2011 IL App (2nd) 080726-U
No. 2—08—0726
Order filed July 28, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. LORMAN J. LEJEUNE, Defendant-Appellant.	)))))))))))	Appeal from the Circuit Court of Winnebago County. Nos. 07—CF—1360 07—CF—2090 Honorable K. Patrick Yarbrough, Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices Zenoff and Schostok concurred in the judgment.

ORDER

Held: (1) Defendant failed to establish that he was denied the effective assistance of counsel prior to trial, during trial, at sentencing, or at post-sentencing proceedings; and (2) defendant failed to establish improper double enhancement of his sentence, that his sentence violated the proportionate penalties clause, or that the trial court otherwise abused its discretion in imposing sentence.

¶ 1 Defendant, Lorman J. LeJeune, was charged in separate indictments with two counts of violation of an order of protection. 720 ILCS 5/12—30 (West 2006) (now renumbered as amended at 720 ILCS 5/12—3.4 (West 2010)). Because defendant had been previously convicted of

aggravated battery, each offense was enhanced from a class A misdemeanor to a class 4 felony. See 720 ILCS 5/12—30(d) (West 2006) (now renumbered as amended at 720 ILCS 5/12—3.4(d) (West 2010)). The causes were consolidated and the matter proceeded to a jury trial in the circuit court of Winnebago County, following which, defendant was convicted on both counts. Defendant was found to be extended-term eligible and the trial court imposed a four-year term of imprisonment on each conviction (see 730 ILCS 5/5—5—3.2(b) (West 2006); 730 ILCS 5/5—8—2(a)(6) (West 2006)) with the sentences to run consecutively (see 730 ILCS 5/5—8—4(h) (West 2006)). Defendant now appeals *pro se*, arguing (1) his trial attorney rendered ineffective assistance of counsel at various stages of the proceedings; (2) the trial court "used impermissible double enhancement and/or otherwise abused its discretion at sentencing" by imposing consecutive, four-year terms of imprisonment; and (3) the sentences imposed by the trial court were excessive in that they were disproportionate to the seriousness of the offenses (see Ill. Const. 1970, art. I, § 11). We affirm.

¶ 2 I. BACKGROUND

¶ 3 Defendant was charged by indictment filed on May 9, 2007, with a violation of an order of protection (720 ILCS 5/12—30 (West 2006) (now renumbered as amended at 720 ILCS 5/12—3.4 (West 2010))) in Winnebago County circuit court case number 07—CF—1360. Defendant was also charged by a separate indictment filed on June 20, 2007, with a violation of an order of protection (720 ILCS 5/12—30 (West 2006) (now renumbered as amended at 720 ILCS 5/12—3.4 (West 2010))) in Winnebago County circuit court case number 07—CF—2090. The indictments alleged that defendant made a telephone call (Case No. 07—CF—1360) and sent a letter (Case No. 07—CF—2090) to Joyce LeJeune (LeJeune), his mother, in violation of an order of protection that

was entered November 28, 2005. Because defendant had a prior conviction of aggravated battery against his mother, each charge was elevated from a class A misdemeanor to a class 4 felony. See 720 ILCS 5/12—30(d) (West 2006) (now renumbered as amended at 720 ILCS 5/12—3.4(d) (West 2010)). The public defender was appointed to represent defendant, but later allowed to withdraw due to a conflict. Attorney David Caulk was then appointed as conflict counsel. Without objection, the two cases were "joined" and the cause proceeded to a jury trial on August 28-29, 2007.

¶ 4 A. TRIAL

¶ 5 Prior to jury selection, the parties stipulated that defendant was previously convicted of (1) aggravated battery (730 ILCS 5/12—4(a) (West 2002)), a class 3 felony, in Kane County case number 03—CF—895 on July 23, 2003, and (2) aggravated battery in Winnebago County case number 05—CF—3665 on February 24, 2006. The parties further stipulated that an order of protection was entered in Winnebago County case number 05—OP—1599. In addition, prior to trial, both defense counsel and the State filed various motions *in limine*. For his part, defense counsel sought to bar the State from introducing before the jury evidence of (1) defendant's two prior convictions of aggravated battery; (2) the fact that LeJeune, the victim of the prior aggravated battery in Winnebago County, was also the victim in the present case; and (3) the fact that defendant sent the letter forming the basis for the June 20, 2007, charge from the Winnebago County jail. The court allowed the State to use the Winnebago County conviction for impeachment purposes if defendant testified. However, it granted defense counsel's other two motions *in limine* in their entirety.

¶ 6 At trial, Theresa Kizer, the senior administrative assistant in the Winnebago County circuit clerk's office, identified the order of protection in case number 05—OP—1559, in which Joyce LeJeune was named as the petitioner and defendant was named as the respondent. The order of

protection was in effect from November 10, 2005, through November 28, 2007. Kizer testified that the plenary order of protection was served on defendant on November 29, 2005.

¶ 7 LeJeune, defendant's 83-year-old mother, testified that she lives alone in a public housing building for senior citizens. LeJeune testified that she is the mother of four children, one daughter and three sons. Two of her sons, Steven and David, are deceased. David died on February 22, 2007, as a result of injuries sustained in an automobile accident. LeJeune's remaining son, defendant, is commonly referred to as Jim.

¶ 8 LeJeune testified that she obtained a two-year order of protection against defendant on November 28, 2005. She admitted that she has had contact with defendant since the order of protection went into effect. For instance, LeJeune stated that in August 2006, defendant came to her home uninvited and asked her for money. LeJeune testified that at that time, defendant was homeless and destitute, so she complied with his request. LeJeune also stated that she bought several cellular telephones and gave one to defendant. Defendant used the telephone to call LeJeune, and she and defendant exchanged phone calls when David was in the car accident that killed him.

¶ 9 LeJeune further testified that she considered having the order of protection vacated after David died on February 22, 2007, because defendant was her only living son. She explained that she "hoped to reconcile." She went to court to obtain the papers to vacate the order of protection, but did not follow through. Sometime in March 2007, LeJeune moved into her current apartment. LeJeune testified that defendant helped her move in and she allowed defendant to stay there. At that time, she told defendant that he could stay for 14 days, but no longer or she could lose her apartment. At the end of the 14-day period, LeJeune asked defendant to leave, but he refused. Defendant

eventually moved out three or four days later, in mid-March. LeJeune testified that when she changed her mind about vacating the order of protection, she informed defendant of her decision.

¶ 10 LeJeune related that when defendant left her apartment, he left some of his property behind. LeJeune testified that defendant was supposed to pick up his property at noon on Easter Sunday, April 8, 2007. He showed up late that day, stayed about two hours, and left without taking his things. Defendant told LeJeune that he would be back in an hour or two, but he did not return. LeJeune testified that defendant telephoned several times, and she called him a couple of times, but defendant told her he needed more time. Around midnight, LeJeune spoke to defendant by telephone and told him, "[d]on't figure on picking it up tonight. You are not coming back and staying here the night. You are going to have to talk to the police, make some arrangements to pick up your stuff." LeJeune also told defendant that if he called her again, she would contact the police. When defendant called again, LeJeune called the police.

¶ 11 According to LeJeune, two police officers responded to the call. She met them in the lobby of her building. Defendant called again while the officers were there, so LeJeune handed the phone to one of the officers. LeJeune testified that she knew when the defendant called because his number was displayed on her phone, and she knew defendant's voice. LeJeune testified that the officer spoke to defendant, returned the phone to her, and made a police report. LeJeune was unable to recall defendant's cell phone number when she testified at trial. Since that Easter night, LeJeune had seen defendant in person, but did not know how many times.

¶ 12 LeJeune testified that she received two letters from defendant, around one month after Easter. LeJeune identified State's exhibit Nos. 2A and 2B as the envelope and letter she received from defendant, postmarked May 5, 2007. LeJeune could tell that defendant wrote the letter by the

handwriting, the contents of the letter, and the return address. Since receiving the letter, LeJeune has not had telephone or personal contact with defendant.

¶ 13 On cross-examination, LeJeune testified that between August 2006 and April 2007, she made a substantial number of telephone calls to defendant, but that defendant also called her. LeJeune admitted that during this time she knew that she had an order of protection against defendant, but did not call the police until 2007. LeJeune testified that when she allowed defendant to stay at her apartment, he knew that living with her was not "a permanent arrangement." LeJeune further testified that defendant "showed a willingness to possibly reconcile our differences." LeJeune denied that she ever told defendant that he did not have to worry about the order of protection.

¶ 14 Rockford police officer Michael Battaglia testified that on April 9, 2007, he responded to a call reporting a violation of an order of protection. Officer Battaglia stated that he was the only officer who responded to that call. Officer Battaglia met LeJeune in the lobby of her building around 12:23 a.m. LeJeune told him that she had an order of protection against defendant, her son, and that he had been calling her. As Officer Battaglia spoke with LeJeune, her cell phone rang. LeJeune told Officer Battaglia that it was defendant who was calling based on the number on the caller identification screen on the phone, so Officer Battaglia answered the call and identified himself. The individual on the other end of the line hung up, but Officer Battaglia recorded the telephone number as 630-400-7726. Officer Battaglia referenced the same telephone number in his police report. Officer Battaglia also verified that the order of protection was valid and that it was in effect.

¶ 15 Rockford police officer Mark Danner testified that he was working at the front desk of the crime-reporting unit on May 11, 2007, around noon, when LeJeune came in. Officer Danner testified that LeJeune gave him a letter from her son, "which was sent from the Winnebago County Jail."

Defense counsel objected to the testimony that the letter was sent from jail because the trial court had previously granted his motion *in limine* barring the State from revealing the letter was sent from a prison. The court sustained the objection and instructed the jury to disregard the comment, but denied defense counsel's motion for a mistrial.

¶ 16 Officer Danner identified State's exhibits 2A and 2B as the envelope and letter that LeJeune gave him on May 11, 2007. The envelope was addressed to LeJeune with a return address reflecting defendant's name and was postmarked May 5, 2007. The letter was dated May 3, 2007, and began, "Dear Mom," but Officer Danner could not read the signature at the end of the letter. Officer Danner verified that there was an active order of protection at the time defendant sent the letter to LeJeune. At the conclusion of Officer Danner's testimony, the State rested. Thereafter, the court denied defense counsel's motion for a directed verdict.

¶ 17 Defense counsel consulted with defendant and then informed the court that defendant had elected not to testify. The court admonished defendant of his right to testify and confirmed his decision not to do so. Defendant told the court that he understood his rights, had consulted with counsel, and had no questions for the court. Defendant assured the court that the decision not to testify was his own, made without coercion, force, offers, or threats. The defense rested without presenting any other evidence, and the court again denied defense counsel's motion for a directed verdict at the close of all of the evidence. Following closing arguments by the State and defense counsel as well as instructions from the court, the jury found defendant guilty on both counts. At defense counsel's request, the jury was polled and the court entered judgment on the verdicts.

¶ 18 B. SENTENCING

¶ 19 The case proceeded to sentencing on October 9, 2007. Elgin police officer Eric Echevarria was called regarding the circumstances surrounding defendant's 2003 conviction of aggravated battery in Kane County case number 03—CF—895. Officer Echevarria testified that he responded to a call at 721 Highland, apartment 3–7, where he located Rex Summers lying in the hallway with a bloody face. There was a trail of blood leading to apartment 3–7 and blood on the door of the apartment. Summers appeared to be intoxicated. Inside the apartment, Officer Echevarria found Lori Ritterford, Richard Buttin, and defendant. Buttin told Officer Echevarria that defendant did not strike Summers until after Summers struck Ritterford. Defendant was arrested without incident.

¶ 20 Rockford police officer Amy Kennedy testified regarding defendant's 2006 aggravated battery conviction in Winnebago County case number 05—CF—3665. Officer Kennedy testified that she was working the front desk at the police station on November 9, 2005, when LeJeune, who was over 80 years old, came in and reported that defendant had restrained her in her apartment and punched her several times the previous day. LeJeune told Officer Kennedy that she had let defendant live with her for a period of time because he had a broken leg, but only if he did not drink. She told defendant to leave after she came home and found him intoxicated. Defendant responded, "I should have killed you a long time ago, bitch." LeJeune then slapped defendant in the face. Since defendant refused to leave the apartment, LeJeune decided she would go but defendant grabbed her at the door. When LeJeune tried to scream, defendant put his hand over her mouth and struck her in the stomach. LeJeune came to the station the next day, accompanied by one of her other sons. Officer Kennedy did not know how LeJeune was eventually able to leave her apartment.

¶ 21 LeJeune testified that she worked with the state's attorney's office to prepare a victim impact statement. Over defense counsel's objection, LeJeune read her victim impact statement to the court.

In the statement, LeJeune testified that defendant had "a lot of anger in him," that she was his primary target for physical abuse after his father's death, and that he subjected her to "vulgar, dirty sex talk." LeJeune stated that the reason she got the order of protection was because defendant had "beat on [her]." LeJeune testified that defendant had been ordered to participate in anger management classes following his release from prison for the aggravated battery in which she was the victim, but that he had referred to the classes as "bullshit" and refused to participate. Describing defendant, LeJeune stated, "[h]e is not and has not functioned as a normal adult male." LeJeune testified that defendant "resorts to physical violence frequently and shows intense pride and pleasure inflicting physical harm to others." LeJeune further testified that she would renew the order of protection against defendant. LeJeune opined that "crime calls for punishment." LeJeune favored a sentence of imprisonment over a sentence of probation, predicting that if probation were imposed, defendant would again become homeless and destitute.

¶ 22 LeJeune testified that defendant had written a letter to his girlfriend, Barbara Zoltz, indicating that he planned to kill LeJeune when he was released from custody. LeJeune further testified that she spoke to Zoltz on October 2, 2007, and Zoltz confirmed that defendant planned "a slow and painful death" for LeJeune. LeJeune believed that defendant could be sentenced from one to three years on each of his two convictions. LeJeune calculated that if defendant was required to serve 85% of his sentence, he would serve about five years plus a couple of months in custody. LeJeune concluded that she offered her feelings about her son in her victim impact statement to keep herself focused rather than out of spite. In response to questioning by the State, LeJeune reiterated that she feared defendant would attempt to kill her if placed on probation.

¶ 23 On cross-examination, LeJeune testified that although she did not have a degree in psychology or psychiatry, her belief that defendant has not functioned as a normal adult male is based upon her personal experience of observing defendant's behavior and attitude and his failure to carry his share of the load as well as his attempts to dominate her when he stayed with her. LeJeune admitted that defendant had not tried to kill her after being released from prison for the aggravated battery to her. She further stated that defendant had not physically hit her since his release from prison for the aggravated battery despite spending 2½ weeks in her home. LeJeune testified that she did not call the police on April 8, 2007, because defendant struck her, but because he repeatedly telephoned her.

¶ 24 Defendant made a statement in allocution. He admitted calling LeJeune at least 100 times, but indicated that she had called him more than 250 times in the same period. Defendant stated that during that eight-month period after his release from prison for an aggravated battery to LeJeune, she "never objected one little bit ***[,] never told[him] that the order of protection was still in effect ***[, and] had told [him] that she had dropped it." Nevertheless, defendant admitted that he "should have known better" when he mailed LeJeune a letter after his arrest.

¶ 25 After reviewing defendant's extensive history of criminality, the impressions and recommendations listed in the presentence report, and selected factors in aggravation (see 730 ILCS 5/5–5–3.2 (West 2006)), the State recommended that the court impose a three-year term of imprisonment on each offense or a longer term if the court saw fit in order to protect the safety of the victim and the community. Defense counsel asked the court to impose a term of probation with credit for time served or for some jail time and the condition that if defendant violated probation, "the Court will give him the maximum extended term." Counsel argued that there was no evidence

presented at trial that any violence or force was used by defendant in violating the orders of protection. Counsel also pointed out while defendant appeared to have an extensive criminal history, only two of his convictions related to violence. Counsel also argued that one of defendant's aggravated battery convictions arose because he was attempting to defend a woman who was struck by the man who defendant hit. Defense counsel also argued that defendant was not the "instigator" in the aggravated battery conviction involving LeJeune because she hit him first. Defense counsel further asserted that the sentencing hearing was the first time that LeJeune indicated unequivocally that she did not want to have any contact with defendant.

¶ 26 The court determined that defendant was eligible for extended terms on the enhanced class 4 felonies. Because the second violation of an order of protection offense was committed by defendant while he was in pretrial custody, the court found that consecutive sentences were mandatory. See 730 ILCS 5/5–8–4(h) (West 2006). The court recognized that according to the testimony presented, the Kane County aggravated battery showed that defendant's conduct was precipitated by his victim's actions against a woman in the apartment at the time. The court then reviewed testimony and evidence, including a statement in the presentence investigation report about the 2005 aggravated battery of LeJeune by defendant and LeJeune's victim impact statement about the effects of defendant's criminal conduct on her.

¶ 27 The court noted that LeJeune was 83 years old and had to use a walker to make her way to the witness stand. The court observed that "LeJeune is a person who appears to be very tough and has taken a lot in her lifetime. She appears to be a woman who was very direct in her testimony and knows what she wants to say and does not beat around the bush." The court recounted that in her victim impact statement, LeJeune expressed concern that defendant "is a danger to her and others."

Additionally, LeJeune remarked that she "does not believe that [defendant] would be successful on a period of probation, that in the past he has been homeless, that he has been destitute, and that she believes he will give her bodily harm if he is released from custody." The court found the fact that LeJeune desired to discontinue contact with her only living son was "a very strong statement for a mother to make about any of her children."

¶ 28 The court reviewed the presentence investigation report, observing that defendant had an extensive criminal history and that his prior aggravated battery offenses, including the 2005 aggravated battery to his mother, appeared to be violent offenses. The court noted that defendant had been sentenced to numerous periods of probation but had not participated in substance-abuse or anger-management counseling. The court further observed that defendant had no employment history but had a history of offenses involving vehicles, alcohol, and violence, including the two aggravated battery cases.

¶ 29 After considering the factors in aggravation and mitigation, the presentence report, the evidence presented at the sentencing hearing, defendant's statement, and the parties' arguments, the court declined to impose a term of probation, stating that to do so would deprecate the seriousness of his offenses. The court further noted that defendant's criminal history did not indicate that he would be a good candidate for probation. In particular, the court did not believe that defendant would take advantage of probation to rehabilitate himself and that he would pose a danger to the community and to LeJeune. The court also stated that it considered defendant's statement in allocution and the costs of sending defendant to prison. The court sentenced defendant to a four-year term of imprisonment on each conviction, to be served consecutively, followed by a one-year term of mandatory supervised release.

¶ 30 C. POSTSENTENCING

¶ 31 On November 1, 2007, defense counsel appeared and asked the court for a hearing on a combined motion for a new trial and for reconsideration of sentence. The State objected, asserting that the motion for a new trial was untimely, having been filed more than 30 days after the verdicts were rendered. Defense counsel pointed out that defendant had filed a *pro se* motion for a new trial within 30 days of the verdicts. Defense counsel also argued that the court had discretion to extend the 30-day period to allow a motion for a new trial to be filed. The court continued the cause for consideration of defense counsel's motion and defendant's *pro se* motion.

¶ 32 On November 14, 2007, the State withdrew its objection to the timeliness of defendant's *pro se* motion and did not object to the lack of notice. The State asserted that since defendant alleged ineffective assistance of counsel in his *pro se* motion, the court should make a preliminary inquiry into the allegations and then determine whether it was appropriate to consider defense counsel's motion. Before adjourning, defendant filed three other *pro se* documents, which the court considered as amendments or addendums to defendant's original *pro se* motion for a new trial. The matter was then continued.

¶ 33 At a hearing on December 14, 2007, the court appointed new counsel (David Carter) to assist defendant with his allegations of ineffective assistance of counsel. On June 20, 2008, new counsel filed an amended motion for a new trial and/or to reconsider sentence. Defendant filed a motion that same day, asking the court to consider his *pro se* filings as a brief in support of counsel's amended motion. On June 24, 2008, a hearing on the motions took place at which defendant and his trial attorney, David Caulk, both testified.

¶ 34 Defendant stated that Caulk never came to him with an offer from the State. He also stated that he was unaware whether such an offer was ever extended. Further, defendant did not feel that Caulk gave his case sufficient attention. Defendant characterized Caulk's representation as a "phone-it-in kind of job." Defendant testified that he first met Caulk sometime in July 2007, shortly before a status date. At the time, defendant was incarcerated. Defendant stated that the meeting lasted for about 20 minutes, during which Caulk took notes. Defendant testified that he related his story to Caulk and Caulk responded that he would "set it for trial." According to defendant, Caulk did not "really go into a lot of discussion" and it seemed as if he "was just getting familiar with the case right then." Defendant testified that he discussed with Caulk the witnesses he would like to call if his case went to trial and that he provided Caulk with contact information for the witnesses. Defendant identified the potential witnesses as Fern Vogel (LeJeune's sister), Barbara Zolts (defendant's former girlfriend), and Mary Hedrich (defendant's sister/LeJeune's daughter). Defendant told Caulk generally that these witnesses would be able to corroborate his side of the story, and, in particular, that they could verify that LeJeune told him that she had dropped the order of protection. Defendant testified that he and Caulk later had a video conference which lasted 15 or 20 minutes. At that time, Caulk asked defendant a couple of questions, although defendant did not remember specifically what was discussed. Caulk also indicated that they would meet again the weekend prior to trial, but that meeting never occurred. Defendant denied that Caulk ever discussed trial strategy with him.

¶ 35 Defendant testified that he prepared about 30 questions he wanted Caulk to ask the State's witnesses and that he provided Caulk with the questions "just before trial." Defendant opined that the questions would have been beneficial in cross-examining LeJeune. Defendant stated that the

only question he prepared that Caulk asked LeJeune was whether she had told defendant that she had dropped the order of protection, which LeJeune denied. According to defendant, Caulk did not "seem to think [the other questions] were necessary" and he "seemed to rather resent" anything that defendant gave to him.

¶ 36 Defendant complained that no witnesses were called on his behalf. Defendant believed that had he testified that LeJeune told him that she had dropped the order of protection, it "would have made a big difference, especially with the witnesses that would have corroborated [his] side of it." Defendant acknowledged that he was admonished by the judge regarding his right to testify. However, defendant stated that Caulk did not speak to him about testifying until after the State rested. During that conversation, defendant related that he wanted to "get in the fact that [LeJeune] had told [him] that she had dropped the order of protection eight months prior to the incidents." According to defendant, Caulk led him to believe that he would be able to "get enough of a hint of that in at closing" so that defendant would not have to testify and be subject to cross-examination and he would not be impeached with any former convictions. Defendant stated that he relied on Caulk's advice, but Caulk "had nothing to say" about dropping the order of protection during closing argument. Defendant believed that had Caulk given him his full attention, spent time discussing the facts of the case and witnesses and defendant's potential testimony, the outcome of the trial "would have been considerably different."

¶ 37 Defendant also complained that between the end of trial and the beginning of the sentencing hearing, Caulk visited him only once. Defendant related that during that encounter, Caulk merely dropped off the presentence report, talked for a couple of minutes, and left. Defendant testified that Caulk did not discuss who, if anyone, would testify at the sentencing hearing. Defendant further

indicated that there were "quite a few" errors or omissions in the presentence report. Defendant was unable to recall the nature of the inaccuracies, but indicated that it "partially" had to do with his criminal history. Defendant stated, however, that he made notations on the presentence report and gave it to Caulk at the sentencing hearing.

¶ 38 Defendant testified that Caulk did mention that he (defendant) had a right to give his own statement to tell the court his feelings. Defendant also stated that he gave Caulk a list of factors that he might argue in favor of probation as opposed to a period of incarceration. In particular, defendant testified that he "listed the [statutory] factors in mitigation and gave [Caulk] a copy of it." According to defendant, Caulk "just looked at it and said 'I have seen these thousands of times' and just took it and *** turned it over and slammed it on the table." Defendant acknowledged that he had several serious convictions in his past, including two aggravated battery cases. Defendant testified that he did discuss with Caulk the facts surrounding those cases prior to sentencing. However, defendant testified that he did not confer with Caulk regarding cross-examination of the witnesses the State called to prove up the prior charges at sentencing. Defendant also related that prior to being incarcerated on the charges of violation of an order of protection, he worked for a temporary agency.

¶ 39 On cross-examination, defendant acknowledged that on court dates he would meet with Caulk, although defendant stated that these meetings lasted "only *** for a couple seconds." Defendant stated that he attempted to confer with Caulk during trial, but Caulk would often ask him to be quiet because he was trying to listen to the court proceedings. Defendant also acknowledged that he was admonished by the judge about his right to testify at trial and that if he had questions about trial procedure, he would ask Caulk those questions. He added that sometimes his questions were answered and sometimes they were not. He stated, however, that his questions to the court

were answered by the judge. Ultimately, defendant opined that he has had a "history of unenthusiastic attorneys."

¶ 40 Caulk related that he has been an attorney for 27 years and has practiced in various fields, including criminal, divorce, real estate, and personal injury. Caulk believed that he had sufficient time to review the facts of the case to adequately prepare for a jury trial. He also believed that he met with defendant enough times to explain trial procedures to him and review defendant's version of events. Caulk believed that he advocated for defendant's interest to the best of his ability. Caulk explained that after he was appointed to represent defendant, he and the state's attorney's office exchanged discovery. Caulk also obtained additional material from the public defender's office. Caulk reviewed this discovery prior to meeting with defendant.

¶ 41 Caulk testified that his first meeting with defendant occurred in person at the county jail a week or two after being appointed. Caulk testified that when he meets a client he typically tells the client a little about himself, asks the client a little bit about himself, and reviews the facts of the case. Caulk testified that he and defendant discussed "what [defendant's] side of the story was" with respect to the charges against him. Caulk also testified that he and defendant discussed the facts as set forth in the police report, trial strategy, bond motion strategy, speedy trial rights, and the difference between a jury trial and a bench trial. Caulk further testified that he explained to defendant that at the pretrial conferences, he would see what offer was on the table and try to get the best possible offer, understanding that defendant was not required to accept the offer. Caulk stated that following each court date, he would discuss with defendant what the next court date would be, and, if defendant was not at the hearing, what occurred. It was Caulk's impression that defendant understood what was happening. Caulk further testified that he met with defendant in person again

prior to trial, although he could not recall the exact date. At that time, Caulk and defendant discussed trial strategy, including defendant's concerns regarding witnesses and testimony. Caulk, however, denied that defendant provided him with names of people he thought should testify.

¶ 42 Caulk testified that he discussed with defendant the motions *in limine* that he filed to ensure that defendant understood them and the possibility that his prior convictions could be admitted should he choose to testify. Caulk further testified that prior to trial, he discussed with defendant his right to testify. Caulk stated that no decision regarding whether defendant would testify was made at that time because he wanted to wait until the State rested before deciding. After the State rested, Caulk and defendant again discussed the matter. Ultimately, defendant opted not to testify and he was admonished on the record. According to Caulk, at no time after he was admonished did defendant disclose that he wanted to testify.

¶ 43 Caulk acknowledged that when he was cross-examining the State's witnesses, defendant provided him notes, some of which contained questions defendant believed should be asked of the witnesses. Caulk would review the notes, but asked only those questions he believed were relevant. In addition, Caulk stated that before he finished cross-examination of a particular witness, he generally asked the court for time to confer with defendant. Caulk testified that defendant wanted him to ask questions regarding "the specificity" of some of the telephone calls, but noted that there were at least 100 calls that occurred between defendant and LeJeune. Caulk stated, nonetheless, that he reviewed the telephone records with defendant. Caulk recounted that during closing arguments he referenced the fact that some of the calls between defendant and LeJeune were initiated by LeJeune, a point that had been stressed to him by defendant.

¶ 44 Caulk testified that he moved for a directed verdict at the close of the State's case in chief and made an argument in support of his motion, and that he moved for a directed verdict at the close of the evidence, relying on the argument he made at the close of the State's case in chief. Caulk also noted that he made a motion for a mistrial after one witness provided testimony precluded by one of his motions *in limine*. Further, he had the jury polled after they returned a verdict to make sure for the record that the decision made was each jury member's own decision and that he or she was not influenced by anyone else.

¶ 45 Caulk testified that following the trial, he discussed with defendant what would happen at sentencing. He stated that he received a copy of the presentence report and reviewed it with defendant "page by page." He and defendant also discussed defendant's criminal history, the factors in aggravation and mitigation, and any witnesses who may testify. Caulk stated that he did not call anyone at the sentencing hearing because no names were submitted to him. Caulk also informed defendant that he had the right to testify and make a statement in allocution. After Caulk and defendant discussed the matter, defendant opted not to testify at sentencing.

¶ 46 Caulk testified that at the sentencing hearing, he "follow[ed] through" the factors in mitigation as listed in the statute. Caulk testified that he conferred with defendant during sentencing to determine if there was anything defendant wanted him to present. Caulk did not recall defendant providing him with any additional mitigating factors he believed would be relevant. Caulk testified that he cross-examined the witnesses presented by the State at the sentencing hearing. Caulk also related that he argued to the court as to what he believed would be an appropriate sentence for the two charges against defendant.

¶ 47 On cross-examination, Caulk testified that defendant's case was "unusual" in that he was charged with violating an order of protection where he had "substantial *** contact with that person subsequent to the order being entered." However, he did not believe that he needed more time than he had to prepare for the trial. Caulk estimated that his first in-person meeting with defendant in the county jail lasted between 30 and 60 minutes. Caulk testified that he discussed the risks of testifying with defendant as well as any defenses. Caulk did not recall defendant relate that LeJeune had told him (defendant) that she had dropped the order of protection. Rather, Caulk recalled that defendant told him that it was his belief that LeJeune had dropped the order of protection in light of the fact that she had been calling him. Caulk denied that defendant ever discussed with him any witnesses that would support his allegation that LeJeune told defendant that she had dropped the order of protection. Moreover, Caulk did not believe that there was anything about the trial process that defendant did not understand. Caulk testified that he did not subpoena any telephone records because he obtained them from defendant's prior counsel. Caulk added that he discussed the telephone records with defendant.

¶ 48 Caulk also testified that he reviewed the presentence report and the information contained therein with defendant. Caulk could not remember if defendant brought to his attention any discrepancies or errors that he found in the presentence report. Caulk testified that prior to sentencing he would have asked defendant if there was anybody he wanted to call on his behalf, but defendant did not submit any names. Caulk also recounted that he objected at the sentencing hearing to LeJeune reading into the record her victim impact statement. Caulk noted that he had not received a copy of the victim impact statement prior to the sentencing hearing as it was not contained in the presentence report.

¶ 49 On July 21, 2008, the trial court announced its decision on defendant's amended motion for a new trial and motion to reconsider sentence. With respect to the allegations of ineffective assistance of counsel, the court noted that both defendant and Caulk testified regarding trial preparation, trial strategy, which witnesses to call, and whether defendant should testify. The court concluded that there were several conversations between defendant and Caulk and that the issues were covered. The court noted that defendant acknowledged that he had been counseled and advised by his attorney in regards to these matters. With respect to counsel's preparation for and performance at the sentencing hearing, the court found that although Caulk did not individually address each of the mitigating factors, he did present mitigation evidence. For instance, Caulk argued that defendant would benefit from probation. Caulk also brought out that defendant testified that one of his prior violent offenses was committed in defense of a woman. Further, after reviewing the testimony presented at the hearing on the motions, the court rejected the notion that Caulk failed to meet with defendant sufficiently to prepare for the sentencing hearing or to put on evidence in mitigation at the sentencing hearing. Thus, the court denied the amended motion for a new trial.

¶ 50 The court upheld its ruling that four-year terms of imprisonment were necessary as not to deprecate the seriousness of defendant's offenses. The court rejected any contention that defendant was likely to successfully complete a term of probation in view of his past performance on probation. Further, the court found that counsel provided effective assistance of counsel at sentencing. Because the violation of an order of protection offense was listed in the violent offenses in the victim impact statute, the court reasoned that it was not error to allow LeJeune to read her victim impact statement over defense objection that the victim impact statement was not allowed by statute. Thus, the court also denied the motion to reconsider sentence. This *pro se* appeal followed.

¶ 51 II. ANALYSIS

¶ 52 Although defendant raises a multitude of issues on appeal, they can be divided into two general categories. First, defendant claims that he was deprived of the effective assistance of trial counsel at various stages of the underlying proceedings. Second, defendant challenges the propriety of his sentence on various grounds.

¶ 53 Prior to addressing these claims, however, we point out that defendant's *pro se* status does not excuse his compliance with the rules of the Illinois Supreme Court. See *People v. Allen*, 401 Ill. App. 3d 840, 854 (2010). In particular, we direct defendant to two sections of Illinois Supreme Court Rule 341 (eff. July 1, 2008). Illinois Supreme Court Rule 341(b)(1) (eff. July 1, 2008), concerns the length of briefs filed in this court. That rule states in relevant part:

> "(1) *Page Limitation.* The brief of appellant *** shall *** be limited to 50 pages, and the reply brief to 20 pages. This page limitation excludes pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a)." Illinois Supreme Court Rule 341(b)(1) (eff. July 1, 2008).

In this case, the length of defendant's briefs greatly exceed the page limitations set forth in Rule 341(b)(1). Defendant's opening brief consists of 75 pages while his reply brief is 28 pages in length. Furthermore, although motions to file briefs in excess of the page limitations are not favored (see Illinois Supreme Court Rule 341(b)(2) (eff. July 1, 2008)), defendant has not sought permission to exceed the page limitations despite the fact that he filed several other motions pertaining to this appeal, including motions for extensions of time to file his appellant brief and a motion to expedite consideration of this appeal. As this court has previously recognized, adherence to the page

limitations set forth in the rules of our supreme court " 'is not an inconsequential matter,' and parties who ignore these rules do so at their peril." *Lundy v. Farmers Group, Inc.,* 322 Ill. App. 3d 214, 218 (2001), quoting *Kerger v. Board of Trustees of Community College District No. 502*, 295 Ill. App. 3d 272, 275 (1997). While a violation of the page limitations set forth in Rule 341(b)(1) may justify striking the offending brief in its entirety (see *Mitchell v. Department of Corrections*, 367 Ill. App. 3d 807, 817 (2006)), we opt not to invoke such a remedy in this case.

¶ 54 We also direct defendant to Illinois Supreme Court Rule 341(h) (eff. July 1, 2008), pertaining to the contents of the appellant's brief. In particular, subsection (h)(7) provides that the appellant's brief shall include:

> "[a]rgument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on. Evidence shall not be copied at length, but reference shall be made to the pages of the record on appeal or abstract, if any, where evidence may be found. *** Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing." Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008).

We have attempted to address each and every claim defendant raises. However, many of defendant's "arguments" are unclear, not well developed, or not supported by relevant authority. Thus, to the extent we have not discussed a particular argument, it is because we consider it forfeited based on defendant's failure to comply with the mandate of Rule 341(h)(7). See *In re Estate of Doyle*, 362 Ill. App. 3d 293, 301 (2005). Those arguments that have been properly presented and briefed are discussed below. Further, we admonish defendant to adhere to all supreme court rules, including the provisions of Rule 341, should he file any additional material with this court in the future.

¶ 55 A. Ineffective Assistance of Counsel

¶ 56 The sixth amendment of the United States Constitution guarantees a criminal defendant the effective assistance of counsel. U.S. Const., amend. VI; see *People v. Simms*, 192 Ill. 2d 348, 402 (2000), citing *People v. Hattery*, 109 Ill. 2d 449, 460-61 (1985). The purpose of this guarantee is to ensure that a criminal defendant receives a fair trial. *People v. Davis*, 353 Ill. App. 3d 790, 794 (2004). "Effective assistance of counsel means competent, not perfect, representation." *People v. Rodriguez*, 364 Ill. App. 3d 304, 312 (2006). We evaluate claims of ineffective assistance of counsel under the analysis developed by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984), and adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984). The *Strickland* analysis consists of two components. First, a defendant alleging that he was deprived of the effective assistance of counsel must demonstrate that counsel's performance was deficient, *i.e.*, it fell below an objective standard of reasonableness. *People v. Fillyaw*, 409 Ill. App. 3d 302, ___ (2011); *Rodriguez*, 364 Ill. App. 3d at 312. Second, a defendant must establish a reasonable probability that he was prejudiced. *Fillyaw*, 409 Ill. App. 3d at ___; *Rodriguez*, 364 Ill. App. 3d at 312.

¶ 57 To establish that counsel's performance was not objectively reasonable, a defendant must overcome the strong presumption that the challenged action or inaction was the product of sound trial strategy and not incompetence. *People v. Coleman*, 183 Ill. 2d 366, 397 (1998). A defendant must show that " 'counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.' " *Fillyaw*, 409 Ill. App. 3d at ___, quoting *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693, 104 S. Ct. at ___. As noted above, however, even if trial counsel did not provide assistance that was objectively reasonable, a defendant must still

show a reasonable probability that counsel's shortcomings prejudiced the defendant. *Rodriguez*, 364 Ill. App. 3d at 312. A reasonable probability is one that would undermine confidence in the outcome of the trial. *Rodriguez*, 364 Ill. App. 3d at 312. Mere conjecture and speculation are insufficient to undermine confidence in the outcome. *People v. Williams*, 139 Ill. 2d 1, 12 (1990) (holding that speculative allegations and conclusory statements are insufficient to support a claim of ineffective assistance of counsel); *Rodriguez*, 364 Ill. App. 3d at 312 (same). Because a defendant's failure to establish either component of the *Strickland* analysis will defeat an ineffectiveness claim, a reviewing court need not address both prongs of the inquiry if the defendant makes an insufficient showing as to one prong. *Strickland*, 466 U.S. at 697, 80 L. Ed. 2d at 699, 104 S. Ct. at ___; *People v. Gonzalez*, 339 Ill. App. 3d 914, 922 (2003).

¶ 58 Defendant alleges that, for a multitude of reasons, Caulk rendered ineffective assistance of counsel at various stages of the underlying proceedings. We first discuss defendant's complaint that Caulk failed to adequately prepare for trial. In this regard, defendant contends that Caulk met with him in person only once prior to trial for less than half an hour. According to defendant, during this meeting, Caulk asked him some questions, but "spent much time reading the file, as if not too familiar with it." Defendant states that his only other meeting with Caulk was a video conference. According to defendant, that encounter lasted just 10 minutes and nothing substantive was discussed. Defendant also claims that during the video conference, Caulk indicated that they would again meet the weekend prior to trial, but that this meeting never took place. Defendant concludes:

> "Two short meetings before trial, only one in person, lasting only 30-35 minutes—somewhat inattentive minutes at that, is obviously highly inadequate for proper preparation of a case and client for trial, with a proper defense, that is. If one is to truly listen

> to one's client and become quite intimately familiar, with him and *all* the details of his cause. Failure to meet for adequate time pretrial, and then to fail to meet, as promised *** in the last few days prior to trial, seriously calls into question counsel's loyalty and total dedication to his client's cause." (Emphasis in original.)

We conclude that defendant has failed to show that Caulk's level of preparations resulted in ineffective assistance of counsel.

¶ 59 The evidence belies defendant's claim that Caulk was not adequately prepared for trial. This case was fairly uncomplicated, involving allegations that defendant had violated an order of protection on two occasions, once by making a telephone call to LeJeune and once through written correspondence to her. At the postentencing hearing, Caulk testified that after being appointed to represent defendant, he obtained discovery from defendant's former counsel (the public defender's office), including telephone records. He also testified that he exchanged discovery with the State. Caulk stated that he reviewed the discovery prior to meeting with defendant. During their in-person meeting, Caulk stated that he and defendant discussed the facts of the case, the police report, and defendant's "side of the story." Caulk further testified that he and defendant discussed trial strategy, bond motion strategy, and speedy-trial rights. Caulk also met with defendant a second time, during which trial strategy was also discussed, including defendant's concerns regarding witnesses and testimony. The record also reflects that once the proceedings began, Caulk's preparations allowed him to zealously advocate on defendant's behalf. For instance, Caulk filed several pretrial motions seeking to bar the introduction of certain testimony. These motions were granted for the most part. Further, during trial Caulk presented an opening statement, he extensively cross-examined the State's witnesses, and he presented two motions for a directed verdict. Finally, we note that Caulk presented

a closing argument asking the jury to acquit defendant on the basis that defendant had a reasonable belief that the order of protection had been vacated given the substantial contact between defendant and LeJeune. Based on this evidence, we cannot say that Caulk's preparations for trial fell below an objective standard of reasonableness. Even if we had found that Caulk's preparations were deficient, defendant has also failed to establish how he was prejudiced. Although defendant insists that Caulk's preparations were minimal, he does not indicate how any additional meetings with trial counsel would have been beneficial to his case and changed the outcome of the trial. See *People v. Johnson*, 372 Ill. App. 3d 772, 777 (2007).

¶ 60 Defendant also asserts that Caulk was ineffective because he failed to ask LeJeune 30 questions that he (defendant) had requested that she be asked. Defendant contends that he carefully crafted the questions "to expose [LeJeune's] duplicity in her conduct toward [defendant] and in her allegations." According to defendant, however, Caulk "barely glanced at these, and used none." Defendant has not shown how Caulk's alleged failure to ask the questions allegedly proposed by defendant amounted to ineffective assistance of counsel. First, we note that while defendant claims that the outcome of his trial would have been different had these questions been asked, defendant does not provide any clue as to the content of these alleged questions. Second, the record does not support defendant's contention that Caulk did not use any of the questions defendant proposed. At the postsentencing hearing, Caulk acknowledged that defendant occasionally provided him notes, some of which contained questions to ask the State's witnesses. According to Caulk, he would review the notes and would ask those questions he felt were relevant. Whether to ask a particular question amounts to trial strategy and therefore falls outside of the realm of ineffective assistance of counsel. See *People v. Pope*, 284 Ill. App. 3d 330, 335 (1996) (noting that trial counsel's

decisions regarding the extent of cross-examination are matters of trial strategy). Because defendant did not establish that he was prejudiced by Caulk's alleged failure to ask these questions, we decline to find Caulk rendered ineffective assistance of counsel on this basis.

¶ 61 Similarly, defendant asserts that he provided Caulk with the names and contact information of "four witnesses who could testify to [LeJeune's] character and her propensity to lie, embellish, and exaggerate facts." Yet, according to defendant, Caulk never interviewed or called any of these witnesses. We note that Caulk denied at the postsentencing hearing that defendant provided him with a list of potential witnesses. We are unable to determine whether defendant was prejudiced by Caulk's failure to interview or call the witnesses. When he testified, defendant identified three of these four potential witnesses. However, in his brief on appeal, he only mentions two of these witnesses– LeJeune's sister and LeJeune' daughter. Further, while defendant claims that these witnesses would have changed the outcome of the trial by corroborating his claim that LeJeune told him that she had dropped the order of protection, defendant does not attach affidavits from any of these witnesses regarding the content of their potential testimony. Moreover, the decision whether to call certain witnesses for the defense are matters of trial strategy and generally immune from claims of ineffective assistance. *People v. Banks*, 237 Ill. 2d 154, 215 (2010); *People v. Clarke*, 391 Ill. App. 3d 596, 614 (2009). As such, we decline to find ineffective representation on this basis.

¶ 62 Defendant next claims that Caulk's representation was ineffective because he failed to prepare defendant to testify. We fail to see how Caulk's alleged failure to prepare defendant to testify resulted in prejudice given the fact that defendant opted not to testify at trial. Defendant acknowledges the fact that he did not testify, but insists that because there were no other defense witnesses, trial counsel should have had him testify. The decision to testify on one's own behalf

belongs to the defendant, although it should be made in consultation with counsel. *People v. McCleary*, 353 Ill. App. 3d 916, 922-23 (2004). As such, advice not to testify is a matter of trial strategy and does not constitute ineffective assistance of counsel unless evidence suggests that counsel refused to allow the defendant to testify. *McCleary*, 353 Ill. App. 3d at 923. Further, when on appeal a defendant contends that he was precluded from testifying, the conviction will not be reversed unless the defendant contemporaneously informed the trial court that he wished to testify. *McCleary*, 353 Ill. App. 3d at 923. In this case, defendant does not point to any evidence of record that suggests that Caulk refused to allow him to testify and that he informed the trial court of his desire to do so. To the contrary, the record demonstrates that defendant unequivocally indicated that he wished not to testify. The trial court admonished defendant of his right to testify and confirmed his decision not to do so. Defendant told the court that he understood his rights, had consulted with trial counsel, and had no questions for the court. Defendant assured the court that the decision not to testify was his own, made without coercion, force, offers, or threats. Accordingly, we conclude that defendant has failed to show that counsel's preparation and advice, or lack thereof, regarding his right to testify arose to ineffective assistance of counsel.

¶ 63 Defendant also claims that he brought to Caulk's attention "several available defenses," but that counsel would not discuss the defenses nor did he mention any himself. Defendant identifies these defenses generally as "mental state-knowledge, agent provocateur/entrapment, necessity, and others." However, whether to present a particular defense is a matter of trial strategy. See *People v. Page*, 155 Ill. 2d 232, 262-63 (1993); *People v. Ramey*, 152 Ill. 2d 41, 54 (1992); *People v. Davenport*, 301 Ill. App. 3d 143, 155 (1998). Moreover, Caulk did present a defense–a defense referenced by defendant in his brief on appeal, *i.e.*, that LeJeune's "constant contacting of him ***

gave [defendant] a more than reasonable belief she had dropped the order [of protection]." In particular, during closing argument, Caulk related that given the substantial contact between LeJeune and defendant after entry of the order of protection, some of which was initiated by LeJeune herself, defendant had a reasonable belief that the order of protection had been vacated. Caulk told the jury that while defendant made many telephone calls to LeJeune, "[s]he was calling him" as well. Caulk then stated:

> "Now, the Court indicated to you that when you do consider the testimony, you can also make reasonable inferences based upon what you see, based upon what is presented to you. I submit to you, ladies and gentlemen, that over an 8-month period of time with a substantial number of phone calls, substantial number of contacts being made between the parties, it's reasonable to infer or it's reasonable to assume that [defendant] thought he was doing nothing wrong. It's reasonable to assume that if he has an Order of Protection, and it says it's a violation to do something, and he continually does it, [LeJeune] has probably done away with the order, or that he won't suffer any consequences for his action."

Caulk later argued:

> "Over this 8-month period the relationship [between defendant and LeJeune] is such where not only is there telephone contact that is accepted by Miss LeJeune, not only is there physical contact that's accepted by Miss LeJeune, but he stays at her place for more than 2 weeks. He is in her residence for more than 2 weeks. A phone call made to the police for that [*sic*]? She gets mad at him. Do not subject [defendant] to a conviction based upon the circumstances that you have before you. What is his frame of mind? I think it's reasonable to assume, it's reasonable to infer, that he probably wasn't doing anything wrong. What is

> his state of mind? The gentleman had the Order of Protection that says no contact, but don't you think it's reasonable to assume that if you contact the person who is protected, they are certainly not going to contact you back, or you are going to be in trouble, for 8 months. Then all of a sudden boom."

That this defense was ultimately unsuccessful does not compel a finding that counsel's representation was inadequate. See *People v. Milton*, 354 Ill. App. 3d 283, 289-90 (2004) ("Counsel's decision to argue a particular defense theory during closing argument is a matter of trial strategy. [Citation.] Counsel's choice does not constitute ineffective assistance simply because it was unsuccessful").

¶ 64 Defendant also alleges that, for various reasons, trial counsel was deficient at sentencing. Initially, defendant attacks Caulk's preparation for the sentencing hearing. According to defendant, "there was no presentencing consultation to speak of." He claims that Caulk "merely dropped off a copy of the [presentence investigation]." Defendant also claims that he related to Caulk various inaccuracies on the presentence investigation report, but Caulk never brought them to the attention of the court. However, defendant does not indicate what a more in-depth presentencing consultation would have achieved. Further, he does not list the errors or omissions that he identified in the PSI or how they would have impacted the sentencing hearing. As such, he has not demonstrated that he was prejudiced by trial counsel's alleged shortcomings.

¶ 65 Defendant next claims that Caulk never told him that he would be allowed to address the court in allocution or that he could call witnesses to testify on his behalf. However, defendant did make a statement at the sentencing hearing. While defendant contends that the statement he made was " 'off the cuff' and awkward," he does not indicate what additional information he would have

presented had he more time to prepare. Moreover, defendant does not identify who he would have called to testify at sentencing, what they would have testified to, or how such testimony would have been beneficial. Thus, defendant has failed to establish that the result of the proceeding would have been different had these alleged errors not been committed.

¶ 66 Defendant also claims that Caulk should have been more proactive in challenging LeJeune's testimony at the sentencing hearing. For instance, according to defendant, he had to "prod" Caulk to object to the fact that a copy of LeJeune's victim impact statement was not provided to the defense prior to the sentencing hearing. However, the record reflects that Caulk did lodge an objection to the victim impact statement on the basis that he had not received a copy. At that point, the court provided Caulk an opportunity to review the victim impact statement before the proceedings continued. Thus, we fail to see how defendant was prejudiced. Defendant also claims that trial counsel should have sought to strike the victim impact statement because it contained LeJeune's opinions and was therefore not truly a victim impact statement. However, Caulk did lodge an objection to the statement on this precise basis. The court overruled the objection. Caulk then informed the court that, rather than objecting at every sentence he found objectionable, he would lodge a standing objection to LeJeune's statement. Moreover, on cross-examination, Caulk challenged the basis for some of the comments LeJeune made. For instance, Caulk asked LeJeune how she was qualified to determine that defendant was not functioning "as a normal adult male." Defendant does not suggest what more Caulk should have done to challenge the victim impact statement. As such, we cannot find that defendant was prejudiced by Caulk's handling of the matter.

¶ 67 Defendant also insists that Caulk "fell well short" when it came to statutory mitigation. Defendant claims that he presented a list of the statutory mitigating factors (see 730 ILCS

5/5—5—3.1 (West 2006)) to Caulk, but that Caulk "refused to read them during sentencing, preferring his freehand speech *** to the total exclusion of [the mitigating] factors." According to defendant, Caulk did not use any of the statutory mitigating factors. Defendant states that while Caulk's presentation was "not a 100 percent disaster, his speech certainly was no masterpiece either." The record does not support defendant's argument. Section 5—5—3.1 of the Unified Code of Corrections (Code) (730 ILCS 5/5—5—3.1 (West 2006)) lists the following statutory mitigating factors:

"(1) The defendant's criminal conduct neither caused nor threatened serious physical harm to another.

(2) The defendant did not contemplate that his criminal conduct would cause or threaten serious physical harm to another.

(3) The defendant acted under a strong provocation.

(4) There were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense.

(5) The defendant's criminal conduct was induced or facilitated by someone other than the defendant.

(6) The defendant has compensated or will compensate the victim of his criminal conduct for the damage or injury that he sustained.

(7) The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present crime.

(8) The defendant's criminal conduct was the result of circumstances unlikely to recur.

(9) The character and attitudes of the defendant indicate that he is unlikely to commit another crime.

(10) The defendant is particularly likely to comply with the terms of a period of probation.

(11) The imprisonment of the defendant would entail excessive hardship to his dependents.

(12) The imprisonment of the defendant would endanger his or her medical condition.

(13) The defendant was mentally retarded as defined in Section 5—1—13 of this Code." 730 ILCS 5/5—5—3.1 (West 2006).

Although Caulk did not review each statutory mitigating factor individually, the record reveals that Caulk referenced several of these factors in his argument at the sentencing hearing. For instance, Caulk argued that "the court did not hear during the trial or at any other time any violence or force used by [defendant] in violating the orders of protection. See 730 ILCS 5/5—5—3.1(1) (West 2006). Further, while recognizing that defendant had a criminal history, Caulk claimed that most of his prior convictions were minor, with the two aggravated battery convictions being the only "major crimes of violence in all of these charges." He claimed that defendant was not the "instigator" in either of the aggravated-battery convictions, contending that one of them stemmed from defendant's attempt to protect a woman that had been struck by the man who defendant hit. See 730 ILCS 5/5—5—3.1(1), (7) (West 2006). Caulk also asserted that the sentencing hearing was the first time that LeJeune indicated unequivocally that she did not want to have any contact with defendant. See 730 ILCS 5/5—5—3.1(4) (West 2006). Defendant does not indicate what other mitigating factors could have been beneficial or how they would apply. As such, we conclude that

defendant has failed to show how he was prejudiced on this basis.

¶ 68 Defendant also challenges Caulk's "posttrial performance." Defendant contends that Caulk was ineffective because he did not timely file a motion for a new trial and to reconsider sentence. However, this claim is not supported by the record. Indeed, defendant admits in his brief that the State ultimately waived its timeliness objection. Thus, we fail to see how defendant was prejudiced. Having rejected all of defendant's claims of ineffective assistance of counsel at trial, we turn to his challenges to the sentence imposed by the trial court.

¶ 69 B. Sentencing

¶ 70 Defendant alleges numerous errors at sentencing and requests that we either resentence him or remand the cause for a new sentencing hearing. Initially, defendant complains that at the sentencing hearing, the State cited LeJeune's age and her physical handicap in aggravation and then cited the same two factors to justify imposing an extended-term sentence. Defendant claims that this is "problematic" for two reasons. First, he contends that once the State used age and physical handicap in aggravation, these factors cannot then be used again to argue for an extended-term sentence. Second, defendant asserts that because neither LeJeune's age or the fact of her physical handicap were included in the indictment, it was improper for the State to use these factors to argue for an extended term. See 725 ILCS 5/111—3(c—5) (West 2006) (providing that "if an alleged fact (other than the fact of a prior conviction) is not an element of an offense but is sought to be used to increase the range of penalties for the offense beyond the statutory maximum that could otherwise be imposed for the offense, the alleged fact must be included in the charging instrument or otherwise provided to the defendant through a written notification before trial, submitted to a trier of fact as an aggravating factor, and proved beyond a reasonable doubt"). The problem with this argument is

that the State did not render the ultimate sentence, the trial court did. We address defendant's claim that the trial court improperly considered LeJeune's age and physical handicap to impose an extended-term sentence and as a factor in aggravation elsewhere in this order.

¶ 71 Next, defendant complains that he was improperly subjected to "double enhancement" at sentencing. According to defendant, the trial court improperly relied on his 2005 Winnebago County aggravated battery conviction "to aggravate his sentences, even though this conviction was already the basis for the enhancement of the instant offenses to felonies." It is unclear whether defendant's position is that (1) it was impermissible for the trial court to consider his 2005 Winnebago County conviction as a basis for imposing *an extended-term sentence* because the same conviction was previously used to enhance the charges against him from class A misdemeanors to class 4 felonies or that (2) it was impermissible for the trial court to consider his 2005 Winnebago County conviction as an aggravating factor (see 730 ILCS 5—5—3.2(a) (West 2006)) *to sentence defendant beyond the minimum permissible term* since the same conviction was previously used as a basis for the enhancement of the instant offenses from misdemeanors to felonies. However, under either scenario, we find no improper double enhancement.

¶ 72 "Double enhancement" occurs when "a single factor [is used] both as an element of a defendant's crime *and* an aggravating factor justifying the imposition of a harsher sentence than might have been imposed." (Emphasis in original.) *People v. Gonzalez*, 151 Ill. 2d 79, 83-84 (1992). There is a general prohibition against double enhancement. *Gonzalez*, 151 Ill. 2d at 83. Thus, for instance, in *People v. Hobbs*, 86 Ill. 2d 242, 245-46 (1981), the supreme court held that where the defendant's prior felony theft conviction was used to enhance a subsequent theft conviction from a class A misdemeanor to a class 4 felony, it was improper for the trial court to use

the same felony theft conviction to then impose an extended-term sentence.

¶ 73 In *Gonzalez*, however, the supreme court held that improper double enhancement did not occur when a prior felony conviction was used to "upgrade" the defendant's conviction of unlawful use of a weapon by a felon from a misdemeanor to a felony and then a *separate* felony conviction was used to enhance the defendant's sentence. *Gonzalez*, 151 Ill. 2d at 84-89. See also *People v. Smith*, 257 Ill. App. 3d 252, 257 (1993) (holding that the trial court did not err in imposing extended-term sentence on conviction of misdemeanor upgraded to felony where separate convictions where used for each enhancement). Similarly, in this case, we do not find that improper double enhancement occurred. As detailed below, the record demonstrates that the conviction that was used to enhance defendant's conviction from a misdemeanor to a felony was not the same conviction that was used to impose an extended-term sentence.

¶ 74 Defendant was convicted of two counts of violation of an order of protection. 720 ILCS 5/12—30 (West 2006) (now renumbered as amended at 720 ILCS 5/12—3.4 (West 2010)). Normally, a violation of an order of protection is a class A misdemeanor, punishable by a term of imprisonment of less than one year. 720 ILCS 5/12—30(d) (West 2006) (now renumbered as amended at 720 ILCS 5/12—3.4(d) (West 2010)); 730 ILCS 5/5—8—3(a)(1) (West 2006) (now recodified as amended at 730 ILCS 5/5—4.5—55(a) (West 2010)). Under certain circumstances, however, the violation of an order of protection may be elevated to a class 4 felony. 720 ILCS 5/12—30(d) (West 2006) (now renumbered as amended at 720 ILCS 5/12—3.4(d) (West 2010)). In this case, the indictments indicate that the charges against defendant were elevated based on defendant "having previously been convicted of the offense of Aggravated Battery, in the Circuit Court of Winnebago County in case number 05CF3665, on February 24, 2006." See 720 ILCS

5/12—30(d) (West 2006) (now renumbered as amended at 720 ILCS 5/12—3.4(d) (West 2010)) (providing that the violation of an order of protection becomes a class 4 felony if the defendant has a prior conviction for aggravated battery). The sentence for a class 4 felony is one to three years' imprisonment. 730 ILCS 5/5—8—1(a)(7) (West 2006) (now recodified as amended at 730 ILCS 5/5—4.5—45(a) (West 2010)). In addition, section 5—5—3.2(b)(1) of the Code (730 ILCS 5/5—5—3.2(b)(1) (West 2006)) provides that an extended-term sentence may be imposed "upon any offender" who:

> "is convicted of any felony, after having been previously convicted in Illinois *** of the same or similar class felony or greater class felony, when such conviction has occurred within 10 years after the previous conviction, excluding time spent in custody, and such charges are separately brought and tried and arise out of different series of acts." 730 ILCS 5/5—5—3.2(b)(1) (West 2006).

If the defendant is extended-term eligible, the sentence for a class 4 felony ranges from three to six years' imprisonment. 730 ILCS 5/5—8—2(a)(6) (West 2006) (now recodified as amended at 730 ILCS 5/5—4.5—45(a) (West 2010).

¶ 75 Here, in pronouncing sentence, the trial court stated that "[b]oth charges are class 4 felonies subject to extended term sentencing." The court then reviewed the presentence report and the evidence presented at the sentencing hearing regarding defendant's prior convictions. Although the court noted that defendant had two prior convictions of aggravated battery, one in Kane County and one in Winnebago County, it did not specify which of these convictions qualified defendant for the extended term. We note that the Winnebago County conviction was used to enhance the charges against defendant from a class A misdemeanor to a class 4 felony. Thus, it would have been

improper for the trial court to use that same enhancement to impose an extended–term sentence. See *Hobbs*, 86 Ill. 2d at 245-46.

¶ 76 However, it would not be improper to use the Kane County conviction as the basis to impose an extended-term sentence as that factor had not previously been used as an enhancement factor. See *Smith*, 257 Ill. App. 3d at 257 (holding that because separate convictions were used to enhance the charges against the defendant and then extend the defendant's sentence, there was no improper double enhancement). Further, the record demonstrates that defendant would be eligible for an extended term based upon his conviction of aggravated battery in Kane County. According to the presentence investigation report, the Kane County conviction was obtained on July 22, 2003, and thus was within 10 years of defendant's convictions in the present case. According to the parties' stipulation, claimant's Kane County aggravated battery conviction was classified as a class 3 felony (see 720 ILCS 5/12—4(e) (West 2006) (now amended as renumbered at 720 ILCS 5/12—3.05(h) (West 2010)) and thus of a greater class than the class 4 felonies involved in this case. Finally, there is no dispute that the instant convictions and the Kane County conviction arose from completely separate incidents and were tried separately. Thus, all of the requirements for imposing an extended-term under section 5—5—3.2(b)(1) of the Code are satisfied in this case. As noted above, while the court did not expressly specify which conviction for aggravated battery it was relying on to impose the extended-term sentence, it did discuss both defendant's 2005 Winnebago County conviction and his 2003 Kane County conviction in sentencing. Accordingly, we find that separate convictions were utilized to enhance the charges against defendant from a misdemeanor to a felony and then to impose an extended-term sentence. See *Smith*, 257 Ill. App. 3d at 255-57. As such, we find no improper double enhancement on this basis.

¶ 77 Likewise, we disagree with any contention that the trial court improperly relied on the Winnebago County conviction as an aggravating factor under section 5—5—3.2(a) of the Code (730 ILCS 5/5—5—3.2(a) (West 2006)) to sentence him beyond the minimum term of imprisonment because it had previously used the same conviction to enhance the underlying offenses. Defendant insists that any doubt that the trial court relied on "inherent factors to aggravate [his] sentence may be resolved by reading the judge's comments at the hearing on the motion to reconsider sentence." Defendant points out that at that hearing, the trial court stated that it determined that a term of four years' imprisonment was necessary in part because of defendant's "aggravated battery to the same victim." However, section 5—5—3.2(a)(3) of the Code (730 ILCS 5/5—5—3.2(a)(3) (West 2006)) expressly authorizes the trial court to consider as a factor in aggravation a defendant's "history of prior delinquency or criminal activity."

¶ 78 Moreover, in *People v. Thomas*, 171 Ill. 2d 207 (1996), the supreme court rejected the argument that the defendant in that case was subject to improper double enhancement when the trial court considered prior convictions as a basis for finding the defendant eligible for class X sentencing and as an aggravating factor in sentencing the defendant beyond the minimum class X term. The court explained:

> "[T]his 'second use' of defendant's prior convictions does not constitute an enhancement, because the discretionary act of a sentencing court in fashioning a particular sentence tailored to the needs of society and the defendant, within the available parameters, is a requisite part of every individualized sentencing determination. See *People v. La Pointe,* 88 Ill.2d 482, 492 (1981) (the Code vests a wide discretion in sentencing judges in order to permit reasoned judgments as to the penalty appropriate to the particular circumstances of

> each case). The judicial exercise of this discretion, in fashioning an appropriate sentence within the framework provided by the legislature, is not properly understood as an 'enhancement.' " *Thomas*, 171 Ill. 2d at 224.

In this case, in ruling on the motion to reconsider sentence, the trial court's reference to defendant's conviction in Winnebago County conveyed that it was merely exercising its discretion to tailor a sentence "to the needs of society and the defendant." Thus, as in *Thomas*, the trial court's reference to the Winnebago County conviction did not constitute an enhancement. See also *People v. Childress*, 321 Ill. App. 3d 13, 28 (2001).

¶ 79 Defendant also suggests that the sentencing court cited LeJeune's age and physical handicap in aggravation and then cited the same two factors to justify imposing an extended-term sentenced. Although the trial court referenced LeJeune's age and the fact that she used a walker in pronouncing sentence, we find no evidence that the court invoked these factors as the basis to impose an extended-term sentence. Moreover, even if the court did consider LeJeune's age and physical handicap, any error was harmless where, as explained previously, there was an independent basis for imposing an extended-term sentence, specifically, the Kane County aggravated battery conviction. See *People v. Harvey*, 162 Ill. App. 3d 468, 475 (1987) (holding that to the extent the trial court erred in relying on the defendant's prior convictions to both enhance the seriousness of the offense and to increase the defendant's sentence, the error was harmless where only two prior convictions were required to enhance the seriousness of the offense and the defendant had four prior felony convictions).

¶ 80 Defendant next argues that, for various reasons, the trial court improperly relied on LeJeune's victim impact statement to aggravate his sentences. Section 6(a) of the Rights of Crime Victims and Witnesses Act (Act) (725 ILCS 120/6 (West 2006)) provides in relevant part:

> "In any case where a defendant has been convicted of a violent crime *** and a victim of the violent crime is present in the courtroom at the time of the sentencing ***, the victim *** shall have the right *** to address the court regarding the impact that the defendant's criminal conduct *** has had upon *** the victim. *** The court shall consider any impact statement admitted along with all other appropriate factors in determining the sentence of the defendant." 725 ILCS 120/6(a) (West 2006).

The Act defines a "crime victim" as, *inter alia*, "any person against whom a violent crime has been committed." 725 ILCS 120/3(a)(4) (West 2006). A "violent crime" includes "any offense involving *** violation of an order of protection." 725 ILCS 120/3(c) (West 2006).

¶ 81 Defendant first notes that during her victim impact testimony, LeJeune referred to a conversation she had with Barbara Zolts, defendant's ex-girlfriend. LeJeune testified that during the conversation, Zolts told her that defendant had written a letter in which he stated that he planned to harm LeJeune. LeJeune told the court that she feared that if defendant was sentenced to probation, he would try to kill her. Defendant claims that this testimony was improper because it constituted "unreliable double hearsay."

¶ 82 It is presumed that a trial judge considers only competent and relevant evidence when determining a sentence. *People v. Fyke*, 190 Ill. App. 3d 713, 721-22 (1989). Defendant has not presented any evidence to overcome this presumption. Here, while defendant claims that the influence upon the trial court of LeJeune's testimony regarding the letter from Zolts was "obvious,"

he does not cite any passage where the trial court expressly referenced the letter. See *Fyke*, 190 Ill. App. 3d 713, 721 (1989) (holding that where trial court made no reference to allegedly inadmissible evidence when pronouncing sentence, reviewing court would not find error). We note that the trial court did reference that LeJeune felt that defendant was a danger to herself and others and that she believed that defendant would harm her if he were released from custody. However, there was evidence upon which to base these findings, apart from the letters. Notably, evidence that defendant had committed violent crimes in the past, including one in which LeJeune was a victim. See *People v. Beck*, 295 Ill. App. 3d 1050, 1066 (1998) (holding that while it may have been improper for trial court to consider letters written by friends of victim, the trial court did not specifically refer to the letters and therefore "gave no undue weight to the letters in imposing sentence"). Further, while defendant chastises the State for not putting Zolts on the stand, he could have easily called her to testify, but did not. In sum, to the extent that LeJeune's testimony regarding her conversation with Zolts was improper, we find no indication that the court gave undue weight to the conversation in imposing sentence.

¶ 83 Defendant next contends that it was improper for the trial court to allow LeJeune to voice her opinions on the proper sentence to be imposed. However, as noted above, there is a presumption that a trial judge considered only competent and relevant evidence at sentencing. *Fyke*, 190 Ill. App. 3d at 721-22; see also *People v. Chapman*, 194 Ill. 2d 186, 246-47 (2000). Again, defendant does not cite any evidence indicating that the trial court took into consideration LeJeune's testimony regarding an appropriate sentence, and our review of the transcript reveals none. As such, we cannot conclude that LeJeune's comments impacted the sentence imposed by the trial court.

¶ 84 Defendant complains about other portions of LeJeune's victim impact statement. For instance, he argues that the trial court erred in allowing LeJeune's "unsubstantiated opinions of [his] psychological makeup, relations with others, alleged events of the past 20 years, [and] his alleged future dangerousness." Defendant claims that the victim impact statement "commented on everything *but* the impact the offense had on her–including her sentencing recommendations." (Emphasis in original.) In support of this claim, defendant cites *People v. Pugh*, 187 Ill. App. 3d 860 (1989). He acknowledges that in *Pugh*, the victim impact statement was found to be admissible, but this was only because the trial court "assured the defense it could separate the editorial comments from the substantive remarks on the impact the offense had upon the family." Defendant argues that in this case there were no such "substantive comments" from the trial court. However, a review of the trial court's comments in this case clearly indicates that the court was able to distinguish relevant and proper remarks from prejudicial or immaterial evidence. Notably, in pronouncing sentence, the trial court never mentioned LeJeune's sentencing recommendations, her opinions of defendant's "psychological makeup," or his relations with others. Moreover, defendant does not indicate what particular comments he is referencing with respect to his claim that the trial court considered "alleged events of the past 20 years" or "his alleged future dangerousness." As such, we find that no error occurred in the trial court's consideration of the victim impact statement.

¶ 85 Defendant's final argument concerns the length of his sentence. Defendant contends that his sentence violates the constitutional mandate that "[a]ll penalties shall be determined both according to the seriousness of the offenses and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. According to defendant, "eight years total, for a non-threatening phone call and letter, is grossly excessive, and a flagrant abuse of the judge's discretion."

Defendant further insists that in imposing sentence, the trial court "barely mentioned the offense the defendant was being sentenced for, preferring apparently to focus on past offenses." Defendant urges us to resentence him to time served or to remand the cause for resentencing.

¶ 86 "[T]he trial court is the proper forum to determine a sentence, and the trial court's sentencing decision is entitled to great deference and weight. [Citation.] The trial court is charged with the duty of balancing relevant factors and making a reasoned decision as to the appropriate punishment in each case. [Citation.] When a sentence falls within the statutory limits for the offense, it will not be disturbed unless the trial court abused its discretion. [Citation.] A trial court abuses its sentencing discretion when the penalty imposed 'is greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense.' [Citation.]

In determining an appropriate sentence, relevant considerations include the nature of the crime, the protection of the public, deterrence, and punishment, as well as the defendant's rehabilitative prospects and youth. [Citation.] The weight to be attributed to each factor in aggravation and mitigation depends upon the particular circumstances of the case. [Citation.] The existence of mitigating factors does not obligate the trial court to impose the minimum sentence. [Citation.] Moreover, the trial court is not required to specifically identify all factors in mitigation that it considered. [Citation.] A sentencing judge is presumed to have considered all relevant factors, including the mitigating evidence presented, unless the record affirmatively shows otherwise. [Citation.]" *People v. Chirchirillo*, 393 Ill. App. 3d 916, 927 (2009).

¶ 87 In this case, we cannot say that the trial court abused its discretion. As noted above, defendant was convicted of two class 4 felonies. The trial court found defendant eligible for an extended-term sentence. The extended sentencing range for a class 4 felony is three to six years. Thus, defendant's sentences of four years for each conviction fall within the lower end of the sentencing range. Further, the trial court noted that because defendant's second act occurred while defendant was in the Winnebago County jail, consecutive sentences were mandatory. See 730 ILCS 5/5–8–4(h) (West 2006).

¶ 88 Moreover, in arriving at the defendant's sentence, the trial court stated that it considered the testimony presented at the sentencing hearing, the factors in aggravation and mitigation, the presentence report, defendant's statement in allocution, and the costs of incarceration. The court pointed out that defendant had an extensive criminal history. The court considered defense counsel's claim that only a few of defendant's prior offenses involved violence, but noted nonetheless, that defendant's record did include violent offenses. The court explained that defendant was sentenced to probation on multiple occasions, but was not deterred from committing subsequent offenses. As such, the trial court did not believe that defendant would take advantage of being on probation by rehabilitating himself. As a result, the court found that a sentence of probation in this case would deprecate the seriousness of the offense. Although defendant perceives the level of harm caused by his conduct as minimal, this is but one factor to consider in imposing sentence. See 730 ILCS 5/5–5–3.1(a)(1) (West 2006) (listing as factor in mitigation that the defendant's conduct neither caused nor threatened serious physical harm to another). Further, despite defendant's contention to the contrary, it was proper for the trial court to consider defendant's prior criminal history. See 730 ILCS 5/5–5–3.2(a)(3) (West 2006) (listing as a factor in aggravation a defendant's history of

criminal activity). In sum, we conclude that the trial court considered the relevant factors and fashioned a sentence within the appropriate range. Accordingly, we do not find that defendant's sentences were excessive.

¶ 89 III. CONCLUSION

¶ 90 For the reasons set forth above, we affirm the judgment of the circuit court of Winnebago County.

¶ 91 Affirmed.