and Peyton. He asked for her help to climb in a window to his house because he had locked his keys inside the house. Her sister's testimony corroborated this account. Two police officers testified

that defendant waived his *Miranda* rights and told them he had asked Peyton for A.B.'s help and they walked south from her house into an alley and then east. When they arrived at the house, A.B. testified that defendant opened the door with a key. They went inside and up to defendant's apartment. She went to use the bathroom and defendant followed her. He told her to remove her clothing or he would kill her. She removed her shirt and bra while defendant removed her underwear. Defendant put "some cream" on his finger and put his finger inside her vagina. Defendant then put his penis inside her vagina. She stated that she screamed and defendant threatened her and put a pillow over her face. When defendant finished, defendant told her to put on her clothes and not to tell anyone. She ran home and along with way ran into her sister. Her sister testified that she found A.B. crying and they went home.

¶ 73 A.B. immediately reported the sexual assault and was taken by ambulance to the hospital. While en route to the hospital, Trojaniak, the emergency medical technician, testified that A.B. pointed to defendant's house and said that was the house of the person who sexually assaulted her. The police were notified of this information. Rademacher testified that A.B.'s vagina had "evidence of definite trauma," including "redness" and "swelling." Further, Sullivan testified that semen was found in swabs from A.B.'s vagina and anus and the YSTR profile in the semen matched defendant.

¶ 74 The defense presented inconsistent testimony from Cheryl Watkins. Cheryl testified that defendant was at home alone and she did not see anyone arrive at the house or hear any additional footsteps in defendant's apartment. However, Cheryl later admitted that she originally told the police that she heard footsteps up and down the stairs that day and was not paying attention to anyone coming and going. Lynn Watkins, defendant's girlfriend, was not home at the time in question. Defendant denied sexually assaulting A.B. and testified that A.B. had a

motive to lie because he was going to tell her mother that A.B. had lied about being in an abandoned house a few weeks earlier. Defendant also denied telling the police that he asked A.B. for her help and walked south from her house into an alley with her.

¶ 75 We find that evidence against defendant was overwhelming. A.B. immediately identified defendant as the perpetrator and sought medical attention and notified the police. The medical evidence showed "definite trauma" to A.B.'s vagina and semen was found in vaginal and anal swabs with a YSTR profile that matched defendant. Since the evidence was not closely balanced, we decline to review this issue for plain error.

¶ 76 Next, defendant asserts that the trial court erred when it failed to instruct the jury as to the factors to consider when weighing A.B.'s prior statements. Specifically, defendant contends that the trial court failed to give IPI Criminal 4th No. 11.66, which instructs the jury on factors to determine weight and credibility when considering a minor's out-of-court statement.

¶ 77 Section 115-10(c) provides:

> "If a statement is admitted pursuant to this Section, the court shall instruct the jury that it is for the jury to determine the weight and credibility to be given the statement and that, in making the determination, it shall consider the age and maturity of the child, or the intellectual capabilities of the moderately, severely, or profoundly intellectually disabled person, the nature of the statement, the circumstances under which the statement was made, and any other relevant factor." 725 ILCS 5/115-10(c) (West 2012).

¶ 78 The pattern jury instruction at issue states:

> "It is for you to determine [whether the statements were made and, if so,] what weight should be given to the statements. In making that determination, you should consider the age and maturity of [the alleged victim], [and] the nature of the statements, and the circumstances under which the statements were made [, and [insert any other relevant factor concerning the weight and credibility of the statements]]." IPI Criminal 4th No. 11.66.

¶ 79 However, the State responds that defendant has forfeited this issue because he did not tender IPI Criminal 4th No. 11.66 at trial, did not object to the absence of this instruction, and did not raise this issue in his motion for a new trial. As we previously stated, defendant must both object at trial and in a written posttrial motion (*Enoch*, 122 Ill. 2d at 186) and the failure to do so operates as a forfeiture as to that issue on appeal (*Ward*, 154 Ill. 2d at 293). Additionally, Supreme Court Rule 366(b)(2)(i) provides that "[n]o party may raise on appeal the failure to give an instruction unless the party shall have tendered it." Ill. S. Ct. R. 366(b)(2)(i) (eff. Feb. 1, 1994). Defendant admits that he failed to preserve this issue, but asks this court to consider the issue under plain error pursuant to Supreme Court Rule 451(c) (Ill. S. Ct. R. 451(c) (eff. Apr. 8, 2013) because the error was serious and the evidence was close.

¶ 80 "Generally, a defendant forfeits review of any putative jury instruction error if the defendant does not object to the instruction or offer an alternative instruction at trial and does not raise the instruction issue in a posttrial motion." *Herron*, 215 Ill. 2d at 175. "This principle encourages a defendant to raise issues before the trial court, thereby allowing the court to correct its errors before the instructions are given, and consequently precluding a defendant from obtaining a reversal through inaction." *Piatkowski*, 225 Ill. 2d at 564 (citing *Herron*, 215 Ill. 2d

at 175. Supreme Court Rule 451(c) "provides that 'substantial defects' in criminal jury instructions 'are not waived by failure to make timely objections thereto if the interests of justice require.' " *Herron*, 215 Ill. 2d at 175 (quoting Ill. S. Ct. R. 451(c)). "Rule 451(c) crafts a limited exception to the general rule to correct 'grave errors' and errors in cases 'so factually close that fundamental fairness requires that the jury be properly instructed.' " *Herron*, 215 Ill. 2d at 175 (quoting *People v. Hopp*, 209 Ill. 2d 1, 7 (2004)). "Rule 451(c) is coextensive with the 'plain error" clause of Supreme Court Rule 615(a), and we construe these rules 'identically.' " *Herron*, 215 Ill. 2d at 175 (quoting *People v. Armstrong*, 183 Ill. 2d 130, 151 n.3 (1998); see also *Piatkowski*, 225 Ill. 2d at 564-65.

¶ 81 Defendant again asserts that we should review this issue under the first prong, but since we have already found that the evidence was not closely balanced, we decline to review this issue for plain error. Further, the supreme court in *People v. Sargent*, 239 Ill. 2d 166 (2010), considered whether it was plain error to fail to give a jury instruction in accordance with section 115-10(c). The court found that "there is no dispute that the jury should have been instructed in accordance with section 115-10(c) of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10(c) (West 2006)) and that sending the case to the jury without such an instruction was a clear and obvious error." *Sargent*, 239 Ill. 2d at 190. The supreme court then reviewed whether the error amounted to a plain error. The court first found that evidence was not closely balanced under the first prong. *Id.* As to the second prong, the supreme court pointed out that "[t]he erroneous omission of a jury instruction rises to the level of plain error only when the omission creates a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial." *Id.* at 191.

¶ 82 The court observed that the jury did receive an instruction based on IPI Criminal 4th No. 1.02, which instructs as follows.

> "Only you are the judges of the believability of the witnesses and of the weight to be given to the testimony of each of them. In considering the testimony of any witness, you may take into account his ability and opportunity to observe, [his age,] his memory, his manner while testifying, any interest, bias, or prejudice he may have, and the reasonableness of his testimony considered in the light of all the evidence in the case." IPI Criminal 4th No. 1.02.

¶ 83 The *Sargent* court observed that

> "[w]hile the language in these two instructions differs, they convey similar principles regarding the jury's role in assessing witness credibility and the various criteria jurors may consider when making that assessment. Under similar circumstances, where instructions based on Illinois Pattern Jury Instructions, Criminal, No. 1.02, have been given to the jury, our appellate court has held that the failure to also tender an instruction based on Illinois Pattern Jury Instructions, Criminal, No. 11.66, was actually harmless and not even subject to the plain-error rule." *Sargent*, 239 Ill. 3d at 192-93.

The court held that the failure to give an instruction pursuant to section 115-10(c), specifically IPI Criminal 4th 11.66, did not amount to plain error in that case. *Id.* at 193-94.

¶ 84 Similarly, in the present case, the trial court did instruct the jury with IPI Criminal 4th 1.02 and we find there was no plain error. The absence of this instruction did not affect the fundamental fairness of the trial and defendant has failed to establish otherwise.

¶ 85 Alternatively, defendant also argues that his trial counsel was ineffective for failing to tender this instruction at trial. Claims of ineffective assistance of counsel are resolved under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court delineated a two-part test to use when evaluating whether a defendant was denied the effective assistance of counsel in violation of the sixth amendment. Under *Strickland*, a defendant must demonstrate that counsel's performance was deficient and that such deficient performance substantially prejudiced defendant. *Strickland,* 466 U.S. at 687. To demonstrate performance deficiency, a defendant must establish that counsel's performance fell below an objective standard of reasonableness. *People v. Edwards*, 195 Ill. 2d 142, 163 (2001). In evaluating sufficient prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. If a case may be disposed of on the ground of lack of sufficient prejudice, that course should be taken, and the court need not ever consider the quality of the attorney's performance. *Strickland*, 466 U.S. at 697.

¶ 86 Defendant focuses his ineffective argument on the first prong by arguing that his attorney was deficient for failing to tender the instruction, but fails to show that there was a reasonable probability that the failure to instruct the jury with IPI Criminal 4th 11.66 undermined confidence in the outcome. As we have already discussed, the jury received instruction on consideration of witness testimony with IPI Criminal 4th 1.02 and any error was harmless. Thus,

defendant cannot satisfy the prejudice prong under *Strickland*, and defense counsel's failure to tender this instruction did not constitute ineffective assistance of counsel.

¶ 87 Defendant next argues that the sentence imposed was excessive and does not adequately reflect the mitigation weighing in defendant's favor. Specifically, defendant contends that the trial court failed to properly consider the evidence in mitigation when imposing defendant's sentence. The State maintains that defendant received an appropriate sentence after the trial court considered both aggravating and mitigating factors.

¶ 88 "It is well established that a trial court has broad discretionary authority in sentencing a criminal defendant." *People v. Evans*, 373 Ill. App. 3d 948, 967 (2007). "An appellate court typically shows great deference to a trial court's sentencing decision since the trial court is in a better position to decide the appropriate sentence." *Id.* "Accordingly, a trial court's sentencing decision is not overturned absent an abuse of discretion." *Id.* "In determining an appropriate sentence, the trial judge is further required to consider all factors in aggravation and mitigation which includes defendant's credibility, demeanor, general moral character, mentality, social environments, habits, and age, as well as the nature and circumstances of the crime." *Id.* "If the sentence imposed is within the statutory range, it will not be deemed excessive unless it is greatly at variance with the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense." *People v. Starnes*, 374 Ill. App. 3d 132, 143 (2007) (citing *People v. Fern*, 189 Ill. 2d 48, 54 (1999)).

¶ 89 Here, defendant was convicted of two counts of predatory criminal sexual assault. At the time of the offense, predatory criminal sexual assault was codified at section 12-14.1 of the Criminal Code of 1961. 720 ILCS 5/12-14.1 (West 2006).[1] Under section 12-14.1(a)(1), a person committed predatory criminal sexual assault if "the accused was 17 years of age or over

[1] Predatory criminal sexual assault is now codified at 720 ILCS 5/11-1.40 (West 2012).

and commits an act of sexual penetration with a victim who was under 13 years of age when the act was committed." 720 ILCS 5/12-14.1(a)(1) (West 2006). A person convicted under subsection 12-14.1(a)(1) committed a Class X felony. 720 ILCS 5/12-14.1(b)(1) (West 2006). The sentencing range for a Class X offense is 6 to 30 years in prison. 730 ILCS 5/5-8-1(a)(3) (West 2004).[2] Defendant received a 13-year term for each count, for an aggregate sentence of 26 years, which was within the appropriate sentencing range.

¶ 90 Defendant asserts that the trial court failed to adequately consider the mitigating evidence presented, particularly his cooperation with the Cook County Jail investigators. At the sentencing hearing, two investigators and an assistant State's Attorney testified that defendant had provided information that helped to confiscate shanks and drugs, prevent gang violence, and on one occasion, he wore a wire to assist in a triple homicide case. Defendant was not promised anything in return for his cooperation.

¶ 91 "The fact that a court expressly mentions a factor in mitigation does not mean the court ignored other factors." *People v. Burton*, 184 Ill. 2d 1, 34 (1998). "We presume that the circuit court considered any mitigating evidence before it, in the absence of some indication to the contrary, other than the sentence itself." *Id.* "[T]he 'existence of mitigating factors does not require the trial court to reduce a sentence from the maximum allowed.' " *People v. Halerewicz*, 2013 IL App (4th) 120388, ¶ 42 (quoting *People v. Pippen*, 324 Ill. App. 3d 649, 652 (2001)).

¶ 92 Prior to imposing defendant's sentence, the trial court stated:

> "I heard some things about what you did in the jail. And they are looking for maybe – and I don't think necessarily was motivated by – that you were going to get something for your cooperation in the jail.

[2] Now codified at 730 ILCS 5/5-4.5-25(a) (West 2012).

> If this was a drug case or if this was a case where there truly wasn't a victim, I think I might be able to give you some consideration. But the fact here that we have a live victim, we have somebody who is a victim, this is not the case that I can give you any consideration. I heard from the officers. I heard from [the assistant State's Attorney] about all of the things that you did for them, but in my mind, that is not anything I could do to give you some consideration for what you did to this young lady. So, [you] did that on your own, as you told us before. There was no promise."

¶ 93 The trial court noted that defendant had multiple prior convictions, including prior felony convictions for aggravated robbery and armed robbery. The court pointed out that the sexual assault was committed a year after he was discharged from mandatory supervised release from the armed robbery conviction. The court imposed the sentence based on the factors in aggravation and mitigation, specifically noting defendant's criminal history and the serious harm caused by the sexual assault.

¶ 94 Defendant's argument focuses on the trial court's use of the word "consideration" as if to imply that the trial court failed to consider or ignored the mitigating evidence entirely. The record indicates otherwise. The trial court expressly acknowledged defendant's mitigating evidence, especially his cooperation with law enforcement while in jail, but found that given the serious nature of the case and defendant's criminal history, it would not give any "consideration" of a lower sentence to defendant. The trial court did not impose the maximum sentence, in fact defendant's aggregate sentence is less than half of the maximum the court could have imposed.

The trial court clearly considered all factors in aggravation and mitigation. Accordingly, we hold that the trial court's sentence of two consecutive terms of 13 years in prison was not an abuse of discretion.

¶ 95 Finally, defendant contends that he is entitled to an additional 20 days of presentence credit for time spent in custody, for a total of 1,974 days of presentence credit. At sentencing, the trial court awarded defendant 1,954 days of presentence credit, but defendant argues that the court failed to account for the 20 days that passed between the pronouncement of his sentence (December 7, 2012) and the issuance of the order (December 27, 2012). The State concedes that defendant is entitled to the additional 20 days of credit.

¶ 96 Under Supreme Court Rule 615(b)(1), this court has the authority to order a correction of the mittimus. Ill. S. Ct. R. 615(b)(1) (eff. Aug. 27, 1999). Accordingly, we order the mittimus to be corrected to reflect 1,974 days of presentence credit for time spent in custody.

¶ 97 Based on the foregoing reasons, we affirm defendant's conviction and sentence and the mittimus is corrected as ordered.

¶ 98 Affirmed; mittimus corrected.